

WHAT IS AN ENDURING POWER OF ATTORNEY? I. WHAT IS AN ENDURING POWER OF ATTORNEY? Birth, aging, sickness and death are said to be inevitable elements of life. The inevitability of these events explains why many of us would want to plan ahead for the various aspects involved, for example financially, psychologically and of course, legally. But how many of us have made good preparation for the limbo between aging and death: dementia? With an increasing awareness of dementia and its potential impact on society and on the family members of the patient, it is the right time for the public to get acquainted with the concept of an Enduring Power of Attorney (EPA). So, what exactly is an EPA? Many of us have probably come across the phrase Power of Attorney. The words "power of attorney" speak for themselves: you give your power to act to your attorney, so that your attorney can do something on your behalf. But "enduring power of attorney" does not simply mean that such power is going to "endure", or last, for a longer time. An EPA is actually something completely different. To put it simply, an EPA is a legal document that allows a person who wishes to give his/her power of attorney to someone to appoint one or more attorney(s) to take care of his/her financial matters in the event that he/she subsequently becomes mentally incapacitated, and do so while he/she is still mentally capable. The person who wishes to establish the EPA and give his/her power of attorney to someone is referred to as the donor. Unlike a normal power of attorney that will cease to have effect as soon as its donor becomes mentally incapacitated, the EPA will continue to be in effect. THE ESSENCE OF AN EPA AND WHAT IT CAN ACHIEVE II. THE ESSENCE OF AN EPA AND WHAT IT CAN ACHIEVE 1. THE RELEVANT LAWS 1. THE RELEVANT LAWS The laws on enduring powers of attorney are contained largely in the: Enduring Powers of Attorney Ordinance (Cap. 501 of the Laws of Hong Kong); and Enduring Powers of Attorney (Prescribed Form) Regulation (Cap. 501A of the Laws of Hong Kong) The following words in section 4(1) of the Enduring Powers of Attorney Ordinance (Cap. 501 of the Laws of Hong Kong) highlight the essence of an EPA: "where an individual creates an enduring power, the power is not revoked by reason of any subsequent mental incapacity of the donor". That is to say, the power given to the attorney is going to "endure" despite any subsequent mental incapacity occurring in the donor. This also marks the key difference between an EPA and a power of attorney; an ordinary power of attorney shall be automatically revoked upon the mental incapacity of the donor. 1. I AM GETTING OLD AND I WANT TO LET MY SON TAKE CARE OF MY FINANCIAL AFFAIRS FOR ME. HE IS A FINE GENTLEMAN AND I TRUST HIM COMPLETELY. I KNOW THAT THERE IS SOMETHING CALLED A GENERAL POWER OF ATTORNEY, WHERE I CAN APPOINT MY ATTORNEY TO DO VIRTUALLY ANYTHING HE CAN DO LAWFULLY. I ALSO KNOW THAT IT IS SIMPLE, STRAIGHT-FORWARD, EFFECTIVE AND DOES NOT INVOLVE MUCH LEGAL COSTS. THIS IS THE PERFECT SOLUTION FOR ME, RIGHT? 1. I AM GETTING OLD AND I WANT TO LET MY SON TAKE CARE OF MY FINANCIAL AFFAIRS FOR ME. HE IS A FINE GENTLEMAN AND I TRUST HIM COMPLETELY. I KNOW THAT THERE IS SOMETHING CALLED A GENERAL POWER OF ATTORNEY, WHERE I CAN APPOINT MY ATTORNEY TO DO VIRTUALLY ANYTHING HE CAN DO LAWFULLY. I ALSO KNOW THAT IT IS SIMPLE, STRAIGHT-FORWARD, EFFECTIVE AND DOES NOT INVOLVE MUCH LEGAL COSTS. THIS IS THE PERFECT SOLUTION FOR ME, RIGHT? Wrong. Under normal circumstances, a General Power of Attorney is, as you have said, simple and effective. But if you are getting old, you should seriously consider the possibility that you may become mentally incapacitated, whereby a General Power of Attorney will cease to be effective. You should therefore consider using an Enduring Power of Attorney to appoint an attorney to take care of your financial affairs. An Enduring Power of Attorney will "endure" your mental incapacity and give power to your attorney to continue to take care of your financial affairs despite such incapacity. 2. AN ATTORNEY'S AUTHORITY, DUTIES AND LIABILITIES 2. AN ATTORNEY'S AUTHORITY, DUTIES AND LIABILITIES The prime objective of an EPA is to allow the donor to authorize an attorney to deal with his/her financial assets. It is therefore very important to choose the right attorney. While it is entirely up to a donor's discretion to choose his/her attorney, the law has set out some provisions to regulate the power and responsibility of an attorney. A. AUTHORITY A. AUTHORITY In order not to give the attorney excessive power, the law provides that an EPA must "specify...the particular matters, property or affairs in relation to which the attorney has authority to act" (section 8(1)(b) of the Enduring Powers of Attorney Ordinance (Cap. 501 of the Laws of Hong Kong)). The attorney therefore will not gain an

