

Overview of the law and practice relating to Enduring Power of Attorney under the Enduring Powers of Attorney Ordinance and Part II Order under the Mental Health Ordinance

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Statutory materials

- Enduring Powers of Attorney Ordinance (Cap 501)
- Enduring Powers of Attorney (Prescribed Form) Regulation (Cap 501A)
- Part II of Mental Health Ordinance (Cap 136)
- Practice Directions 30.1 - Applications under Part II of the Mental Health Ordinance (“MHO”)

Introduction

- The Reverse Mortgage scheme was first introduced in Hong Kong in July 2011, providing an alternative means of financing to home owners aged 55 or above to use their residential properties as mortgage security to borrow moneys from banks whilst allowing them to stay at their properties for the rest of their life
- 2 sure things in life: death and taxes. But before death – old age with associated physical and mental health problems
- One of the problems that comes with old age is the unfortunate event of anyone subsequently becoming a mentally incapacitated person (“MIP”) – also caused by accident or illness
- Before a home owner becomes MIP, there is, in general, no legal obstacle for him/her to enter into a Reverse Mortgage

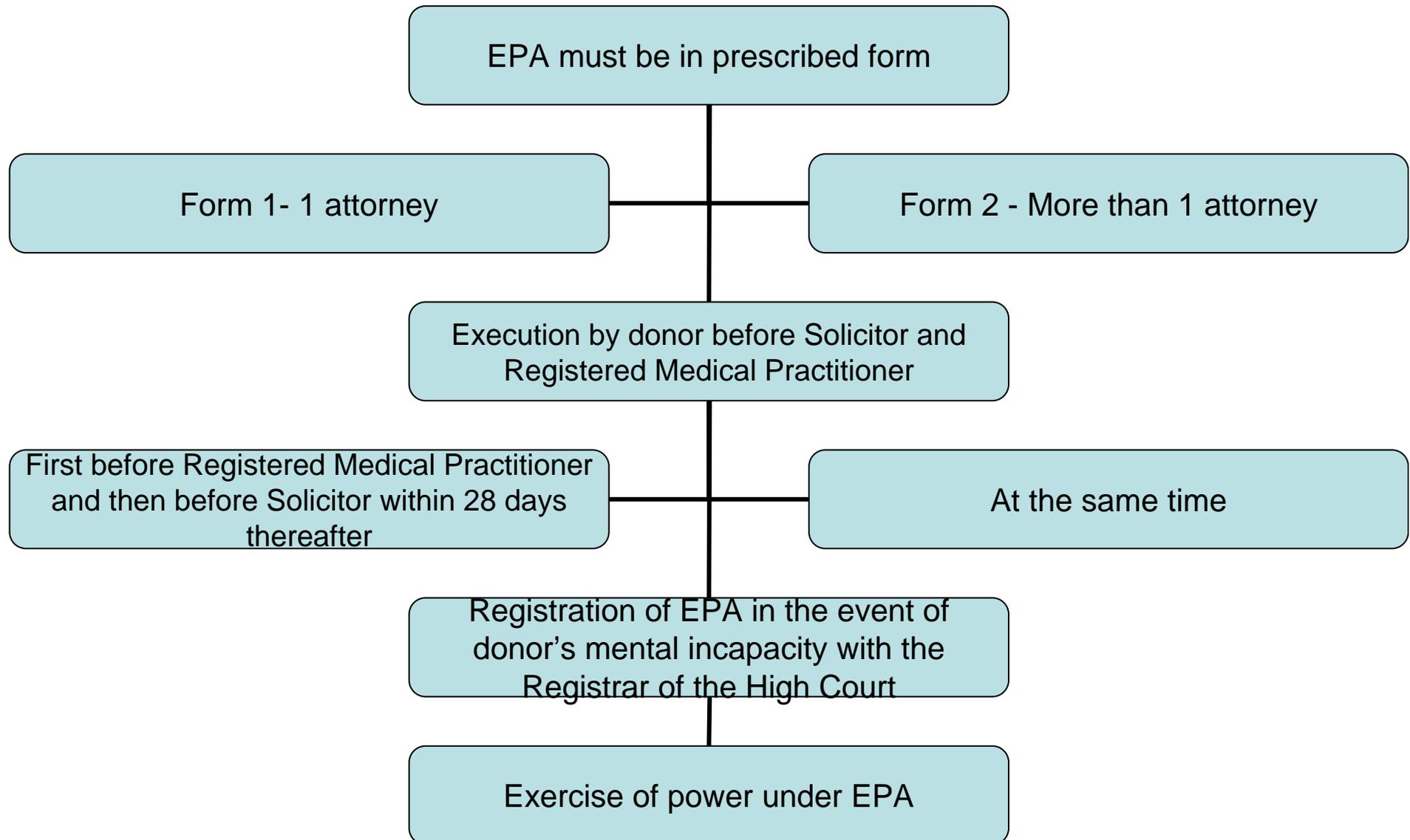
Reverse Mortgage & subsequent mental incapacity

