

Enduring power of attorney –
conceptual framework, special
considerations in evaluating mental
capacity

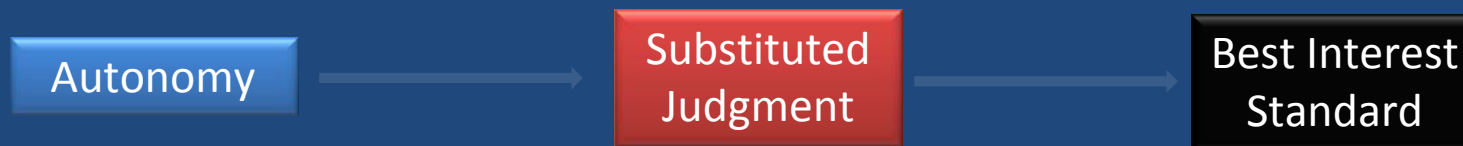
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Enduring Power of Attorney

- Available under the Enduring Power of Attorney Ordinance (Cap. 501 of the Laws of Hong Kong) (Note: Enduring Powers of Attorney (Amendment) Ordinance 2011).
- One key advantage is to allow an individual to choose the person or persons who will look after the individual's affairs if he/she becomes incapable of doing so.
- A registered medical practitioner and a solicitor must certify the mental capacity of the donor in making the EPA.

Mental capacity in General

- Pivotal in balancing the duty to maximize one's autonomy and protect vulnerable individual.
- Unwise decision can be made by a mentally capable person.



Mental Capacity in General

- Distinct from functional or physical capacity
- Presumption of mental capacity
- The statutory and common law requirements
- It is task-specific and time-specific.

Conceptualizing a Mental Capacity Assessment

- Task specificity
- Time specificity
- Documentation
- Practical Steps

Task specificity

Section 5(1) of Enduring Power of Attorney Ordinance (Cap. 501):

The mental capacity required for the creation of an enduring power is mental capacity within the meaning of section 2.

Section 2(1) of Enduring Power of Attorney Ordinance (Cap. 501):

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;

Task specificity

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

Section 2(2) of the Enduring Power of Attorney Ordinance (Cap. 501):

(1) A person shall be regarded as being mentally incapable or suffering from mental incapacity for any purpose relating to a **enduring** 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 **enduring** power of attorney; or

(ii) is unable by reason of his mental disorder or mental handicap to make a decision to grant a **enduring** 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 **enduring** 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).

Task specificity

In summary,

- the donor should be able to understand the effect of EPA and make a decision.

AND

- the donor should be able to communicate his/her wish to grant an EPA.

But do we have any criteria to prove one's ability in understanding and making a decision?

Task specificity

The degree of understanding (i.e. to understand the nature and effect of the EPA) required to create an enduring power of attorney was considered in *Re K, Re F* [1988] 1 All ER 358:

- if such be the terms of the power, that **the attorney will be able to assume complete authority over the donor's affairs;**
- if such be the terms of the power, that **the attorney will in general be able to do anything with the donor's property which the donor could have done;**
- that **the authority will continue if the donor should become mentally incapable;**
- that **if he should be or become mentally incapable, the power will be irrevocable without confirmation by the court.**

(British Medical Association 2010. Assessment of Mental Capacity, 3rd edition)

Criticism with *Re K*, *Re F* criteria

- “Do you understand that your attorney will be able to assume complete authority over the your affairs?”
- “What will your attorney do with your affairs?”

Simple answers “yes” or “no” may be inadequate for the purpose of establishing one’s mental capacity.

(British Medical Association 2010. Assessment of Mental Capacity, 3rd edition)

Some questions???

- Is remembering equivalent to understanding the effect of an EPA?
- Is impaired memory equivalent to impaired judgment?
- Is understanding the effect of a general EPA is equivalent to the effect of your personal EPA?

Decision-making abilities in contemporary clinical practice

Section 3(1) of Mental capacity Act (2005), United Kingdom

a person is unable to make a decision for himself if he is unable:

- (a) to understand the information relevant to the decision,
- (b) to retain that information,
- (c) to use or weigh that information as part of the process of making the decision, or
- (d) to communicate his decision (whether by talking, using sign language or any other means).