overwhelming authority to manage all the donor's assets against the donor's wishes because the attorney's power is limited by whatever the donor has particularly specified in the EPA. Section 8 of the Enduring Powers of Attorney Ordinance (Cap. 501 of the Laws of Hong Kong) also stipulates as follows: "(3) An attorney may, subject to any conditions and restrictions contained in the enduring power and without obtaining any consent- (a) execute or exercise all or any of the trusts, powers or discretions vested in the donor as trustee and may, without the concurrence of any other person, give a valid receipt for capital or any other money paid; (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; 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." (4) A gift under subsection (3)(c) must not be unreasonable having regard to all the circumstances, in particular, the donor's estate." In other words, even though an attorney himself/herself is allowed to benefit from the donor's assets, his/her acts will be scrutinized under the test of reasonableness if any dispute arises.

**B. DUTIES AND LIABILITIES** Section 12(1) of the Enduring Powers of Attorney Ordinance (Cap. 501 of the Laws of Hong Kong) emphasizes that an attorney's duties towards the donor "are of a fiduciary nature". So what is "fiduciary"? A renowned Judge in the House of Lords in the UK once defined "fiduciary" as follows:

"A fiduciary is someone who has undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence." (Bristol & West Building Society v Mothew [1998] Ch 1 at 18, Millett LJ)

In light of this fiduciary nature, the attorney is expected to administer the donor's assets only for the donor's benefit. The attorney definitely should not profit from the administration of the donor's assets, and must avoid a situation where his/her interest will conflict with the donor's. To put it simply, in the process of the administration of the donor's estate and affairs, the attorney must give the donor's interest at paramount importance. Section 12(2) of the Enduring Powers of Attorney Ordinance (Cap. 501 of the Laws of Hong Kong) expresses in clear and plain terms that an attorney under an EPA has the following duties: "(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." These statutory terms should serve as adequate guidelines to an attorney in respect of his/her basic duties.

1. MY PARENTS ARE GETTING OLD AND THEY WANT TO APPOINT ME AS THEIR ATTORNEY UNDER THEIR ENDURING POWERS OF ATTORNEY. OF COURSE I AM MOST WILLING TO HELP. I KNOW I AM SUPPOSED TO TAKE CARE OF THEIR FINANCIAL AFFAIRS IF THEY BECOME MENTALLY INCAPACITATED. BUT HOW SHOULD I EXERCISE MY POWER? I HAVE SIBLINGS AND I DON'T WANT TO SEE ANY DISPUTE ARISE AMONG US REGARDING THE MANAGEMENT OF OUR PARENTS' ASSETS. FRANKLY, I DON'T WANT TO BE BLAMED BY ANYONE FOR MISMANAGING THOSE ASSETS IF SOMETHING GOES WRONG.

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A straight-forward answer to your question is: you should refer to section 12(2) of the Enduring Powers of Attorney Ordinance (Cap. 501 of the Laws of Hong Kong), which deals with the duties of an attorney. One further hint is: once you start exercising your power as an attorney, if you always make your parents' best interests a top priority, you probably won't make any serious mistake.