- However, once a home owner becomes MIP, he no longer has the legal capacity to enter into a Reverse Mortgage
- Under existing legal framework, there may be basically 2 ways of executing a Reverse Mortgage in the event of subsequent mental incapacity:-
 1. Enduring Power of Attorney (“EPA”) already executed in advance before mental incapacity [with express power and scope of authority for attorney to handle Reverse Mortgage on behalf of the donor]
 2. Application for Part II Order under MHO to the Court of First Instance

EPA & Part II Order under MHO

- EPA must be executed when the elderly person is still mentally capable, by appointing an attorney to take over his financial affairs in the event of his subsequent mental incapacity
- Part II Order under MHO would be relevant in the event that the elderly person is already mentally incapacitated

Summary of procedure to create an EPA



EPA - Background

- Legislative history – Enduring Powers of Attorney Ordinance (“EPAO”) was first enacted in 1997
- Previous onerous requirement for an EPA to be executed at the same time in the presence of a solicitor and a registered medical practitioner in the prescribed form

Number of EPA registered

- Due to the onerous requirement, very few EPA were executed. As a result, the Law Reform Commission recommended to modify this requirement and allow a more flexible period for the donor to sign the EPA in the presence of a solicitor within 28 days of signing the same in the presence of a registered medical practitioner.
- Ultimately the Enduring Powers of Attorney (Amendment) Ordinance was passed and came into force on 3rd July 2012
- Up to 31st May 2013, the total number of EPA registered with the High Court is **66** – a very small number compared with a population figure of over 7 million – probably many more EPA executed but not yet registered

Nature of EPA

- Unlike a general Power of Attorney which will cease to have effect once the donor becomes mentally incapacitated, an EPA will survive the mental incapacity of the donor, thus allowing the attorney to continue to exercise the power given by the donor

Mental capacity of the donor

- s2 EPAO sets out the definition of mental capacity as follows:-
- *“mentally incapable (精神上無能力行事) and mental incapacity (精神上無行爲能力) 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 (精神上行爲能力) must be construed accordingly”*

Section 1A of the Powers of Attorney Ordinance (Cap 31)

- **s 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).

How to create an EPA?

- S.3 of the EPAO & Enduring Powers of Attorney (Prescribed Form) Regulation (“EPA (PF) R”) set out the formal requirements for an instrument creating an EPA
 1. In the prescribed form (Form 1 or Form 2)
 2. Executed in prescribed manner by the donor and the attorney
 3. Contained at the time of execution by the donor the prescribed explanatory information

Note: s3(3) EPAO –

an instrument which purports to create an enduring power but does not comply with this section cannot take effect as an enduring power

Explanatory information

- As stipulated in s3(1)(c) of EPAO, an instrument must contain at the time of execution by the donor the prescribed explanatory information
- the prescribed Form 1 and Form 2 contain a section “*Information you must read*” in order to comply with the requirement of s3(1)(c)

s.4(1) EPAO –

where an individual creates an enduring power, the power is not revoked by reason of any subsequent mental incapacity of the donor