MacCAT-T

- Understanding
- Appreciation
- Reasoning
- Expressing a choice

(Grisso, et al. 1997. Psychiatric Services, 48: 1415-1419;

Lui, et al. 2009. American Journal of Geriatric Psychiatry, 17(5): 428-436)

Decision-making abilities in contemporary clinical practice

Understanding:

the ability to comprehend basic information about a problem, its potential solutions, and the risks and benefits associated with those solutions

Appreciation:

the ability of a person to recognize how a problem or solution pertains to his or her specific situation

Reasoning:

the ability to process the information in a logical fashion toward a decision

Expressing a choice:

the ability to communicate his or her decision.

(Lui, et al. 2013. Journal of Geriatric Psychiatry and Neurology, 26(2): 69-77)

Some suggested questions

- What do you understand with an EPA?
- What are your reasons for making an EPA?
- Who have you chosen to be your attorney (s)?
- Why have you chosen \bar{X} to be your attorney(s)?
- What powers are you giving him (them)?
- When should the power be used by your attorney(s)?
- What types of decision would you like them to make?
- When could you cancel the EPA?
-(depending on the complexity of the EPA)

Restructuring some suggested questions

Understanding:

- What do you understand with an EPA?
- What powers are you giving him (them)?
- When should the power be used by your attorney(s)?
- When could you cancel the EPA?

Appreciation:

- What are your reasons for making an EPA?

Reasoning:

- Why have you chosen X to be your attorney(s)?

Expressing a Choice:

- Who have you chosen to be your attorney (s)?
- What types of decision would you like them to make?)

Time specificity

Section 5(2) of Enduring Power of Attorney Ordinance (Cap. 501):

- (i) the donor must sign the instrument creating the enduring power before a registered medical practitioner and a solicitor; and
- (ii) the instrument must be signed by the donor before the solicitor either at the same time when it is signed before the registered medical practitioner or at any time after that signing but before the expiry of the period of 28 days after the day on which it is so signed

Time specificity

“Capacity is “time-specific”, focusing on the particular time when a decision is made or has to be made. The fact that, after just a few minutes, or on the following day, a person cannot recall having made a particular decision doesn’t automatically mean that he or she lacked the capacity to make that decision, or that the decision is invalid.”

*(Re Collis (unreported), 27 October 2010,
(Court of Protection, UK))*

- Fluctuating mental capacity e.g. acute confusion due to physical conditions, psychosis, anxiety, uncooperative, etc.
- Reversibility
- Mental incapacity \neq Mental capacity

Documentation

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]*

Documentation

The “golden rule” by Mr. Justice (later Lord) Templeman in *Kenward v Adams* (1975):

“The making of *a will* by such a testator ought to be witnessed or approved by a medical practitioner who satisfies himself of the capacity and understanding of the testator, and records and preserves his examination and finding.”

(Jacoby & Steer 2007. British Medical Journal, 335:155-157)

Practical steps in a formal assessment (1)

1. Clarify the purpose and understand the task (in writing)
2. Consider the relevant legal tests, questions to be asked, prescribed form
3. Consider the means of communication and interview arrangement
4. Discuss examination with the patient and make sure the patient informed of the purpose of assessment
5. Assess whether the patient has dementia or other mental disorder
6. Evaluate whether the mental capacity is impaired, fluctuating and there is any relationship with mental disorder if identified.

Practical steps in a formal assessment (2)

7. Consider the adjunctive sources of information (may be helpful but not definitive), e.g.
 - a. family
(enhance understanding in mental condition, personal value against potential conflict of interests, confidentiality);
 - b. nursing staff (if in residential care homes);
 - c. general cognitive or indirect assessment instruments
(its value is questionable);
 - d. repeat examination
8. Determine the patient's ability in understanding and decision-making
9. Record patient's answers, verbatim, together with relevant findings (includ. general mental state, decisional abilities, choice(s) etc.)
10. Document the reasons in support of your opinion
11. If in doubt, seek second opinion

Thank you.