1. MY FRIEND, WHO IS A SOLICITOR, TOLD ME ABOUT SOMETHING CALLED AN

ENDURING POWER OF ATTORNEY, WHICH WILL ALLOW SOMEONE TO TAKE CARE OF MY FINANCIAL AFFAIRS IF I BECOME MENTALLY INCAPACITATED. THAT SEEMS TO BE A GOOD IDEA. SO I CAN JUST SIGN AN ENDURING POWER OF ATTORNEY APPOINTING MY SON TO BE MY ATTORNEY, AND HE WILL TAKE CARE OF EVERYTHING, RIGHT? 1. MY FRIEND, WHO IS A SOLICITOR, TOLD ME ABOUT SOMETHING CALLED AN ENDURING POWER OF ATTORNEY, WHICH WILL ALLOW SOMEONE TO TAKE CARE OF MY FINANCIAL AFFAIRS IF I BECOME MENTALLY INCAPACITATED. THAT SEEMS TO BE A GOOD IDEA. SO I CAN JUST SIGN AN ENDURING POWER OF ATTORNEY APPOINTING MY SON TO BE MY ATTORNEY, AND HE WILL TAKE CARE OF EVERYTHING, RIGHT? Well, your son, i.e. your attorney cannot take care of "everything". The law prescribes that a donor under an Enduring Power of Attorney must specify the particular matters, property or affairs in relation to which the attorney has authority to act. So you have to do something more than just signing a document. 3. MONITORING THE ATTORNEY 3. MONITORING THE ATTORNEY Despite that the Enduring Powers of Attorney Ordinance (Cap.501 of the Laws of Hong Kong) has prescribed certain statutory duties and liabilities in relation to the attorney, one would certainly ask: "But who is going to monitor the attorney's acts, as once the attorney starts exercising his/her authority, it means that the donor no longer has the mental capacity to control the attorney? Even if the attorney abuses his/her authority, what can other people do?" Section 11(1) of the Enduring Powers of Attorney Ordinance (Cap.501 of the Laws of Hong Kong) provides as follows: "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." An attorney's acts can therefore be monitored by an 'interested party'. While the Enduring Powers of Attorney Ordinance (Cap.501 of the Laws of Hong Kong) does not define who can be qualified as an "interested party", it is believed that the Court will not hesitate to allow a wide interpretation in cases where a mentally incapacitated person's interest is involved. Once an EPA is registered with the High Court, the law also allows any person to inspect it and obtain copies of it (section 9(5)(b) of the Enduring Powers of Attorney Ordinance (Cap.501 of the Laws of Hong Kong)). It will therefore be quite easy for any interested party to ascertain an attorney's scope of authority under the EPA and decide whether it is necessary to make an application under section 11(1). 1. THE IDEA OF ENDURING POWER OF ATTORNEY SOUNDS GOOD. BUT I AM STILL A BIT HESITANT ABOUT IT. IF MY ATTORNEY BECOMES VICIOUS AFTER I HAVE BECOME MENTALLY INCAPACITATED, WHAT PROTECTION DO I HAVE? 1. THE IDEA OF ENDURING POWER OF ATTORNEY SOUNDS GOOD. BUT I AM STILL A BIT HESITANT ABOUT IT. IF MY ATTORNEY BECOMES VICIOUS AFTER I HAVE BECOME MENTALLY INCAPACITATED, WHAT PROTECTION DO I HAVE? An Enduring Power of Attorney cannot guarantee that the attorney will always be a trustworthy person. But the existing law provides that an "interested party" is entitled to raise queries on an attorney's behaviour and can even ask the Court to remove the attorney. Therefore, an attorney's acts and behavior could be kept under the surveillance by a number of other persons, including other persons in your family, even though you may have already become mentally incapacitated. 4. THE ATTORNEY'S CAPACITY 4. THE ATTORNEY'S CAPACITY A. AN INDIVIDUAL AS THE ATTORNEY A. AN INDIVIDUAL AS THE ATTORNEY There are some basic requirements that must be met by a person intending to become an attorney. Section 6(a) of the Enduring Powers of Attorney Ordinance (Cap.501 of the Laws of Hong Kong) provides that an attorney has to be an individual who "has attained the age of 18 years and is not bankrupt or mentally incapable" at the time when he/she executes the EPA. Some further points to note are that the attorney cannot be: the registered medical practitioner or the solicitor witnessing the signing of the instrument creating the EPA; the spouse of the registered medical practitioner or the solicitor; or a person related by blood or marriage to the registered medical practitioner or the solicitor. (section 5(2)(aa) of the Enduring Powers of Attorney Ordinance (Cap.501 of the Laws of Hong Kong)) This serves to safeguard the conflict of role between the attorney and the medical practitioner/solicitor and the possibility that the registered medical practitioner or the solicitor may exercise undue influence on the donor. Other than the above, a donor is basically free to appoint whoever he/she likes to be his/her attorney under the EPA.