Prescribed form

- For an EPA to take effect, it must be in one of the 2 Prescribed Forms set out in Schedules 1 & 2 to EPA (PF) R
 1. Form 1 is to be used when the donor intends to appoint only one single attorney
 2. Form 2 is to be used when the donor intends to appoint more than one attorney, i.e. 2 or more attorneys whether jointly or jointly and severally

Execution by the donor

- The donor of an EPA must execute the instrument before a solicitor and a registered medical practitioner in the following manner (s5(2)(A) EPAO):
 1. The donor to sign the EPA in the presence of both a solicitor and a registered medical practitioner at the same time; or
 2. The donor to sign the EPA in the presence of a solicitor within 28 days of signing the same in the presence of a registered medical practitioner
- N.B. The solicitor and the registered medical practitioner certifying the donor's execution must provide their full names and addresses in the instrument

Execution on behalf of the donor

- If the donor is mentally capable but physically incapable of signing the instrument, s5(2)(b) EPAO provides that:
“any other person, [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], may sign the instrument on behalf of the donor in the presence, and under the direction, of the donor”

- S5(2)(aa) provides that “*the registered medical practitioner and the solicitor before whom the instrument is signed must each be a person other than the person being appointed as the attorney, the spouse of such person or a person related by blood or marriage to the donor or the attorney*”, i.e. the certifying registered medical practitioner and the solicitor must be independent from and not related to the donor and/or attorney

Certification by attesting solicitor

- s 5(2)(d) provides that the attesting solicitor must certify that:
 1. the donor appeared to be mentally capable
 2. the instrument was signed in the presence of the solicitor
 3. If the instrument was signed by the donor, the donor acknowledged that it was signed voluntarily
 4. If the instrument was signed on the donor's behalf, it must be signed in the presence and under the direction of the donor

Certification by attesting registered medical practitioner

- s 5(2)(e) provides that the attesting registered medical practitioner must certify that:
 1. he was satisfied that the donor was mentally capable
 2. the instrument was signed in the presence of the registered medical practitioner
 3. If the instrument was signed by the donor, the donor acknowledged that it was signed voluntarily
 4. If the instrument was signed on the donor's behalf, it must be signed in the presence and under the direction of the donor
- N.B. – The Registered Medical Practitioner need not be a psychiatrist, i.e. a family doctor or GP can do

Commencement date of EPA

S10 EPAO:-

- (1) Subject to section 4(3), an enduring power commences -
 - (a) where a date or an event is specified in the instrument creating it, for its commencement, on that date or the happening of that event; and
 - (b) where no such date or event is specified, on its execution.

Registration of EPA

- If the donor eventually becomes mentally incapacitated, the attorney must register the EPA with the High Court before exercising any power under EPA. Steps to be taken after the donor's mental incapacity are set out below:

s4 EPAO

- (2) If the attorney has reason to believe that the donor is or is becoming mentally incapable he must, as soon as practicable, apply under section 9 for registration of the instrument creating the power
- (3) In the event of the subsequent mental incapacity of the donor, the attorney shall not do anything under the authority of the power unless or until it is registered.

Urgent Power for Maintenance

- (5) Notwithstanding subsections (3) and (4), where the attorney has applied for registration of the instrument, he may, pending such registration, act under the enduring power-
 - (a) to maintain the donor or prevent loss to his estate;
 - (b) to maintain himself or other persons in so far as section 8(3)(b) permits him to do so.
- (6) Where the attorney purports to act under subsection (5), then, in favour of any person who deals with him without knowledge that the attorney is acting otherwise than in accordance with paragraph (a) or (b) of that subsection, the transaction between them is valid as if the attorney were acting in accordance with that paragraph (a) or (b).

Scope of authority, etc. of attorney under enduring power

- s8 EPAO:-
- (1) An enduring power-
- (a) 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;
- (b) subject to paragraph (a), must specify, in accordance with regulations made under section 18, the particular matters, property or affairs in relation to which the attorney has authority to act.
- (2) An instrument which purports to create an enduring power which does not comply with subsection (1) cannot take effect as an enduring power.

