

Understanding Enduring Power of Attorney in Hong Kong

What is an Enduring Power of Attorney? (EPA)

- ❖ A legal instrument that enables a donor, while he/she is still mentally capable, to appoint desired attorney(s) to take care of the donor's financial matters *in the event that he/she subsequently becomes mentally incapacitated*.
- ❖ Governed by the Enduring Powers of Attorney Ordinance (Cap. 501) (“**EPAO**”), which was enacted in 1997.

What is ‘mentally incapable’/’mental incapacity’?

- ❖ Mentally incapable (精神上無能力行事) and mental incapacity (精神上無行為能力) mean being mentally incapable and suffering from mental incapacity within the meaning of section 1A of the Powers of Attorney Ordinance (Cap. 31) and mentally capable (精神上有能力行事) and mental capacity (精神上行為能力) must be construed accordingly. (s. 2 EPAO)

What is ‘mentally incapable’/’mental incapacity’?

1A. Mental incapacity

- (1) A person shall be regarded as being mentally incapable or suffering from mental incapacity for any purpose relating to a power of attorney for which the fact that a person is mentally incapable or is suffering from mental incapacity is relevant, if —
 - (a) he is suffering from mental disorder or mental handicap and—
 - (i) is unable to understand the effect of the power of attorney; or
 - (ii) is unable by reason of his mental disorder or mental handicap to make a decision to grant a power of attorney; or
 - (b) he is unable to communicate to any other person who has made a reasonable effort to understand him, any intention or wish to grant a power of attorney.
- (2) For the purposes of subsection (1), *mental disorder* (精神紊亂) and *mental handicap* (弱智) have the meanings assigned to them by the Mental Health Ordinance (Cap. 136).

(Added 18 of 1997 s. 2. Amended 81 of 1997 s. 59)

What is 'mentally incapable'/'mental incapacity'?

❖ S. 2, Mental Health Ordinance

❖ Mental incapacity means –

- ❖ (a) mental disorder; or
- ❖ (b) mental handicap,

❖ Mental disorder (精神紊亂) means –

- ❖ (a) mental illness;
- ❖ (b) a state of arrested or incomplete development of mind which amounts to a significant impairment of intelligence and social functioning which is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned;
- ❖ (c) psychopathic disorder; or
- ❖ (d) any other disorder or disability of mind which does not amount to mental handicap

❖ Mental handicap means (弱智) means sub-average general intellectual functioning with deficiencies in adaptive behaviour,

Why should one have
an EPA?

EPA vs General Power of Attorney (POA)

	POA	EPA
Revocation	Automatically revoked when the donor loses capacity	'Endurance' : NOT revoked when the donor loses capacity; <i>'endures' the donor's mental incapacity</i>

EPA vs Wills

	Wills	EPA
Commencement	When the testator dies	Where a date or an event is specified in the instrument, on that date or the occurrence of the event (s. 10 EPAO)

Benefits of 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.¹

(Report on Enduring Powers of Attorney, The Law Reform Commission of Hong Kong, https://www.hkreform.gov.hk/en/docs/repa_e.pdf)

But...what if there is no EPA?

- ❖ If a person becomes mentally incapacitated but there is no EPA, his relative can make an application under Part II of the Mental Health Ordinance (Cap.136) with relevant documentary evidence. Upon application, the court would inquire in the application.
- ❖ If the Court is satisfied that the person who is alleged to be mentally incapacitated is incapable, by reason of mental incapacity, of managing and administering his property and affairs, the Court may appoint anyone whom the Court thinks proper to be a part of a committee of the estate. (**s. 11(1) Mental Health Ordinance**) The whole process can be time-consuming and costly.
- ❖ To avoid the tedious process of application under Part II of the Mental Health Ordinance and to have someone you personally trust to manage your assets if you become mentally incapable in the future, EPA would be a better option.

Legal Requirements of Creating an EPA

Legal Requirements of Creating an EPA

- ❖ 1. The use of prescribed form(s)
- ❖ 2. Execution (signing) by the donor and the attorney
- ❖ 3. Explanatory information
- ❖ 4. The attorney's authority
- ❖ 5. Restrictions on the attorney's authority and notification of named persons
- ❖ 6. Certificates by a solicitor and a registered medical practitioner
- ❖ 7. Registration of the EPA
- ❖ Note: waiver of the requirements of this Ordinance pursuant to an agreement or otherwise is not valid (**s. 16 EPAO**)

The use of prescribed forms

3. Characteristics of an enduring power

- (1) For the purposes of this Ordinance, a power of attorney is an enduring power of attorney if the instrument which creates the power—
 - (a) is in the prescribed form;
 - (b) was executed in the prescribed manner by the donor and the attorney; and
 - (c) contained at the time of execution by the donor the prescribed explanatory information.

Enduring Powers of Attorney (Prescribed Form) Regulation (Cap. 501A, sch. 1) – Form 1 (appointing only one attorney)

持久授權書表格 (只委任一名受權人)

A 部

[本刑須由委任受權人的人(受權人)填寫, 但第9及10段則分別須由一名註冊醫生及一名律師填寫, 你應該在填寫本表格前細閱於“使用本表格須知”的標題下提供的說明資料, 除非你明白本表格的意義, 否則切勿簽署本表格。]

1. 由受權人委任受權人

本人[你的姓名] _____ 持有人,
([你的身分證明文件] _____ 持有者,
地址為[你的地址], _____
現委任[受權人的姓名] _____
([身分證明文件] _____ 持有者,
地址為[受權人的地址] _____)

根據《持久授權書條例》(第501章)擔任本人的受權人。

2. 受權人的權限

[你須指明你授權受權人辦理甚麼事宜, 你不能將處理你所有財產及財政事務的權限無限授予受權人, 否則你的持久授權書將會無效, 你可(二擇其一)在(1)分段標劃選任何或所有適用的方格來指明你授權受權人辦理甚麼事宜, 或不劃選任何方格, 然則你須在(2)分段列出你授權受權人就那些特定財產或特定財政事務行事, 如你劃選了(1)分段的任何或所有方格, 你仍可在(2)分段列出任何特定財產或特定財政事務, 授權受權人就該等財產或事務行事, 切勿既不在(1)分段劃選任何方格而又不在(2)分段列出任何財產。]

- (1) 本人的受權人有權代本人行事如下:
- (a) 收取須付予本人的任何入息;
 - (b) 收取須付予本人的任何資金;
 - (c) 出售本人的任何動產;
 - (d) 出售、出租或退回本人的居所或任何不動產;
 - (e) 使用本人的任何入息;
 - (f) 使用本人的任何資金;
- (2) 本人的受權人有權就下列財產或財政事務代本人行事: [如欲受權人只就你的某些財產或財政事務代你行事, 你須在此處將之列出。]
- _____
- _____
- _____

3. 對受權人的限制

本持久授權書受以下條件及限制所規限: [如欲對受權人行使任何權力的方式施加條件或限制, 你須在此處將之列出, 例如, 你可限制受權人, 在合理相信你正在變為精神上無能力行事之前, 不得代你行事, 如你不欲施加任何條件或限制, 則須刪去此段。]

Form of enduring power of attorney (for appointment of only one attorney)

Part A

[This Part must be completed by the person appointing the attorney (the donor), except for paragraphs 9 and 10, which must be completed by a registered medical practitioner and a solicitor respectively. You should read the explanatory information given under the heading "Information you must read" before you fill it in. Do not sign this form unless you understand what it means.]