1. I AM GETTING OLD AND I WANT TO EXECUTE AN ENDURING POWER OF ATTORNEY TO LET MY SON HANDLE MY FINANCIAL AFFAIRS IN CASE I BECOME MENTALLY INCAPACITATED. MY SON IS A SOLICITOR AND MY DAUGHTER-IN-LAW IS A MEDICAL DOCTOR. SO THINGS ARE EASY. THEY CAN WITNESS THE EXECUTION OF THE ENDURING POWER OF ATTORNEY AND MY SON CAN BE THE ATTORNEY.

1. I AM GETTING OLD AND I WANT TO EXECUTE AN ENDURING POWER OF ATTORNEY TO LET MY SON HANDLE MY FINANCIAL AFFAIRS IN CASE I BECOME MENTALLY INCAPACITATED. MY SON IS A SOLICITOR AND MY DAUGHTER-IN-LAW IS A MEDICAL DOCTOR. SO THINGS ARE EASY. THEY CAN WITNESS THE EXECUTION OF THE ENDURING POWER OF ATTORNEY AND MY SON CAN BE THE ATTORNEY. Well, in this case, things are not quite as easy as they seem to be. The existing law provides that the attorney and the witnessing solicitor/medical practitioner (and his/her spouse) cannot be the same person. If you want your son (who is also a solicitor) to be your attorney, then you have to find another solicitor to witness your execution of the Enduring Power of Attorney. For the same reason, your daughter-in-law cannot be the medical practitioner who witnesses your execution of the Enduring Power of Attorney. B. A TRUST CORPORATION AS THE ATTORNEY B. A TRUST CORPORATION AS THE ATTORNEY For a donor having substantial assets, he/she may consider getting professional assistance to manage those assets in case he/she becomes mentally incapacitated. In such circumstances, the donor may want to engage a professional trust corporation to become his/her attorney under the EPA. Section 6(b) of the Enduring Powers of Attorney Ordinance (Cap.501 of the Laws of Hong Kong) expressly allows the appointment of a trust corporation to act as an attorney. 5. MORE THAN ONE ATTORNEY? 5. MORE THAN ONE ATTORNEY? It is natural for a donor to worry about the ability, integrity and/or trustworthiness of an attorney. If a donor finds it more comfortable to appoint more than one attorney so that the attorneys may assist or monitor each other, a donor is free to do so as long as "the attorneys are appointed to act jointly or jointly and severally" (section 15(1) of the Enduring Powers of Attorney Ordinance (Cap.501 of the Laws of Hong Kong)). If the donor chooses to have multiple attorneys, the donor must choose whether his/her attorneys are to act jointly or jointly and severally. If the donor does not make an express choice, the EPA will not be valid. A. TO ACT JOINTLY A. TO ACT JOINTLY If attorneys are acting "jointly", it means that they have to act together and cannot act separately. A decision made by any one of the attorneys alone will not be valid. They therefore have to make decisions together in respect of the donor's assets on agreed terms. B. TO ACT JOINTLY AND SEVERALLY B. TO ACT JOINTLY AND SEVERALLY If attorneys are acting "jointly and severally", it means that they can act together, but can also act separately if they wish. This would effectively mean that any one of the attorneys will be able to make a decision by themselves. One obvious advantage is of course that there will be more flexibility for any one attorney to exercise his/her power; and the disadvantage is that it may be easier for any one attorney to abuse his/her power. 1. I AM GETTING OLD AND I WANT TO EXECUTE AN ENDURING POWER OF ATTORNEY. I HAVE 3 GROWN UP CHILDREN WHO ARE ALL FINE AND TRUSTWORTHY PERSONS. BUT I WANT TO LET MY WIFE HANDLE MY FINANCIAL AFFAIRS IN CASE I BECOME MENTALLY INCAPACITATED. 1. I AM GETTING OLD AND I WANT TO EXECUTE AN ENDURING POWER OF ATTORNEY. I HAVE 3 GROWN UP CHILDREN WHO ARE ALL FINE AND TRUSTWORTHY PERSONS. BUT I WANT TO LET MY WIFE HANDLE MY FINANCIAL AFFAIRS IN CASE I BECOME MENTALLY INCAPACITATED. Basically you are free to appoint whatever person you like to be your attorney under an Enduring Power of Attorney. However, if you are getting old, probably your wife is also getting old; so it may not be a good idea to have your wife to handle your financial affairs by herself. Maybe you can consider letting your wife and one of your children to be your attorney jointly and severally, so that either one of them can exercise their power as an attorney and take care of your financial affairs in case you become mentally incapacitated. 6. REGISTRATION AND NOTIFICATION 6. REGISTRATION AND NOTIFICATION A. REGISTRATION OF AN EPA A. REGISTRATION OF AN EPA To further safeguard a donor's interests, the Enduring Powers of Attorney Ordinance (Cap.501 of the Laws of Hong Kong) prescribes: under section 4(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." under section 4(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.” An attorney is therefore be effectively barred from dealing with the donor’s assets before the registration process is completed. This registration system, which is administered by the Registrar of the High Court of Hong Kong, will ensure that a register of every EPA in force is kept with the Court, which in turn will allow any person to inspect any EPA and thus be able to monitor an attorney’s activity. One should also note: while section 4(2) provides that an attorney must apply for the registration of the EPA upon the donor becoming mentally incapable, it does not mean that the attorney or the donor cannot register the EPA before the onset of the donor’s mental incapacity. In other words, the donor can apply for the registration of the EPA soon after executing an EPA, i.e. while he/she is still mentally sound. This would have the benefit of ensuring that the registration occurs while the donor is still in control of the matter. Under section 9(5) of the Enduring Powers of Attorney Ordinance (Cap.501 of the Laws of Hong Kong), a register of EPAs registered under the Ordinance is kept by the Registrar and all the registers as well as the EPAs are open to public inspection. Section 13(2) of the Enduring Powers of Attorney Ordinance (Cap.501 of the Laws of Hong Kong) provides that where an EPA is registered, its revocation would require confirmation of the court following an application made by or on behalf of the donor. In deciding the timing of registration of the EPA, the donor should take into account his or her own circumstances and the effects of the registration under sections 9(5) and 13(2) of the Ordinance.