Strict interpretation of terms of Power

- “Where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to shew that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication” (per Lord Macnaghten in *Bryant, Powis and Bryant Ltd v La Banque du Peuple* 1893 A.C. 170)

- As for any power of attorney, the terms and scope of authority of attorney will be construed strictly
- For this reason, the clause conferring powers on the attorney to handle or deal with Reverse Mortgage on behalf of the donor must be carefully drafted with precision

Attorney's duties and liabilities

- S12 EPAO:-
- (1) The attorney's duties towards the donor of an enduring power are of a fiduciary nature.
- (2) Without limiting the generality of subsection (1), the attorney under an enduring power has a duty-
 - (a) to exercise his powers honestly and with due diligence;
 - (b) to keep proper accounts and records;
 - (c) not to enter into any transaction where a conflict of interest would arise with the donor; and
 - (d) not to mix the property of the donor with other property

Registration of EPA

s9 EPAO:-

- (1) An application to register, for the purposes of section 4(2), an instrument creating an enduring power must be made to the Registrar of the High Court
- (2) Where an application is made under subsection (1), the Registrar shall register the instrument concerned, if he is satisfied that the instrument purports to create an enduring power, the requirements in this Ordinance or in any rules relating to the registration of such an instrument have been complied with and the fee payable for such registration has been paid (currently HK\$440).
- Persons to be notified before applying for registration – see paragraph 4 of Form 1 or paragraph 5 of Form 2:-
 - (1) donor – Registrar must inform donor after such registration whether or not donor wishes to be notified before application (see Rule 3 of Enduring Power of Attorney (Registration) Regulations)
 - (2) any other specified persons (up to 2 persons)

Revocation of EPA by donor

s13 EPAO – EPA is revoked in the following circumstances:-

1. Donor may revoke the EPA before registration when he is still mentally capable
2. Donor who recovers from mental incapacity may apply to the Court for revocation if the EPA was registered
3. Bankruptcy of donor or attorney
4. Court orders revocation of the EPA or the attorney has breached his fiduciary duties.
5. On the appointment of committee under Part II of MHO
6. Death of donor/attorney

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

Form 1

Information you must read

1. This form is a legal document that allows you to create an enduring power of attorney (*EPA*). An EPA enables you to authorize another person (*your attorney*) to act on your behalf in relation to your property and financial affairs. You must use this form if you intend to appoint only one attorney. If you become mentally incapable, your attorney will be able to make decisions for you after your attorney has registered this form with the Registrar of the High Court.
2. If you are a trustee, you should seek legal advice if you want your attorney to act as a trustee on your behalf.
3. You must complete Part A.
4. **Paragraph 1 of Part A:** You must include the name and address of the person you wish to appoint as your attorney at paragraph 1 of Part A. The person you appoint as your attorney must be over 18 years of age and must not be bankrupt or mentally incapable. Your attorney does not have to be a solicitor. Your attorney must complete Part B and sign this form in the presence of a witness.
5. **Paragraph 2 of Part A:** You cannot give your attorney a general authority over all your property and financial affairs. If you do, your EPA will not be valid. Instead, you must specify at paragraph 2 of Part A what you authorize your attorney to do with your property and financial affairs, or the particular property or financial affairs for which you have given your attorney authority to act. For example, you may decide to give your attorney authority only for a particular bank account, or a particular piece of property.

6. **Paragraph 3 of Part A:** You may include any restrictions you like on the authority you give to your attorney. 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, or that your attorney must not enter into a contract without first seeking legal advice if its value exceeds a specified amount. You should set out these restrictions at paragraph 3 of Part A.

7. Unless you include a restriction preventing it, your attorney will be able to use any of your money or property to make any provision which you might be expected to make yourself for the needs of your attorney or the needs of other persons. Your attorney will be able to use your money to make gifts, but only for reasonable amounts in relation to the value of your money and property.

8. Your attorney may recover out-of-pocket expenses for acting as your attorney. If your attorney is a professional person, such as an accountant or a solicitor, your attorney may charge for any professional services provided when acting as your attorney.

9. If your attorney has reason to believe that you are, or are becoming, mentally incapable of managing your affairs, your attorney must apply to the Registrar of the High Court to register this EPA. Registration will allow your attorney to make decisions for you after you have become mentally incapable.