1. Appointment of attorney by donor

I, [your name here] _____,
holder of [your identification document here] _____,
of [your address here] _____
_____ appoint [your attorney's name here] _____,
holder of [identification document here] _____,
of [your attorney's address here] _____

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

2. Attorney's authority

[You must specify what you authorize your attorney to do. You cannot give a general authority over all your property and financial affairs. If you do, your EPA will not be valid. You can either specify at subparagraph (1) what you authorize your attorney to do by ticking any or all of the appropriate boxes, or tick no box, in which case you must list at subparagraph (2) the particular property or financial affairs for which you have given your attorney authority to act. If you have ticked any or all the boxes at subparagraph (1), you may still list at subparagraph (2) any particular property or financial affairs in relation to which you have given your attorney authority to act. You must not make no ticks at subparagraph (1) and list no property at subparagraph (2).]

- (1) My attorney has 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.
- (2) My attorney has authority to act on my behalf in respect of the following property or financial affairs: [If you want your attorney to act for you only in relation to some of your property or financial affairs, you must list them here.]
- _____
- _____
- _____

3. Restrictions on attorney

This enduring power of attorney is subject to the following conditions and restrictions: [If you want to put conditions or restrictions on the way your attorney exercises any powers, you must list them here. For example, you may include a restriction that your attorney must not act on your behalf until your attorney has reason to believe that you are becoming mentally incapable. If you do not want to impose any conditions or restrictions, you must delete this paragraph.]

Enduring Powers of Attorney (Prescribed Form) Regulation (Cap. 501A, sch. 1) – Form 1 (appointing only one attorney)

4. 通知獲指定的人
[如不欲任何人(包括你自己)獲通知有申請將本持久授權書註冊一事, 你須刪去第(1)及(2)分段。]

(1) 本人的受權人在申請註冊本持久授權書之前, 必須通知本人。*[如不欲獲得通知, 你須刪去此分段。]*

(2) 本人的受權人在申請註冊本持久授權書之前, 必須通知以下人士:*[此處填上(除你以外)最多2名須予通知的人的姓名及地址。如不欲其他人獲得通知, 則須刪去此分段。]*

姓名: _____

地址: _____

姓名: _____

地址: _____

5. 持久授權書的生效
[本持久授權書如在下列第7或8段所指的律師面前簽署, 即於同日生效。如你希望指明某較後的日期或某較後的事件發生之時為本持久授權書生效之時, 請填寫下列印有星號的句子。如你希望本授權書在它於律師面前簽署的同日生效, 請刪去該句子。]

* 本持久授權書在 _____ (在此處填上較後的日期或事件)生效。

6. 授權書繼續有效
本人屬意, 即使本人日後變為精神上無能力行事, 本持久授權書仍繼續有效。

7. 簽署
作為製據由本人簽署: *[在此簽署]* _____
日期: *[簽署日期]* _____
在場註冊醫生: *[註冊醫生的姓名及地址]* _____

作為製據由本人簽署: *[在此簽署]* _____
日期: *[簽署日期]* _____
在場律師: *[律師的姓名及地址]* _____

8. [如你身體上無能力簽署本表格, 並指示別人代你簽署, 該人須在此段簽署, 而第7段則須刪去。]
本持久授權書由以下人士在授權人的指示下並在授權人在場的情況下簽署:
[代簽署者的姓名] _____ 持有人,
(身分證明文件) _____
地址為*[代簽署者的地址]* _____

在授權人及註冊醫生在場的情況下作為製據簽署:

4. Notification of named persons
[If you do not want anyone (including yourself) to be notified of the application for the registration of this EPA, you must delete subparagraphs (1) and (2).]

(1) My attorney must notify me before applying for the registration of this enduring power of attorney. *[If you do not want to be notified, you must delete this subparagraph.]*

(2) My attorney must notify the following persons before applying for the registration of this enduring power of attorney. *[Fill in the names and addresses of up to 2 persons (other than yourself) to be notified. If you do not want other persons to be notified, you must delete this subparagraph.]*

Name: _____

Address: _____

Name: _____

Address: _____

5. Commencement of EPA
[This EPA takes effect on the date it is signed before the solicitor in paragraph 7 or 8 below. If you want to specify a later date or later event on which this EPA will take effect, please fill in the gap in the sentence marked with an asterisk below. Delete that sentence if you wish this EPA to take effect on the date it is signed before the solicitor.]

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

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

7. 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]* _____

8. [If you are physically incapable of signing this form and you direct someone else to sign on your behalf, that person must sign here and paragraph 7 must be deleted.]
This enduring power of attorney has been signed by *[name of person signing on your behalf]* _____,
holder of *[identification document]* _____,

Enduring Powers of Attorney (Prescribed Form) Regulation (Cap. 501A, sch. 2) – Form 2 (appointing more than one attorney)

持久授權書表格 (委任多於一名受權人)

A部

[本部份由委任受權人的人(授權人)填寫,但第10及11段則分別須由一名註冊醫生及一名律師填寫。你應該在填寫本表格前細閱於“使用本表格須知”的標題下提供的說明資料。除非你明白本表格的意義,否則切勿簽署本表格。]

1. 由授權人委任受權人

本人[你的姓名] _____
([你的身分證明文件] _____ 持有人,
地址為[你的地址] _____) ,

現委任:

(a) [受權人的姓名] _____
([身分證明文件] _____ 持有人,
地址為[受權人的地址] _____);
及

(b) [受權人的姓名] _____
([身分證明文件] _____ 持有人,
地址為[受權人的地址] _____)

[如委任多於2名受權人,請自行加入類似(a)及(b)分段的分段。]

根據《持久授權書條例》(第501章)擔任本人的受權人。

2. 受權人是否須共同行事

[你須決定受權人將會(a)共同行事; 抑或(b)共同和各別行事,請參閱“使用本表格須知”部分中的第3段,並在下列陳述中刪去(a)或(b),否則你的持久授權書將會無效。]

本人根據第1段委任的受權人將 _____

(a) 共同行事。

或

(b) 共同和各別行事。

3. 受權人的權限

[你須指明你授權受權人辦理甚麼事宜,你不能將處理你所有財產及財政事務的概括權限授予受權人,否則你的持久授權書將會無效。你可(二擇其一)在第(1)分段標明任何或所有適用的方格來指明你授權受權人辦理甚麼事宜,或不標明任何方格,然則你須在第(2)分段列出你授權受權人就那些特定財產或特定財政事務行事。如你標明了第(1)分段的任何或所有方格,你仍可在第(2)分段列出任何特定財產或特定財政事務,授權受權人就該等財產或事務行事,切勿既不在第(1)分段標明任何方格而又不第(2)分段列出任何財產。]

(1) 本人的受權人有權代本人行事如下:

- (a) 收取須付予本人的任何利息;
- (b) 收取須付予本人的任何資金;
- (c) 出售本人的任何動產;

Form of enduring power of attorney (for appointment of more than one attorney)

Part A

[This Part must be completed by the person appointing the attorneys (the donor), except for paragraphs 10 and 11, which must be completed by a registered medical practitioner and a solicitor respectively. You should read the explanatory information given under the heading “Information you must read” before you fill it in. Do not sign this form unless you understand what it means.]

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] _____.

[If you appoint more than 2 attorneys, please add additional subparagraph(s) similar to subparagraphs (a) and (b).]

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

2. Whether attorneys must act jointly

[You must decide whether your attorneys are to act (a) jointly; or (b) jointly and severally. See paragraph 3 under the heading “Information you must read” and delete either (a) or (b) from the statement below. If you do not, your EPA will not be valid.]

My attorneys appointed under paragraph 1 are to act—

(a) jointly.

or

(b) jointly and severally.

