



ACP for People with Dementia and their Families- Legal Perspectives

JCECC'S TALK ON ACP ON 14TH NOVEMBER 2020

4 Stages of Lifetime

Stage 1

Stage 2

Stage 3

Stage 4

0 – aged 18

Aged 18 onwards

Become mentally
incapacitated

Death

3 Ways to Manage the Affair and Assets of Mentally Incapacitated Persons (“MIPs”)

1. Appointment of Legal Guardian by the Guardianship Board under Part IVB of the Mental Health Ordinance (Cap. 136) (“MHO”)
2. Appointment of Committee by the High Court under Part II of the MHO
3. Making of Enduring Power of Attorney pursuant to Enduring Powers of Attorney Ordinance (Cap. 501)

1. Appointment of Legal Guardian by the Guardianship Board under Part IVB of the MHO

► Features:

1. The relevant application is considered and approved by the Guardianship Board
2. This method mainly focuses on the welfare aspect as opposed to the financial aspect of the MIP;
3. The Vision of the Board is “to promote the welfare, interest and protection of MIP through guardianship”
(quoted from the official website of Guardianship Board)

1. Appointment of Legal Guardian by the Guardianship Board under Part IVB of the MHO

Circumstances under which Guardianship Order is regarded as required:

- ▶ if that MIP or other people disagree with decisions currently being made for him/her, for example, when there are conflicts within his/her family, or between his/her family and service providers, about his/her care and treatment which may result in inappropriate accommodation or a failure to get medical treatment for him/her;
- ▶ when the MIP objects to his/her proposed care or treatment, e.g. placement in a residential facility;
- ▶ if the doctor refuses to give non-urgent medical treatment to him/her unless he/she has a guardian to consent to that treatment;
- ▶ when that MIP is suffering from, or at risk of sexual, physical, emotional, or financial abuse, neglect, self-neglect or exploitation, or a danger to his health, and his/her interests are not being protected sufficiently

(quoted from the official website of Guardianship Board)

1. Appointment of Legal Guardian by the Guardianship Board under Part IVB of the MHO

Powers and responsibilities of the Legal Guardian:

- (a) To require the MIP to reside at a specific place;
- (b) To bring the MIP to a specific place and use reasonable force for the purpose;
- (c) To require the MIP to attend at a place and time for medical or dental treatment or training;
- (d) To give consent to medical/dental treatment if the MIP is incapable of understanding the general nature and effect of the treatment;
- (e) To require access to the MIP to be given to any doctor, approved social worker etc.; and
- (f) To hold, receive or pay a specified monthly sum for the maintenance or other benefit of the MIP (currently maximum at HK\$13,500 per month).

(quoted from the official website of Guardianship Board)

1. Appointment of Legal Guardian by the Guardianship Board under Part IVB of the MHO

▶ Pros:

1. Faster and cheaper application; No lawyer is required;

▶ Cons:

1. The jurisdiction of the Board is limited - Guardianship Order is **NOT** applicable to deal with various situations: e.g. managing landed properties, investments, applying for grant of probate, handling legal proceedings or lodging civil action, etc.
2. Max. monthly sum of maintenance authorized by the Board is limited to **HK\$17,500**
3. The MIP concerned must be **18 aged or above**

2. Appointment of Committee by the High Court under Part II of the MHO

Jurisdiction of the Court:

The Court may do all such things as appear necessary or expedient :

- (a) for the maintenance or other benefit of the MIP;
- (b) for the maintenance or other benefit of dependent members of the MIP's family;
- (c) for making provision for any other person or purposes for whom or for which the MIP might be expected to provide if he were not mentally incapacitated; or
- (d) otherwise for administering the MIP's property and affairs.

(Section 10A(1) of the MHO)

2. Appointment of Committee by the High Court under Part II of the MHO (cont.)

Circumstances under which the appointment of Committee is required:

Case Illustration 1 : Substantial part of the family financial resources are held by one elderly (all flats were owned by the wife).

Case illustration 2: Elderly who owned an old building (cannot repair/sell to developer/change to new flat with better facilities and lifts)

Case illustration 3: Children buy flat in the name of elderly parents

Case illustration 4: Joint-name property (Couple move to elderly home)

Case illustration 5: Probate issue (Making a Will is a solution)

2. Appointment of Committee by the High Court under Part II of the MHO (cont.)

- ▶ **Protection to MIP** -- Since the MIP is very vulnerable in these kinds of situation, stringent mechanism is put in place to **protect the MIP's interest** in his/her own properties as **against abuse of power** by the Committee in the following ways:
 1. The committee is put under the duty, inter alia:
 - To act in the best interest of the MIP at all times;
 - To make sure that the MIP's money is being used to give him/her the best quality of life; and
 - to obtain Court's prior approval before dealing with the MIP's savings and/or investments

2. Appointment of Committee by the High Court under Part II of the MHO (cont.)

CERTIFICATE OF FAMILY AND PROPERTY

I, [] being the Applicant in this matter, certify as follows:-

1. I am [*complete details*]. The following information is true and accurate to the best of my knowledge, information and belief.