10. **Paragraph 4 of Part A:** If you would like to be notified before your attorney applies to the Registrar of the High Court to register this EPA, or if you would like other persons to be notified, you must include the names and addresses of the persons to be notified at paragraph 4 of Part A. You can include up to 2 persons to be notified in addition to yourself. If your attorney does not notify you or the persons you have nominated, that does not prevent the registration of your EPA or make it invalid. However, in any legal proceedings relating to the EPA the court may, if it considers it appropriate, draw an adverse inference from the failure to notify you or the nominated persons.

11. **Paragraphs 7, 9 and 10 of Part A:** You must sign this form at paragraph 7 of Part A and fill in the names and addresses of the registered medical practitioner and the solicitor who are present when you sign. If you do not sign in the presence of both the registered medical practitioner and the solicitor at the same time, you must sign the form in the presence of the solicitor no later than 28 days after the date on which you sign in the presence of the registered medical practitioner. The registered medical practitioner and the solicitor will need to complete the certificates at paragraphs 9 and 10 of Part A respectively to certify that you are mentally capable when you sign this form.

12. **Paragraph 8 of Part A:** If you are physically incapable of signing this form yourself, you can direct someone else to sign on your behalf. In this case, paragraph 8 of Part A must be completed and that person must sign at that paragraph in your presence and in the presence of the registered medical practitioner and the solicitor. The person signing on your behalf must not be your attorney, the spouse of your 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.

13. This form takes effect as an EPA in accordance with section 10 of the Enduring Powers of Attorney Ordinance (Cap. 501) when it is signed by you or the person signing on your behalf and under your direction before the solicitor. You should note that unless and until this form is so signed, it has no effect either as an EPA or an ordinary power of attorney. However, if you wish, you may choose a later date or later event, on which the EPA will take effect. In such case you must specify this later date or event in paragraph 5 of Part A.

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; or
- (g) to exercise any of my powers as a trustee.

(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.]*

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

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]*.....,
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]*.....
.....
.....

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. *[If someone else signs this form on the donor's behalf, this statement must be deleted.]*
- (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. *[If the donor signs this form, this statement must be deleted.]*

Signed by registered medical practitioner.....
on *[date]*

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. *[If someone else signs this form on the donor's behalf, this statement must be deleted.]*
- (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. *[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 attorney.]

1. I understand that I 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. I also understand my 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 my duties and liabilities under section 12 of that Ordinance.

3. Signed by me as a deed *[signature of attorney]*
on *[date]*
in the presence of *[signature and name and address of witness, who must not be the donor]*
.....
.....
.....

Note on the scope of authority of attorney

- As one can see in paragraph 2 of Form 1 above regarding the scope of authority of attorney, there is no box to “tick” for entering into mortgage. As such, in order for the EPA to empower the attorney to enter into Reserve Mortgage on behalf of the donor, such a power must be clearly set out in paragraph 2(2)

Suggested wording

- “To mortgage or charge (including but not limited to Reverse Mortgage) any of my existing or future residential property and to handle all matters incidental thereto such as receiving counseling advice on Reverse Mortgage, making an annual declaration and giving other notices or confirmation, applying for lump-sum payout and change of payment term; and/or refinancing the Reverse Mortgage on my behalf as the attorney may think fit”

- The precise scope of the attorney's authority to enter into or administer Reverse Mortgage may be specified or restricted as the case may be
- It should be drafted carefully to reflect the intention of the donor as to the extent or limits of authority to be granted to the attorney

Part II Order under MHO

- The procedure of how to apply for a Part II Order is set out in Practice Direction 30.1 of the High Court
- Annex A - Ex-parte Originating Summons
- Annex B - Certificate of Family and Property
- Annex C - Medical Certificate in support of an Application under Part II of the MHO
- Annex D - Form of Consent to Appointment as Committee
- Annex E – Draft Order for directions sought
- Annex F – Draft Order for relief sought in the s.10 hearing