3. Attorneys' authority

[You must specify what you authorize your attorneys to do. You cannot give a general authority over all your property and financial affairs. If you do, your EPA will not be valid. You can either specify at subparagraph (1) what you authorize your attorneys to do by ticking any or all of the appropriate boxes, or tick no box, in which case you must list at subparagraph (2) the particular property or financial affairs for which you have given your attorneys authority to act. If you have ticked any or all the boxes at subparagraph (1),

Enduring Powers of Attorney (Prescribed Form) Regulation (Cap. 501A, sch. 2) – Form 2 (appointing more than one attorney)

- (d) 出售、出租或退回本人的居所或任何不動產；
- (e) 使用本人的任何入息；
- (f) 使用本人的任何資金。

(2) 本人的受權人有權就下列財產或財政事務代本人行事：【如欲受權人只就你的某些財產或財政事務代你行事，你須在此處將之列出。】

4. 對受權人的限制

本持久授權書受以下條件及限制所規限：【如欲對受權人行使任何權力的方式施加條件或限制，你須在此處將之列出。例如，你可限制受權人，在有理由相信你正在變為精神上無能力行事之前，不得代你行事。如你不欲施加任何條件或限制，則須刪去此段。】

5. 通知獲指名的人

【如不欲任何人(包括你自己)獲通知有申請將本持久授權書註冊一事，你須刪去第(1)、(2)及(3)分段。】

(1) 本人的受權人在申請註冊本持久授權書之前，必須通知本人。【如不欲獲得通知，你須刪去此分段。】

(2) 申請註冊本持久授權書的受權人在提出申請之前，必須通知任何沒有參與申請的受權人。【如你決定受權人可分開行事，又無將申請註冊本持久授權書的受權人通知任何沒有參與申請的受權人，則須刪去此分段。】

(3) 本人的受權人在申請註冊本持久授權書之前，必須通知以下人士：【此處填上(除你及受權人以外)最多2名須予通知的人的姓名及地址。如不欲其他人獲得通知，則須刪去此分段。】

姓名：_____
地址：_____
姓名：_____
地址：_____

6. 持久授權書的生效

【本持久授權書加在下列第8或9段所指的律師面前簽署，即於同日生效。如你希望指明某較後的日期或某較後的事件發生之時為本持久授權書生效之時，請填寫下列印有星號的句子。如你希望本授權書在它於律師面前簽署的同日生效，請刪去該句子。】

* 本持久授權書在 _____ (在此處填上較後的日期或事件)生效。

7. 授權書繼續有效

本人屬意，即使本人日後變為精神上無能力行事，本持久授權書仍繼續有效。

8. 簽署

you may still list at subparagraph (2) any particular property or financial affairs in relation to which you have given your attorneys authority to act. You must not make no ticks at subparagraph (1) and list no property at subparagraph (2).]

(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.

(2) My attorneys have authority to act on my behalf in respect of the following property or financial affairs: *[If you want your attorneys to act for you only in relation to some of your property or financial affairs, you must list them here.]*

4. Restrictions on attorneys

This enduring power of attorney is subject to the following conditions and restrictions: *[If you want to put conditions or restrictions on the way your attorneys exercise any powers, you must list them here. For example, you may include a restriction that your attorneys must not act on your behalf until they have reason to believe that you are becoming mentally incapable. If you do not want to impose any conditions or restrictions, you must delete this paragraph.]*

5. Notification of named persons

[If you do not want anyone (including yourself) to be notified of the application for the registration of this EPA, you must delete subparagraphs (1), (2) and (3).]

(1) My attorneys must notify me before applying for the registration of this enduring power of attorney. *[If you do not want to be notified, you must delete this subparagraph.]*

(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. *[If you decide that your attorneys may act separately and you do not require any attorney applying for the registration of this EPA to notify any attorney not joining in the application, you must delete this subparagraph.]*

(3) My attorneys must notify the following persons before applying for the registration of this enduring power of attorney. *[Fill in the names and addresses of up to 2 persons (other than yourself or any of your attorneys) to be notified. If you do not want other persons to be notified, you must delete this subparagraph.]*

Name: _____
Address: _____
Name: _____

Address:

6. Commencement of EPA

[This EPA takes effect on the date it is signed before the solicitor in paragraph 8 or 9 below. If you want to specify a later date or later event on which this EPA will take effect, please fill in the gap in the sentence marked with an asterisk below. Delete that sentence if you wish this EPA to take effect on the date it is signed before the solicitor.]

* 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.

Enduring Powers of Attorney (Prescribed Form) Regulation (Cap. 501A, sch. 2) – Form 2 (appointing more than one attorney)

作為契據由本人簽署：[在此簽署] _____
日期：[簽署日期] _____
在場註冊醫生：[註冊醫生的姓名及地址] _____

作為契據由本人簽署：[在此簽署] _____
日期：[簽署日期] _____
在場律師：[律師的姓名及地址] _____

9. [如你身體上無能力簽署本表格，並指示別人代你簽署，該人須在此段簽署，而第8段則須刪去。]

本持久授權書由以下人士在授權人的指示下並在授權人在場的情況下簽署：[代簽署者的姓名] _____
([身分證明文件] _____ 持有人，
地址為[代簽署者的地址] _____)

在授權人及註冊醫生在場的情況下作為契據簽署：[代簽署者簽署] _____
日期：[簽署日期] _____
在場註冊醫生：[註冊醫生的姓名及地址] _____

在授權人及律師在場的情況下作為契據簽署：[代簽署者簽署] _____
日期：[簽署日期] _____
在場律師：[律師的姓名及地址] _____

10. 註冊醫生的證明書

本人核證：

- 本人信納授權人屬《持久授權書條例》(第501章)第2條所述的精神上有能力行事者；及
- 授權人在本人在場的情況下，簽署本表格，而授權人確認為是自願簽署本表格的。[如本表格由別人代授權人簽署，此項陳述須刪去。]
- _____ [代授權人簽署的人的姓名]

在授權人及本人在場的情況下，在授權人的指示下代授權人簽署本表格。[如本表格由授權人簽署，此項陳述須刪去。]

註冊醫生簽署： _____
簽署日期： _____

11. 律師的證明書

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] _____

9. [If you are physically incapable of signing this form and you direct someone else to sign on your behalf, that person must sign here and paragraph 8 must be deleted.]

This enduring power of attorney has been signed by [name of person signing on your behalf] _____
holder of [identification document here] _____
of [address of person signing on your behalf] _____

under the direction and in the presence of the donor.
Signed as a deed [signature of person signing on your behalf] _____
on [date] _____
in the presence of the donor and [name and address of registered medical practitioner] _____

Signed as a deed [signature of person signing on your behalf] _____
on [date] _____
in the presence of the donor and [name and address of solicitor] _____

10. Certificate by registered medical practitioner

I certify that:

- I am satisfied that the donor is mentally capable in terms of section 2 of the Enduring Powers of Attorney Ordinance (Cap. 501); and
- this form was signed by the donor in my presence and the donor acknowledged signing it voluntarily. [If someone else signs this form on the donor's behalf, this statement must be deleted.]
- 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. [If the donor signs this form, this statement must be deleted.]