2. The details of the family and the property given in this my Certificate, to the best of my knowledge, information and belief, are based on the information I have received from []

Attached to this Certificate are supporting documents.

2. Appointment of Committee by the High Court under Part II of the MHO (cont.)

CERTIFICATE OF FAMILY AND PROPERTY

4. Next of Kin

(a) Spouse

[Name, Occupation, Age and Address]

(b) Children

[Name, Occupation, Age and Address]

(c) Brothers and Sisters

[Give details and specify if still alive] [Name, Occupation, Age and Address]

(d) Parents

[Give details - specify if still alive] [Name, Occupation, Age and Address]

(e) Relatives as defined under Section 2(1) of the Mental Health Ordinance, Cap.136

[Name, Occupation, Age and Address]

2. Appointment of Committee by the High Court under Part II of the MHO (cont.)

CERTIFICATE OF FAMILY AND PROPERTY

5. Guardianship

The powers of guardianship under the Mental Health Ordinance [have/have not] been conferred on any person or body in respect of [*add initials of MIP*].

2. Appointment of Committee by the High Court under Part II of the MHO (cont.)

CERTIFICATE OF FAMILY AND PROPERTY

6. Care arrangements (both present and future), Income and Maintenance

- (a) The MIP is at **present living** at [*give details and with whom*]
- (b) I understand that there are sufficient assets to which [*add initials of MIP*] is entitled to enable [*him/her*] to be maintained from those assets. **Details of assets and liabilities are set out in the Schedule below.**
- (c) [*Add initials of MIP*]'s **annual income** is as follows:
[*include pension, dividends, rental income, salary, director's fees etc.*]
- (d) It is understood that the **outgoings** of [*add initials of MIP*] are approximately [HK\$] per annum (HK\$ per month) as follows (***include present and estimated future costs of care*** as well as, if relevant, *maintenance requirements of family members of MIP*):-

2. Appointment of Committee by the High Court under Part II of the MHO (cont.)

CERTIFICATE OF FAMILY AND PROPERTY

7. Will

I am aware that [*add initials of MIP*] [does/does not] have a Will. [*give details*]

8. Power of Attorney/Enduring Power of Attorney

The Applicant is [aware/unaware] if any Powers of Attorney/Enduring Power of Attorney *have/has* been executed by [*add initials of MIP*].

2. Appointment of Committee by the High Court under Part II of the MHO (cont.)

CERTIFICATE OF FAMILY AND PROPERTY

9 Committee

Subject to the Court's approval, it is proposed to appoint [] as Committee of [*add initials of MIP*] ("the Proposed Committee"). **[Give details of the Proposed Committee including qualifications and experience]** [*Give also details of how [add initials of MIP]'s financial affairs are to be managed in the future*].

10. Service of the Notice of Inquiry

[*Please complete as to proposed arrangements for service and details of proposed substituted service, if applicable*].

11. Personal background of [*add initials of MIP*]

[*please complete*]

2. Appointment of Committee by the High Court under Part II of the MHO (cont.)

CERTIFICATE OF FAMILY AND PROPERTY

11. Personal background of [add initials of MIP]
[*please complete*]
12. The circumstances giving rise to this Application
[*please complete*]
13. The attitude of [add initials of MIP] to the Application
[*please complete*]
14. The attitude of the relatives of [add initials of MIP] to the Application.

2. Appointment of Committee by the High Court under Part II of the MHO

▶ Pros:

1. Appointed committee has much wider financial jurisdiction
 - They can be empowered to sell the subject's landed properties, stocks or investments or starting litigation, etc.
2. No max. limit on monthly sum of maintenance for the MIP or his family members

▶ Cons:

1. More complicated, lengthy and expensive application ∴ lawyer is needed;
2. The Committee has no power to give medical consent

3. Making of Enduring Power of Attorney under Enduring Powers of Attorney Ordinance

Forming of an EPA:

Section 3 - A PA is an EPA if the instrument which creates the power:

- is **in the prescribed form**;
- was **executed in the prescribed manner** by the donor and the attorney (i.e. witnessed by solicitor and registered doctor);
- and **contained the prescribed explanatory information**.

Section 4 - If the attorney has reason to believe that **the donor is or is becoming mental incapable** he must, as soon as practicable **apply under section 9 for registration of the instrument** creating the power.