Effect of Part II Order

- A Part II Order seeks to appoint a committee of the estate which shall manage the property and affairs of the mentally incapacitated person (“MIP”) subject to the order of the Court

Powers of the committee of the estate (s10A MHO)

- Wide powers are usually conferred on the committee for the maintenance of the MIP, members of that person's family and dependents
- otherwise for administering the MIP's property and affairs

Powers of the Court

- The powers of the Court under a Part II Order may include but not limited to the following:-
 1. Sale, exchange, charging or other disposition of or dealing with any property of MIP [s10B(1)(b) – power seems to be wide enough to cover Reverse Mortgage if done in the best interests of MIP]
 2. Creation of trust and/or gift
 3. Execution of will
 4. Carrying on the trade of the MIP by suitable persons
 5. Carrying out any contracts entered into by the MIP
 6. Conduct legal proceedings in the name of the MIP
 7. Pay MIP's debts
 8. Exercise any power vested in the MIP whether beneficially, or as guardian or trustee, or otherwise

Application for Part II Order

- In *Re Madam A* (HCMP 44/2004), Lam J (as he then was) held that an inquiry under Part II of MHO involves a two-stage process:
 1. Directions stage: the initial stage in which directions are sought from the Court
 2. Inquiry Stage: the stage where the actual inquiry takes place

The Directions Stage

- Pursuant to s7(3) MHO, the following persons may make the application:
 - (1) Any relative
 - (2) Director of Social Welfare
 - (3) Official Solicitor
 - (4) Guardian of MIP

Definition of relative under s2 MHO

- "relative" in relation to a mentally incapacitated person, means any of the following persons being, persons who have attained the age of 18 years-

“relative” to include :

- (a) spouse or reputed spouse;
- (b) child or child's spouse;
- (c) parent or parent-in-law;
- (d) sibling or sibling's spouse;
- (e) grandparent or grandparent-in-law;
- (f) grandchild or grandchild's spouse;
- (g) uncle or aunt;
- (h) nephew or niece or spouse of nephew or niece;
- (i) cousin or cousin's spouse;
- (j) any person with whom the mentally incapacitated person resides or has resided (e.g. cohabitee)

Ex Parte application by way of Originating Summons

- In general the application should be made ex parte for directions. Neither the alleged MIP nor the Official solicitor should be named as the respondent
- Application should follow the format of Annex A to PD30.1. Supporting documents and a draft Order for directions to be given at this stage should also be filed
- No return date will be fixed and the papers will be placed before a judge for his consideration and directions

All relevant and necessary information to be provided

- The Applicant should ensure that there is at least prima facie evidence to justify an inquiry as to the allegation of mental incapacity
- The Applicant is duty bound to provide the court with all relevant and necessary information to enable the court to discharge its statutory duty under the MHO properly. Failure to do so will delay the application and increase the costs thereof

- Applicant should canvass the views of the alleged MIP and the relatives before an application is made. If the application is likely to be contested, the court must be informed as soon as possible
- S7(5) MHO provides that the application shall be accompanied by 2 medical certificates (at least one from a psychiatrist) and evidence of the relatives or next-of-kin and the property (if any) of the mentally incapacitated person, and such other documents or evidence as may be required by the Court

- The Certificate of Family and Property should be in the format of Annex B to PD30.1
- Where an Applicant seeks directions relating to the property and/or affairs of the alleged MIP, the nature and extent of his/her property as well as the number and identity of all relatives who may be affected must be made known to the court
- If the Applicant has reason to suspect or believe that the property or assets of the alleged MIP are being dissipated or mishandled, this should be brought to the attention of the court

- The Applicant must conduct all necessary investigations in his preparation for an application
- He must ensure the adequacy of the evidence such as bank statements and medical reports
- Insufficient evidence will inevitable lead to delay and the incurring of further costs

Medical Evidence

- The requisite medical certificate under s7(5) MHO is essential –not medical report
- The medical certificates should be in the format of Annex C to PD 30.1 (Medical Certificate in support of an Application under Part II of the MHO)

HCMP No. [] / 200 []

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO. [] OF 200 []

—————
IN THE MATTER OF Part II of the Mental
Health Ordinance, Cap. 136 ("the Ordinance")

and

IN THE MATTER OF an alleged mentally
incapacitated person [*Add initials of MIP*]

—————
**MEDICAL CERTIFICATE IN SUPPORT OF AN APPLICATION
UNDER PART II OF THE MENTAL HEALTH ORDINANCE, CAP.136**

I, [name of medical practitioner] hereby certify as
follows:-

1. I have the following professional qualifications:-

[

]

I [am/not] on the List of Approved Doctors for the purposes of section 2(2) of the
Mental Health Ordinance, Cap.136.