Signed by registered medical practitioner _____
on [date] _____

Enduring Powers of Attorney (Prescribed Form) Regulation (Cap. 501A, sch. 2) – Form 2 (appointing more than one attorney)

本人核證：

- (a) 授權人看似屬《持久授權書條例》(第 501 章)第 2 條所述的精神上有能力行事者；及
(b) 授權人在本人在場的情況下，簽署本表格，而授權人確認自己是自願簽署本表格的。
[如本表格由別人代授權人簽署，此項陳述須刪去。]

(c) _____
[代授權人簽署的人的姓名]

在授權人及本人在場的情況下，在授權人的指示下代授權人簽署本表格。[如本表格由授權人簽署，此項陳述須刪去。]

律師簽署： _____

簽署日期： _____

B 部

[本部須由受權人填寫。如你決定受權人可分開行事，則獲委任的受權人中須至少有一名受權人簽署本表格，本表格方能作為持久授權書而生效。只有已簽署本表格的受權人才具有本持久授權書下的受權人職能。]

1. 我們明白我們有責任在授權人精神上無能力行事或正在變為精神上無能力行事時，根據《持久授權書條例》(第 501 章)向高等法院司法常務官申請將本表格註冊。
2. 我們亦明白我們只具有該條例第 8(3)及(4)條所訂定的有限權力以動用授權人的財產讓授權人以外的人受益，並明白我們根據該條例第 12 條負有的責任和法律責任。
3. 作為契據由我們簽署：

(a) 受權人簽署及姓名： _____

簽署日期： _____

在場見證人：[見證人的簽署及姓名、地址(授權人及其他受權人不得擔任見證人)] _____

_____ ;

_____ ;

及

(b) 受權人簽署及姓名： _____

簽署日期： _____

在場見證人：[見證人的簽署及姓名、地址(授權人及其他受權人不得擔任見證人)] _____

_____ ;

_____ ;

[如委任多於 2 名受權人，請自行加入類似(a)及(b)分段的分段。]

11. 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. [If someone else signs this form on the donor's behalf, this statement must be deleted.]
(c) his 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. [If the donor signs this form, this statement must be deleted.]

Signed by solicitor _____ on [date]

Part B

[This Part must be completed by the attorneys. If you decide that your attorneys may act separately, then at least one of the attorneys appointed must sign this form for it to take effect as an EPA. An attorney will have the functions of an attorney under this EPA only if that attorney has signed this form.]

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] _____

[If you appoint more than 2 attorneys, please add additional subparagraph(s) similar to subparagraphs (a) and (b).]

Execution (signing) by the donor and the attorney

3. Characteristics of an enduring power

- (1) For the purposes of this Ordinance, a power of attorney is an enduring power of attorney if the instrument which creates the power—
 - (a) is in the prescribed form;
 - (b) was executed in the prescribed manner by the donor and the attorney; and
 - (c) contained at the time of execution by the donor the prescribed explanatory information.

Execution (signing) by the Donor

- ❖ The donor of an EPA has to sign it before a registered medical practitioner and a solicitor. That is to say, the donor has to sign twice on the prescribed form, once before a registered medical practitioner and one before a solicitor. **(s. 5(2)(a)(i) EPAO)**
- ❖ The donor can sign his/her part in the presence of the solicitor within 28 days after he/she signs it in the presence of the registered medical practitioner. **(s. 5(2)(a)(ii) EPAO)**
- ❖ If the donor is mentally capable but is NOT physically capable of signing, any other person can sign on behalf of the donor in his/her presence (NOT being the attorney, the spouse of the attorney, the registered medical practitioner or the solicitor before whom the instrument is signed or the spouse of the registered medical practitioner or the solicitor). **(s. 5(2)(b) EPAO)**

Execution (signing) by the **Attorney**

- ❖ The attorney can sign in the presence of a witness and the witness must sign the instrument and provide his or her full name and address in the instrument. (**s. 3(2), s. 3(3), Cap. 501A**)
- ❖ Anybody can be an witness to the attorney EXCEPT:
 - ❖ The donor cannot witness the signature of the attorney; and
 - ❖ In the case where there is more than one attorney, one attorney cannot witness the signature of another attorney. (**s. 3(4), Cap. 501A**)

Execution (signing) **if there is more than one Attorney**

- ❖ The donor must use Form 2 and indicate in it whether the attorneys will be acting (i) jointly or (ii) jointly and severally. (s. 15 EPAO)
- ❖ If the attorneys are to act **jointly**, all of them have to sign the EPA to express their consent to act as attorneys.
- ❖ If the attorneys are to act **jointly and severally**, then at least one of them has to sign the EPA to make it effective. (s. 4(1), Cap. 501A)
 - ❖ However, in the event of the registration of the EPA or the donor's mental incapacity (whichever occurs first), only the attorney, or those attorneys, who have signed the EPA will be able to exercise the functions of an attorney. (s. 4(2), Cap. 501A)
- ❖ If the donor does not make an express choice of whether the attorneys are to act jointly or jointly and severally, the **EPA will not be valid**. (s. 15)(1) EPAO)

Execution (signing) **if there is more than one Attorney**

- ❖ Acting jointly
 - ❖ The attorneys have to act together and cannot act separately. A decision made by any one of the attorneys alone will not be valid
- ❖ Acting jointly and severally
 - ❖ The attorneys can act together but can also act separately if they wish
 - ❖ Any one of them will be able to make a decision by themselves
 - ❖ The failure to comply with the requirements of creation of power by one of the attorneys does not affect the other attorney(s) who has/have complied with those requirements (**s. 15(3) EPAO**)

Explanatory Information

3. Characteristics of an enduring power

- (1) For the purposes of this Ordinance, a power of attorney is an enduring power of attorney if the instrument which creates the power—
 - (a) is in the prescribed form;
 - (b) was executed in the prescribed manner by the donor and the attorney; and
 - (c) contained at the time of execution by the donor the prescribed explanatory information.

Explanatory Information

- Both the prescribed Form 1 and Form 2 contain a section “Information you must read”, which sets out in detail all the necessary information

持久授權書表格(只委任一名受權人)

表格 1

使用本表格須知

- 本表格是法律文件，你可用本表格訂立一項持久授權書。憑藉持久授權書，你可授權另一人(受權人)就你的財產及財政事務代你行事。若你只擬委任一名受權人，便須使用本表格。日後如你變為精神上無能力行事，受權人在將本表格送交高等法院司法常務官註冊之後，便可代你作出決定。
- 你須填妥 A 部。
- A 部第 1 段：**你須在 A 部第 1 段填上你欲委任為受權人的人的姓名及地址，你委任為受權人的人須年滿 18 歲，而且不得是破產或精神上無能力行事。受權人無須是律師。受權人須填妥 B 部，並在一名見證人在場的情況下簽署本表格。
- A 部第 2 段：**你不能將處理你所有財產及財政事務的概括權限授予受權人，否則你的持久授權書將會無效。反之，你須在 A 部第 2 段，指明你授權受權人就你的財產及財政事務辦理甚麼事宜，或指明你授權受權人就那些特定財產或特定財政事務行事。例如，你可決定僅將只可就某一特定銀行戶口或某一特定物業行事的權限，授予受權人。
- A 部第 3 段：**你可隨意對你授予受權人的權限附加任何限制。例如：受權人在有理由相信你正在變為精神上無能力行事之前，不得代你行事，或受權人如欲訂立價值超過某指明款額的合約，須先尋求法律意見，否則不得訂立該合約。你應該在 A 部第 3 段列出這些限制。
- 除非你附加限制加以防止，否則受權人將能夠動用你的任何款項或財產，為受權人或其他人供應所需(但只限於可預期你本人會如此行事的情況)。受權人亦能夠動用你的款項作出贖回，但贖回款項只限於就你的款項及財產的價值而言屬合理者。
- 受權人可收回以你的受權人身分行事而付出的實際現金付款開支。如受權人是專業人士，例如會計師或律師，受權人可就在以你的受權人身分行事時提供的任何專業服務收取費用。
- 如受權人有理由相信，你精神上無能力管理你的事務，或正在變為精神上無能力管理你的事務，受權人須向高等法院司法常務官申請註冊本持久授權書。註冊將容許受權人在你變為精神上無能力行事之後，為你作出決定。
- A 部第 4 段：**如你希望在受權人向高等法院司法常務官申請註冊本持久授權書之前獲得通知，或希望其他人獲得通知，你須在 A 部第 4 段填上須予通知的人的姓名及地址，除你自己以外，你還可填上最多 2 名須予通知的人。即使受權人未有通知你或你所提名的人，亦不會令你的持久授權書不獲註冊或變成無效。然而，在任何關乎該持久授權書的法律程序中，法院如認為適當，可基於你或獲提名人未獲通知一事而作出不利的推論。