Part A - Appointment of Attorney by Donor

1.Appointment of attorneys by donor

I, [your name here] ,
holder of [your identification document here] ,
of [your address here]
.....
appoint

(a)[your attorney's name here]
holder of [identification document here] ,
of [your attorney's address here]
..... ;

and

(b)[your attorney's name here]
holder of [identification document here] ,
of [your attorney's address here]
.....

to be my attorneys under the Enduring Powers of Attorney Ordinance (Cap 501).

Part A - Whether Attorneys Must Act Jointly

2. Whether attorneys must act jointly

My attorneys appointed under paragraph 1 are to act—

(a) jointly.

or

(b) jointly and severally.

Part A – Attorney’s Authority

3. Attorney’s authority

(1) My attorneys have authority to act on my behalf:

- (a) to collect any income due to me;
- (b) to collect any capital due to me;
- (c) to sell any of my movable property;
- (d) to sell, lease or surrender my home or any of my immovable property;
- (e) to spend any of my income;
- (f) to spend any of my capital. (13 of 2013 s. 60)
- (g) (Repealed 13 of 2013 s. 60)

(2) My attorneys have authority to act on my behalf in respect of the following property or financial affairs:

.....

.....

.....

Part A – Restrictions on Attorney

4. Restrictions on attorney

This enduring power of attorney is subject to the following conditions and restrictions:

.....
.....
.....

Part A – Notification of Named Persons

5. Notification of named persons

- (1) My attorneys must notify me before applying for the registration of this enduring power of attorney.
- (2) Any attorney applying for the registration of this enduring power of attorney must, before the application is made, notify any attorney not joining in the application.
- (3) My attorneys must notify the following persons before applying for the registration of this enduring power of attorney.

Name:

Address:

Name:

Address:

Part A – Commencement of EPA and Power to Continue

6. Commencement of EPA

*This EPA takes effect on
..... (insert a later date or event).

7. Power to continue

I intend this enduring power of attorney to continue even if I become mentally incapable.

Part A – Signatures (by donor himself/herself)

8. Signatures

Signed by me as a deed *[sign here]*
on *[date]*
in the presence of *[name and address of registered medical practitioner]*
.....
.....

Signed by me as a deed *[sign here]*
on *[date]*
in the presence of *[name and address of solicitor]*
.....
.....

Part A – Certificate by Registered Medical Practitioner

9. Certificate by registered medical practitioner

I certify that:

(a) I am satisfied that the donor is mentally capable in terms of section 2 of the Enduring Powers of Attorney Ordinance (Cap 501); and

(b) this form was signed by the donor in my presence and the donor acknowledged signing it voluntarily.

(c) this form was signed, in the presence of the donor and me, by *[name of person signing on donor's behalf]*
..... on behalf and under the direction of the donor.

Signed by registered medical practitioner on
[date]

Part A – Certificate by Solicitor

10. Certificate by solicitor

I certify that:

(a) the donor appears to be mentally capable in terms of section 2 of the Enduring Powers of Attorney Ordinance (Cap 501);
and

(b) this form was signed by the donor in my presence and the donor acknowledged signing it voluntarily.

(c) this form was signed, in the presence of the donor and me, by *[name of person signing on donor's behalf]*

on behalf and under the direction of the donor.

Signed by solicitor on
[date]

Part B – completed and signed by the attorney

1. We understand that we have a duty to apply to the Registrar of the High Court to register this form under the Enduring Powers of Attorney Ordinance (Cap 501) when the donor is, or is becoming, mentally incapable.

2. We also understand our limited power to use the donor’s property to benefit persons other than the donor as provided in section 8(3) and (4) of that Ordinance and also our duties and liabilities under section 12 of that Ordinance.

3. Signed as a deed—

(a) by *[signature and name of attorney]*on
[date] in the presence of *[signature and name and
address of witness, who must not be the donor or another attorney of the donor]*

.....; and

(b) by *[signature and name of attorney]*on
[date] in the presence of *[signature and name and
address of witness, who must not be the donor or another attorney of the donor]*

.....

3. Making of Enduring Power of Attorney under Enduring Powers of Attorney Ordinance

Advantages of an EPA:

- ▶ it allows an individual to choose the person or persons who will look after the individual's affairs if he/she becomes incapable of doing so;
- ▶ it avoids expensive and potentially distressing court proceedings for the appointment of another person to look after the individual's affairs;
- ▶ it provides an efficient and cost-effective way of administering the individual's property; and
- ▶ it eases the difficulties and distress that may otherwise be suffered by the donor's family in managing the donor's affairs.

(quoted from the information leaflet produced by the Department of Justice)

3. Making of Enduring Power of Attorney under Enduring Powers of Attorney Ordinance

Limitation of an EPA

At present, there is one major limitation of an EPA. That is, the same as the Committee appointed by the High Court, and EPA can apply only to decision about the donor's property and financial affair and cannot be used to delegate decision about the donor's personal care.



THE END. THANK YOU!