2. At the request of [] I examined [*full name of MIP*]
on the [] and in my opinion [*add initials of MIP*] is incapable by reason of
mental incapacity as defined in the Mental Health Ordinance Cap.136 of managing and
administering [his/her] property and affairs.

3. I based my opinion on the following grounds :-

[

]

4. How long has the present mental incapacity lasted?

[

]

5. Is [*add initials of MIP*] dangerous to [himself/herself] or others in any way?

[

]

6. Is [*add initials of MIP*] capable of appreciating [his/her] surroundings?

[

]

7. Does [*add initials of MIP*] need anything to provide additional comfort?

If so, what recommendations do you make?

[

]

8. [*Where the MIP is living in a hospital/nursing home*] Is there a reasonable prospect of [*add initials of MIP*] being discharged to a nursing home/own home? If so, in approximately how many months/years?

HCMP No.[]/ 200 []

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO. [] OF 200 []

IN THE MATTER OF Part II of the Mental
Health Ordinance, Cap. 136 ("the Ordinance")

and

IN THE MATTER OF an alleged mentally
incapacitated person [*Add initials of MIP*]

MEDICAL CERTIFICATE
IN SUPPORT OF AN APPLICATION

Filed this [] day of [] 200 []

- At least one of the 2 medical certificate must be given by a medical practitioner (i.e. a psychiatrist) approved for this purpose by the Hospital Authority as having special experience in the diagnosis or treatment of mental disorder or having special experience in the assessment or determination of mental handicap

- The medical certificates must state that the alleged MIP is currently incapable, by reason of mental incapacity, of managing and administering his/her own property and affairs

The interests of the alleged MIP are paramount

- s10A(2)(a) MHO states that the interests of the alleged MIP are paramount
- Court will therefore consider matters affecting the alleged MIP's interests such as:-
 1. Existing and future care arrangements of the alleged MIP
 2. Costs of such arrangements
 3. Health condition of the alleged MIP
 4. Life expectancy of the alleged MIP
 5. Maintenance of family members of the alleged MIP
 6. Income and expenditure of the family of the alleged MIP

Application for appointment of a committee of estate

- Where the appointment of a committee of the estate under s11 MHO is sought, the court must be provided with all necessary information regarding the members of the proposed committee
- Information as to the background, training, qualification and experience of members of the committee must be provided

- The Applicant must also provide details as to how the committee is envisaged to manage and administer the property and affairs of the alleged MIP
- The intended members of the committee will have to file a Consent to Appointment as committee as set out in Annex D to PD30.1

Notice to the Official Solicitor

- The Applicant should submit a set of draft directions together with the Originating Summons and other documents to the Official Solicitor
- The Official Solicitor may raise such requisitions and ask for further information or documents from the Applicant

Paper Application

- Normally, directions will be given after consideration on paper without a hearing unless the court considers, whether upon request or on the court's own motion, that a hearing should be held
- Such a request should be made in writing at the time of filing of the Originating Summons

Notice of the Inquiry must be served on the alleged MIP

- Notice of inquiry must be served on the alleged MIP. Such Notice cannot be dispensed with
- The Applicant must indicate to the court the appropriate mode of service on the alleged MIP

- S8 MHO provides that:-
- (1) Reasonable notice of the time and place appointed for the inquiry shall be given to the person alleged to be a mentally incapacitated person:
Provided that if it shall appear that the person alleged to be a mentally incapacitated person is in such a state that personal service on him would be ineffectual, the Court may direct such substituted service of the notice as it shall think proper
- (2) The Court may also, if it thinks fit, direct a copy of such notice to be served upon any relative of the person alleged to be a mentally incapacitated person.