- A 部第 7、9 及 10 段：**你須在 A 部第 7 段簽署本表格，並填上你簽署時在場的註冊醫生及律師的姓名及地址。如你並非在註冊醫生及律師同時在場的情況下簽署，你須於你在註冊醫生面前簽署當日之後的 28 天內，在律師面前簽署。該名醫生及該名律師須分別在 A 部第 9 及 10 段填寫證明書，核證你在簽署本表格時是精神上有能力行事的。
- A 部第 8 段：**如你身體上無能力親自簽署本表格，可指示別人代你簽署。在此情況下，A 部第 8 段須予填寫，而該人則須在你本人及上述醫生及律師在場的情況下簽署該段。代你簽署的人不得是你的受權人或其配偶，亦不得是上述醫生或律師或該醫生或該律師的配偶。
- 在你(或在你指示下代你簽署的人)於上述律師面前簽署本表格時，本表格即按照《持久授權書條例》(第 501 章)第 10 條作為持久授權書而生效。須留意，在本表格獲如此簽署之前，本表格並無作為持久授權書或普通的授權書的效力。然而，如你希望以某較後的日期或某較後的事件發生之時作為本持久授權書生效之時，你可如此選擇。在此情況下，你須在 A 部第 5 段指明該較後的日期或事件。

Explanatory Information

持久授權書表格 (委任多於一名受權人)

表格 2

使用本表格須知

1. 本表格是法律文件，你可用本表格訂立一項持久授權書。憑藉持久授權書，你可授權另一人就你的財產及財政事務代你行事。若你擬委任多於一人代你行事，便須使用本表格。日後如你變為精神上無能力行事，你所委任的人(受權人)在將本表格送交高等法院司法常務官註冊之後，便可代你作出決定。
2. **A 部第 2 段：**你須決定受權人將會——
 - (a) 共同行事(即他們須全體一同行事，而不能分開行事)；抑或
 - (b) 共同和各別行事(即他們可全體一同行事，但如他們意欲分開行事，則亦可分開行事)。
3. 你須在 A 部第 2 段表明你的決定。須留意，如受權人將會共同行事，一旦任何一名受權人破產或死亡，本授權書即根據法律被撤銷。
4. 你須填妥 A 部。
5. **A 部第 1 段：**你須在 A 部第 1 段填上你欲委任為受權人的人的姓名及地址。你委任為受權人的人均須年滿 18 歲，而且不得是破產或精神上無能力行事。受權人無須是律師。每名受權人均須填妥 B 部，並在一名見證人在場的情況下簽署本表格。
6. **A 部第 3 段：**你不能將處理你所有財產及財政事務的概括權限授予受權人，否則你的持久授權書將會無效。反之，你須在 A 部第 3 段，指明你授權受權人就你的財產及財政事務辦理甚麼事宜，或指明你授權受權人就哪些特定財產或特定財政事務行事。例如，你可決定僅將只可就某一特定銀行戶口或某一特定物業行事的權限，授予受權人。
7. **A 部第 4 段：**你可隨意對你授予受權人的權限附加任何限制。例如：受權人在有理由相信你正在變為精神上無能力行事之前，不得代你行事，或受權人如欲訂立價值超過某指明款額的合約，須先尋求法律意見，否則不得訂立該合約。你應該在 A 部第 4 段列出這些限制。
8. 除非你附加限制加以防止，否則受權人將能夠動用你的任何款項或財產，為受權人或其他人供應所需(但只限於可預期你本人會如此行事的情況)。受權人亦能夠動用你的款項作出饋贈，但饋贈款額只限於就你的款項及財產的價值而言屬合理者。

9. 受權人可收回他們以你的受權人身分行事而付出的實際現金付款開支。如受權人當中有人是專業人士，例如會計師或律師，該受權人可就在以你的受權人身分行事時提供的任何專業服務收取費用。
10. 如受權人有理由相信，你精神上無能力管理你的事務，或正在變為精神上無能力管理你的事務，受權人須向高等法院司法常務官申請註冊本持久授權書。註冊將容許受權人在你變為精神上無能力行事之後，為你作出決定。
11. **A 部第 5 段：**如你希望在受權人向高等法院司法常務官申請註冊本持久授權書之前獲得通知，或希望其他人獲得通知，你須在 A 部第 5 段填上須予通知的人的姓名及地址。如你決定受權人可分開行事，你亦可提名任何不參與註冊申請的受權人為須予通知的人。除你自己及任何不參與註冊申請的受權人以外，你還可填上最多 2 名須予通知的人。即使受權人未有通知你或你所提名的人，亦不會令你的持久授權書不獲註冊或變成無效。然而，在任何關於該持久授權書的法律程序中，法院如認為適當，可基於你或獲提名人未獲通知一事而作出不利的推論。
12. **A 部第 8、10 及 11 段：**你須在 A 部第 8 段簽署本表格，並填上你簽署時在場的註冊醫生及律師的姓名及地址。如你並非在註冊醫生及律師同時在場的情況下簽署，你須於你在註冊醫生面前簽署當日之後的 28 天內，在律師面前簽署。該名註冊醫生及該名律師須分別在 A 部第 10 及 11 段填寫證明書，核證你在簽署本表格時是精神上有能力行事的。
13. **A 部第 9 段：**如你身體上無能力親自簽署本表格，可指示別人代你簽署。在此情況下，A 部第 9 段須予填寫，而該人則須在你本人及上述醫生及律師在場的情況下簽署該段。代你簽署的人不得是你的任何一名受權人或其配偶，亦不得是上述醫生或律師或該醫生或該律師的配偶。
14. 在你(或在你指示下代你簽署的人)於上述律師面前簽署本表格時，本表格即按照《持久授權書條例》(第 501 章)第 10 條作為持久授權書而生效。須留意，在本表格獲如此簽署之前，本表格並無作為持久授權書或普通的授權書的效力。然而，如你希望以某較後的日期或某較後的事件發生之時作為本持久授權書生效之時，你可如此選擇。在此情況下，你須在 A 部第 6 段指明該較後的日期或事件。

The Attorney's Authority

- ❖ An non-exhaustive list of the most common authorities in Form 1 and 2 (at least one of the boxes must be ticked):

3. 受權人的權限

[你須指明你授權受權人辦理甚麼事宜。你不能將處理你所有財產及財政事務的概括權限授予受權人，否則你的持久授權書將會無效。你可(二擇其一)在第(1)分段劃選任何或所有適用的方格來指明你授權受權人辦理甚麼事宜，或不劃選任何方格，然則你須在第(2)分段列出你授權受權人就那些特定財產或特定財政事務行事。如你劃選了第(1)分段的任何或所有方格，你仍可在第(2)分段列出任何特定財產或特定財政事務，授權受權人就該等財產或事務行事。切勿既不在第(1)分段劃選任何方格而又不在第(2)分段列出任何財產。]

(1) 本人的受權人有權代本人行事如下：

- (a) 收取須付予本人的任何入息；
- (b) 收取須付予本人的任何資金；
- (c) 出售本人的任何動產；

- (d) 出售、出租或退回本人的居所或任何不動產；
- (e) 使用本人的任何入息；
- (f) 使用本人的任何資金。

(2) 本人的受權人有權就下列財產或財政事務代本人行事：[如欲受權人只就你的某些財產或財政事務代你行事，你須在此處將之列出。]

Restrictions on the Attorney's authority and notification of the named persons

- ❖ Restrictions on the attorney's authority in the EPA could be expressly provided by the donor in both Form 1 and Form 2:

4. 對受權人的限制

本持久授權書受以下條件及限制所規限：*[如欲對受權人行使任何權力的方式施加條件或限制，你須在此處將之列出。例如，你可限制受權人，在有理由相信你正在變為精神上無能力行事之前，不得代你行事。如你不欲施加任何條件或限制，則須刪去此段。]*

Restrictions on the Attorney's authority and notification of the named persons

- ❖ The donor may, in the instrument, nominate all or any of the following persons to be notified by the attorney applying for the registration of the instrument under section 9 of EPAO before the application is made—
 - ❖ (a) the donor;
 - ❖ (b) any attorney who does not join in the application;
 - ❖ (c) a maximum of 2 other persons. (**s. 6(1), Cap. 501A**)
- ❖ If the donor does not intend to nominate, the donor must delete relevant parts in both Form 1 and Form 2 where the donor can nominate person(s) to be notified by the attorney applying for the registration of the EPA. (**s. 6(3), Cap. 501A**)

Restrictions on the Attorney's authority and notification of the named persons

5. 通知獲指名的人

[如不欲任何人(包括你自己)獲通知有申請將本持久授權書註冊一事, 你須刪去第(1)、(2)及(3)分段。]

(1) 本人的受權人在申請註冊本持久授權書之前, 必須通知本人。[如不欲獲得通知, 你須刪去此分段。]

(2) 申請註冊本持久授權書的受權人在提出申請之前, 必須通知任何沒有參與申請的受權人。[如你決定受權人可分開行事, 又無需申請註冊本持久授權書的受權人通知任何沒有參與申請的受權人, 則須刪去此分段。]

(3) 本人的受權人在申請註冊本持久授權書之前, 必須通知以下人士: [此處填上(除你及受權人以外)最多 2 名須予通知的人的姓名及地址。如不欲其他人獲得通知, 則須刪去此分段。]

姓名: _____

地址: _____

姓名: _____

地址: _____

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Certificates by a solicitor and a registered medical practitioner

- ❖ As mentioned, the EPA must be signed by the donor either
 - ❖ In the presence of the solicitor and the registered medical practitioner at the same time; or
 - ❖ In the presence of the solicitor at any time **not more than 28 days after it is signed** in the presence of the registered medical practitioner (**s. 5(2)(a) EPAO**)
- ❖ The registered medical practitioner or the solicitor witnessing the donor's signing of the EPA:
 - ❖ Must not be the attorney;
 - ❖ Must not be the spouse of the attorney; and
 - ❖ Must not be any person related by blood or marriage to the donor or the attorney. (**s. 5(2)(aa) EPAO**)

Certificate by a registered medical practitioner

- ❖ The medical practitioner must certify—
 - ❖ (i) *(Repealed 25 of 2011 s. 3)*
 - ❖ (ii) That the registered medical practitioner was **satisfied that the donor was mentally capable** (specifying in the certification that the registered medical practitioner was satisfied that the donor was mentally capable in terms of section 2); and *(Replaced 25 of 2011 s. 3)*
 - ❖ (iii) That the instrument was signed in the presence of the registered medical practitioner and, if it is signed by the donor, that the donor acknowledged that it was signed voluntarily and, if it is signed on the donor's behalf, that it was so signed in the presence, and under the direction, of the donor.
(Replaced 25 of 2011 s. 3) (s. 5(2)(e) EPAO)

Certificate by a solicitor

- ❖ Who is a solicitor?
 - ❖ ‘A person admitted before the Court of First Instance to practise as a solicitor’ (**s. 3, Interpretation and General Clauses Ordinance**)
- ❖ The the solicitor must certify—
 - ❖ (i) *(Repealed 25 of 2011 s. 3)*
 - ❖ (ii) that **the donor appeared to be mentally capable** (specifying in the certification that the donor appeared to be mentally capable in terms of section 2); and
 - ❖ (iii) that the instrument was signed in the presence of the solicitor and, if it is signed by the donor, that the donor acknowledged that it was signed voluntarily and, if it is signed on the donor’s behalf, that it was so signed in the presence, and under the direction, of the donor; and *(Replaced 25 of 2011 s. 3)* (**s. 5(2)(d) EPAO**)

Registration of the EPA

- ❖ Once the donor becomes incapacitated, the attorney appointed under the EPA will not have the authority to act unless the EPA has been registered at Court. **(s. 4(3) EPAO)**
- ❖ If the attorney has reason to believe the donor is or is becoming mentally incapable, they must apply to the Registrar of the High Court for registration of the instrument creating the EPA as soon as practicable. **(s. 4(2) & s. 9(1) EPAO)** It is also possible to register the EPA before incapacity.
- ❖ Before the attorney applies to register the EPA, if the donor has nominated persons (can include the donor) to receive notice before application, the attorney making the application should notify persons nominated about the application. **(s. 18(3) EPAO)**
- ❖ An instrument will be registered if it purports to create an EPA, complies with the rules for registration under the EPAO, and the registration fee has been paid. **(s. 9(2) EPAO)**

Registration of the EPA

- ❖ What if the attorney fails to notify any of the nominated persons? Does that affect the registration of the EPA? **NO**.

- ❖ **S. 19 EPAO:** Where provision is made under section 18(3) for nomination of persons for the purpose of notification and the donor of an enduring power makes such a nomination, the failure (for whatever reason) by the attorney to notify any person so nominated has the following effect—
 - ❖ (a) it does not preclude the registration of the instrument creating the enduring power;
 - ❖ (b) the enduring power is not invalidated by reason of such failure; and
 - ❖ (c) in any legal proceedings relating to the enduring power, where it considers it appropriate, the court may draw an adverse inference from such failure.

Commencement and Restrictions of the EPA

When will an EPA take effect?

- ❖ An EPA commences “*where a date or an event is specified in the instrument creating it, for its commencement, on that date or happening of that event; and where no such date or event is specified, on its execution.*” (s. 10(1) EPAO)
- ❖ Execution? An EPA is executed when it is duly signed before the solicitor in compliance with the requirements in section 5. (s. 10(3) EPAO)
- ❖ Can an EPA take effect *after* being signed before the medical practitioner and *before* being signed before the solicitor? **NO**, an EPA does not commence as a power of attorney before it is executed. (s. 10(2) EPAO) ²⁶

Restrictions

- ❖ Is there any restriction on **being an attorney**?
 - ❖ A power of attorney cannot be an enduring power unless the attorney, when executing the instruments creating it
 - ❖ Is an individual who has attained the age of 18 years and is not bankrupt or mentally incapable; or
 - ❖ is a trust corporation. (s. 6 EPAO)²⁷
- ❖ Is there any restriction on the **instruments which purport to create enduring powers**?
 - ❖ A power of attorney cannot be an enduring power if it –
 - ❖ Empowers the attorney to appoint another person in substitution for himself or as his successor; or
 - ❖ Empowers the attorney to delegate trusts for the purposes of section 27 of the Trustee Ordinance (Cap. 29).
(s. 7 EPAO)

Restrictions

- ❖ Is there any restriction the extent of how the attorney applies the asset of the donor under an EPA?
- ❖ An attorney may, subject to any conditions and restrictions contained in the enduring power and without obtaining any consent—
 - ❖ (a) *(Repealed 13 of 2013 s. 56)*
 - ❖ (b) act under the power so as to benefit himself and other persons (not being the donor) to the following extent, but no further—
 - ❖ (i) he may so act in relation to himself or in relation to any other person **if the donor might be expected to provide for his or that person's needs respectively**; and
 - ❖ (ii) he may do **whatever the donor might be expected to do to meet those needs**; (s. 8(3) EPAO) and