- Note that substituted service in this context is not by way of advertisement in a newspaper
- Substituted service by way of serving the notice on the person in charge of the institution having the care of the alleged MIP may be considered

Urgent application

- In cases of urgency, the Applicant may consider an application under s10D and/or s10A(1) of MHO

Draft order for directions

- The draft order for directions should be in the format of the specimen at Annex E to PD 30.1 which should cover:-
- (a) a clear indication of the scope of the inquiry, e.g. appointment of a committee;
- (b) a list of the persons to be served with Notice of the inquiry;
- (c) the mode of service of the Notice on the alleged mentally incapacitated person, and whether it should be by way of substituted service, and if so, why;
- (d) whether further evidence will be required or adduced at the inquiry;
- (e) whether it is proposed that a medical examination be conducted;
- (f) whether it will be necessary to identify and/or trace relatives or next of kin;
- (g) proposed directions covering all aspects relating to the property and affairs of the alleged mentally incapacitated person;
- (h) whether the doctors who compiled the reports should attend the inquiry;
- (i) whether any interim relief is necessary, or any interim directions should be issued for the protection of the property of the alleged mentally incapacitated person;
- (j) an estimate of the length of the inquiry.

Inquiry Stage

- A draft order containing all the relief sought in s10 must be submitted to the Court. It should be in the format of the specimen at Annex F to PD 30.1
- A skeleton bill of costs (if the costs intended to be paid out of the estate) shall also be lodged
- Both documents should be filed with the Court at least 10 days before the hearing
- The Court will usually fix the costs by way of summary assessment in lieu of taxation

The Inquiry

- A set of papers should be submitted by the Applicant to the Official Solicitor for comment well in advance of the inquiry – up to the Official Solicitor to decide whether to intervene
- The Court will consider and decide on those matters referred to in s10 MHO
- The Court may appoint a committee of estate of MIP if the Court is satisfied that the alleged person is, by reason of mental incapacity, incapable of managing and administering his property and affairs
- Only the Court has the power to direct the sale or mortgage [including Reverse Mortgage?] of any property of the MIP under s.10B(1)(b) of the MHO

Restrictive Powers of management of the Committee of Estate of MIP

- But note s.12 of MHO – powers of management of the Committee of Estate of MIP shall not extend to:
 - (a) sale;
 - (b) charge by way of mortgage of the estate ; or
 - (c) letting of any immovable property, unless for a term not exceeding 3 years

As such, the Committee of the Estate of MIP has no power on its own to enter into any Reverse Mortgage on behalf of MIP – Court Order is required for such purpose pursuant to s13

- If the Committee of Estate seeks to do anything not empowered by an Order under s.12, it is necessary for the Committee to submit proposal to the Registrar of the High Court for report to the Court to make “such order as shall under the circumstances seem just” under s. 13

- The committee needs to apply to Court for an Order under s13 if a Reverse Mortgage is proposed to be executed on behalf of MIP – rather novel concept – but legally feasible under Part II of MHO
- If a sale or Reverse Mortgage of the MIP's residential property is contemplated, the application should be supported by proper valuation evidence and details of the Reverse Mortgage proposal
- The draft order should contain appropriate directions as to conduct of the sale or Reverse Mortgage and distribution or disposal of sale proceeds or mortgage payment, etc.

Summary - Planning ahead of potential event of mental incapacity

- This could be done by executing an EPA in advance whilst in full mental capacity
- An elderly person could be advised to execute EPA in advance by conferring express power on the attorney to enter into Reverse Mortgage on his behalf
- To allow the attorney to make application for lump-sum payout, change of payment term and/or refinancing in the event of mental incapacity of the donor

Steps to be taken after mental incapacity

- The relevant person may apply for an Order under Part II of MHO for a Committee of Estate to manage the properties and affairs of MIP
- The Court has wide powers to deal with the MIP's properties, such as sale or mortgage (including Reverse Mortgage) if done in the best interests of MIP

End

Thank you!