-
- ❖ (c) without prejudice to paragraph (b) and subject to subsection (4), dispose of the property of the donor **by way of gift** to the following extent, but no further—
 - ❖ (i) he may make gifts of a seasonal nature or at a time or on an anniversary of a birth or marriage to persons (including himself) who are related to or connected with the donor; and
 - ❖ (ii) he may make gifts to any charity to which the donor made or might be expected to make gifts. (s. 8(3) EPAO)
 - ❖ A gift under subsection (3)(c) **must not be unreasonable** having regard to all the circumstances, in particular, the donor's estate. (s. 8(4) EPAO)

Restrictions

- ❖ An EPA must not confer on the attorney any authority other than authority to act in relation to the property of the donor and his financial affairs. If not, the EPA cannot take effect as an enduring power. **(S.8(1)(a) & s. 8(2) EPAO)**
- ❖ The enduring power must specify the particular matters, property or affairs in relation to which the attorney has authority to act. **(S. 8(1)(b) EPAO)**
 - ❖ The list of powers granted under an EPA should be carefully drafted if the standard provisions are not to be followed.
- ❖ Attempts to confer powers which exceeds the matters set out in s.8 (3) (e.g. empowering an attorney to fund a discretionary trust settled by the donor) may be considered invalid by the Court
- ❖ Registration of the EPA does NOT signify that the powers listed in the instrument are valid and challenges to the scope of powers may still be made to Court.

Duties of the attorney and Revocation of the EPA

Duties of the attorney

- ❖ The attorney's duties towards the donor of an enduring power are of a fiduciary nature (**s. 12(1) EPAO**)
- ❖ In particular, the attorney under an enduring power has a duty—
 - ❖ to exercise his powers honestly and with due diligence;
 - ❖ to keep proper accounts and records;
 - ❖ not to enter into any transaction where a conflict of interest would arise with the donor; and
 - ❖ not to mix the property of the donor with other property. (**S. 12(2) EPAO**)

What if the attorney abuses his/her power?

- ❖ It is open for an applicant to make an application to the Court to revoke the EPA and remove the attorney.
- ❖ Such application or revocation of the EPA and the removal of the attorney may be made by any “**interested party**”, usually meaning any person who may be prejudiced by the wrongdoing of the attorney, such as a beneficiary of the estate on the death of the donor. (**s. 11(1) EPAO**)
- ❖ Court generally prefers to maintain the validity of the EPA and its appointed attorney because that attorney was consciously appointed by the donor to act. Therefore, good and cogent evidence is needed to support the applicant’s application.

What if the attorney abuses his/her power?

- ❖ **S. 11(1) EPAO:** The court may on the application of an interested party
 - ❖ (a) require the attorney under an enduring power to produce records and accounts and make an order for their auditing;
 - ❖ (b) **revoke an enduring power or vary an enduring power**; or
 - ❖ (c) if satisfied that the interests of the donor of an enduring power so require it, **remove the attorney**.

- ❖ **S. 11(2) EPAO:** The attorney under an enduring power may apply to the court for directions on the meaning and scope of the authority of the power.

What if the attorney abuses his/her power?

- ❖ **S. 11(3) EPAO:** The court may relieve the attorney under an enduring power wholly or partly from any liability which he has or may have incurred on account of a breach of his duties as attorney, if it appears to the court that the attorney has acted honestly and reasonably.
- ❖ **S. 11(4) EPAO:** The court shall cancel the registration of an instrument creating an enduring power—
 - ❖ (a) where the enduring power has expired or is revoked under section 13;
 - ❖ (b) where it confirms, under section 17, the revocation of the enduring power; or
 - ❖ (c) where the attorney is removed under subsection (1)(c).

What should happen if the only attorney is removed?

- ❖ **Last resort:** Application to the Court for the appointment of a Committee under Part II of the Mental Health Ordinance (Cap 136) to manage the mentally incapacitated person's (or the then donor) ("**MIP**") property and affairs
- ❖ The applicant of a Part II Committee application can be the relative of the MIP or if no such application is made by the relative then by the Director of Social Welfare, the Official Solicitor or the guardian of that person (**s.7(3) of the Mental Health Ordinance (Cap 136)**).

Revocation of enduring power

- ❖ **S. 13(1) EPAO:** An enduring power is revoked—
 - ❖ (a) if the donor revokes it when he is mentally capable, or where the donor becomes mentally incapable after the grant and the instrument is registered, if the donor revokes it after his recovery and the court makes an order under subsection (2) confirming the revocation;
 - ❖ (b) on the bankruptcy of the attorney;
 - ❖ (c) if a court makes an order for its revocation under section 11(1)(b) or for the removal of an attorney under section 11(1)(c);
 - ❖ (d) *(Repealed 81 of 1997 s. 59)*

Revocation of enduring power

- ❖ (e) on the appointment of a committee pursuant to Part II of the Mental Health Ordinance (Cap. 136), if the court gives a direction revoking the enduring power;
 - ❖ (f) on the death of the donor or the attorney; or
 - ❖ (g) subject to this Ordinance, on any ground on which a power of attorney is revoked at common law.
- ❖ (2) Where the enduring power is registered, on application made for the purpose, by or on behalf of the donor, the court shall confirm the revocation of the power if satisfied that the donor has done whatever is necessary in law to effect an express revocation of the power and was mentally capable of revoking a power of attorney when he did so.

What if the instrument does not create valid enduring power?

❖ Situation:

- ❖ The donor attempted to make an instrument which is framed in the prescribed form
- ❖ HOWEVER, by some reason, the instrument **does not create a valid enduring power but creates a power of attorney**
- ❖ Later, the donor has lost his mental capacity
- ❖ What would happen?

What if the instrument does not create valid enduring power?

- ❖ **Protection for such situation: s. 14 EPAO**
- ❖ (1)(a) An attorney who acts under the power does not by reason of the revocation incur any liability (either to the donor or to any other person) unless at the time of so acting he knew—
 - ❖ (i) that the instrument did not create a valid enduring power; and
 - ❖ (ii) that the donor has become mentally incapable;
- ❖ (1) (b) any transaction between the attorney and any other person, in favour of that person, is as valid as if the power had then been in existence, unless at the time of the transaction that person knew—
 - ❖ (i) that the instrument did not create a valid enduring power; and
 - ❖ (ii) that the donor has become mentally incapable;

What if the instrument does not create valid enduring power?

- ❖ (1)(c) Where the interest of a particular purchaser depends on whether a transaction between the attorney and any other person was valid by virtue of paragraph (b), it shall be conclusively presumed in favour of the purchaser that the transaction was valid if—
 - ❖ (i) the transaction between that person and the attorney was completed within 12 months of the date on which the instrument came into operation; or
 - ❖ (ii) that person makes a statutory declaration, before or within 3 months after the completion of the purchase, that he had no reason at the time of the transaction to doubt that the attorney had authority to dispose of the property which was the subject of the transaction.

Legal Development: Continuing Powers of Attorney Bill

Continuing Powers of Attorney Bill

- ❖ The Law Reform Commission of Hong Kong (LRC) published the report on “Enduring Powers of Attorney: Personal Care” in July 2011, recommending the extension of the scope of an EPA to cover not only decisions on a donor’s property and financial affairs, but also decisions on a donor’s personal care.
- ❖ The Department of Justice has convened an inter-departmental working group (IWG) to examine the Report.
- ❖ The Department of Justice in December 2017 released a consultation paper on the Continuing Powers of Attorney Bill with a view to implementing the relevant recommendations in the 2011 Report.

Continuing Powers of Attorney Bill

- ❖ At present, the powers which may be delegated under an EPA in Hong Kong are **limited to decisions in relation to the property and financial affairs of the donor.**
- ❖ The Bill seeks to provide a statutory framework for the creation of **Continuing Powers of Attorney (“CPA”)**, under which the donor confers on the attorney authority to act for (including making decisions for) the donor on any matters relating to the **personal care**, and property or financial affairs, of the donor.
- ❖ As in the case of an EPA, a CPA will survive the subsequent mental incapacity of the donor.
- ❖ Whilst new EPAs may no longer be created after the commencement of the CPA Ordinance, **EPAs executed prior to that would continue to be governed by the EPAO.**

New Proposals by the IWG of the DOJ

- ❖ A new provision to the effect that where a donor fails to specify in an instrument (which appoints more than one attorney) whether joint attorneys or joint and several attorneys are appointed, **the attorneys are taken to be joint attorneys.**
- ❖ An attorney cannot be authorized to do any of the following matters:
 - ❖ (a) to make, vary or revoke the donor's will;
 - ❖ (b) to make, vary or revoke a continuing power given by the donor;
 - ❖ (c) to exercise the donor's right to vote in an election;
 - ❖ (d) to consent to the adoption of a child of the donor, being a child under the age of 18 years;
 - ❖ (e) to consent to any change in the marital status of the donor;
 - ❖ (f) to appoint another person in substitution for the attorney or as the attorney's successor;
 - ❖ (g) to delegate trusts for the purposes of section 27 of the Trustee Ordinance (Cap. 29).

New Proposals by the IWG of the DOJ

- ❖ An attorney **can** be authorized to do any of the following **personal care matters**:
 - ❖ (a) where the donor lives;
 - ❖ (b) whom the donor lives with;
 - ❖ (c) the donor's daily dress and diet;
 - ❖ (d) what education or training the donor undertakes;
 - ❖ (e) whether, and if so where and how, the donor works;
 - ❖ (f) whether the donor applies for a licence or permit;
 - ❖ (g) whether, and if so where, the donor goes on holiday;
 - ❖ (h) whether to refuse any specific individual to have access to, or contact with, the donor;
 - ❖ (i) legal matters relating to the donor's personal care;
 - ❖ (j) matters relating to the donor's healthcare, including the following for the purpose of providing healthcare to the donor—
 - ❖ (i) access to the donor's health record;
 - ❖ (ii) sharing the record (or any part of it) with a person (other than the donor);
 - ❖ (iii) giving consent to a person (other than the donor) to have access to the record and to further share the record with another person;
 - ❖ (k) whether to consent to a forensic examination of the donor.

New Proposals by the IWG of the DOJ

- ❖ An attorney **cannot** be authorized to do any of the following **personal care matters**:
 - ❖ (a) to remove non-regenerative tissue or any organ from the donor while the donor is alive—
 - ❖ (i) for transplanting into another person; or
 - ❖ (ii) for any purpose that is not in the donor's best interests;
 - ❖ (b) to sterilize the donor if the donor is, or is reasonably likely to be, fertile;
 - ❖ (c) to place the donor in a mental hospital (as defined by section 2(1) of the Mental Health Ordinance) for treatment of mental disorder against the donor's will;
 - ❖ (d) to give, refuse or withdraw any life-sustaining treatment for the donor;
 - ❖ (e) to make, vary or revoke an advance directive for the donor;
 - ❖ (f) to make the donor participate in any medical research or experimental healthcare;
 - ❖ (g) to make the donor take any electroconvulsive therapy or psychiatric surgery;
 - ❖ (h) to make the donor take any reproductive technology procedure (as defined by section 2(1) of the Human Reproductive Technology Ordinance (Cap. 561));
 - ❖ (i) to make the donor take any healthcare or medical procedure that is prohibited by the laws of Hong Kong;
 - ❖ (j) to make the donor take a type or form of healthcare as may be prescribed for the purpose of this section.

New Proposals by the IWG of the DOJ

- ❖ Requirements for attorney
 - ❖ An attorney for a continuing power must be an individual—
 - ❖ (a) who has reached the age of 18 years; and
 - ❖ (b) who is not mentally incapable.
 - ❖ However, if the continuing power relates only to the donor's financial matters, the attorney may be a trust corporation
 - ❖ An individual who is bankrupt must not be appointed to act as an attorney under a continuing power in relation to the donor's financial matters.
- ❖ A donor may, in a continuing power of attorney, **designate a person (substitute attorney) for the purpose of substituting for an original attorney** if—
 - ❖ (a) the donor becomes mentally incapable; and
 - ❖ (b) the appointment of the original attorney is terminated under section 16(1) (i.e. happening of a specified event in relation to that attorney)

New Proposals by the IWG of the DOJ

- ❖ An attorney under a CPA must: -
 - ❖ (i) Act in best interest of donor
 - ❖ (ii) Act to meet needs / benefit the attorney or a person other than the attorney
 - ❖ (iii) Act to make gifts
 - ❖ (iv) Act when the donor becomes mentally incapable
 - ❖ (v) not do anything, if a continuing power is suspended, until it is registered

New Proposals by the IWG of the DOJ

- ❖ The **Guardianship Board** may review the validity, revocation, or operation and effect, of a continuing power—
 - ❖ (a) on the application of an interested party; or
 - ❖ (b) on its own initiative on hearing a matter under CPAO or the Mental Health Ordinance.

- ❖ The Guardianship Board can also –
 - ❖ (a) make decisions if it would be in the best interest of the donor, having regard to donor’s wishes and feelings that are ascertainable
 - ❖ (b) require an applicant for a review to submit written reports of 2 registered medical practitioners
 - ❖ (c) require a social enquiry report from the Director of Social Welfare
 - ❖ (d) treat an application to review as an application for guardianship under the Mental Health Ordinance if the board considers inappropriate to make an order under CPAO
 - ❖ (e) make an order to suspend the continuing power, meaning that the continuing power had been revoked
 - ❖ (f) refer the application to the court in appropriate cases

New Proposals by the IWG of the DOJ

- ❖ The **Court** can –
 - ❖ (a) make decisions if it would be in the best interest of the donor, having regard to donor's wishes and feelings that are ascertainable
 - ❖ (b) review the validity, revocation or operation and effect of a continuing power
 - ❖ (c) remit the case to the Guardianship Board
- ❖ Both the Guardianship Board and the Court can –
 - ❖ (a) make declarations relating to validity of continuing power
 - ❖ (b) make declarations relating to donor's revocation of continuing power
 - ❖ (c) make orders confirming the revocation of a registered continuing power
 - ❖ (d) make orders relating to revocation of registered continuing power of attorney by attorney's disclaimer
 - ❖ (e) make orders relating to operation and effect of continuing power
- ❖ A person may appeal a decision made by the Guardianship Board to the court

New Proposals by the IWG of the DOJ

- ❖ If it appears to the Guardianship Board or the court that the attorney for a continuing power has acted honestly and reasonably, they may relieve the attorney wholly or partly from any liability that the attorney has or may have incurred on account of a breach of duty as attorney.
- ❖ There are protections in place for persons dealing with attorney when
 - ❖ The continuing power is suspended
 - ❖ The continuing power is invalid/revoked
 - ❖ The person is unaware that a guardian has been appointed for the donor by the Guardianship Board
 - ❖ The person is in good faith for valuable consideration
- ❖ There can be **no waiver** of requirements of CPAO



Q&A