B. WHAT HAPPENS BETWEEN THE COMMENCEMENT AND COMPLETION OF THE REGISTRATION? The registration of the EPA may take time. If, as stipulated by section 4(3) of the Enduring Powers of Attorney Ordinance (Cap.501 of the Laws of Hong Kong), an attorney is not allowed to deal with the donor’s assets unless or until the completion of the registration process, who can take care of those assets when the donor may have already lost his/her capability to take care of the same? Section 4(5) provides an answer to this question: “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.” As discussed above, a donor can procure the registration of the EPA when he/she is still mental capable. Such “early” registration will have the further benefit of eliminating the suspension period under section 4(3), so that the attorney can start administering the donor’s assets soon after the donor’s mental incapacity without having to take time to register the EPA and then having to wait for the completion of its registration.

C. NOTIFICATION OF THE REGISTRATION While there is no statutory requirement that the attorney has to notify any person before he/she brings the EPA to the Court for registration, the law allows the donor to specify that the attorney must notify the donor, the other attorney (if more than one attorney is appointed) and/or up to 2 persons before applying for the registration (see section 6 of the Enduring Powers of Attorney (Prescribed Form) Regulation (Cap.501A of the Laws of Hong Kong)). This mechanism should also serve to give some psychological comfort to the donor, by ensuring that persons other than the attorney will become aware of the operation of the EPA upon the donor becoming mentally incapacitated. However, if the attorney fails to notify the nominated person(s), that does not prevent the EPA from being registered, nor does it invalidate the EPA; however the Court will be entitled to draw an adverse inference from such failure in any legal action related to the subject EPA (section 19 of the Enduring Powers of Attorney Ordinance (Cap.501 of the Laws of Hong Kong)).

1. LET’S ASSUME THAT A DONOR SPECIFIES IN THE ENDURING POWER OF ATTORNEY THAT IT SHALL TAKE EFFECT WHEN THE DONOR IS DIAGNOSED TO BE SUFFERING FROM DEMENTIA. A FEW YEARS LATER, THE DONOR SHOWS SYMPTOMS OF DEMENTIA. THE ATTORNEY, HOWEVER, DOES NOT LODGE THE ENDURING POWER OF ATTORNEY WITH THE COURT FOR REGISTRATION. WHEN THE DONOR IS EVENTUALLY DIAGNOSED TO BE MENTALLY INCAPABLE, THE ATTORNEY STILL DOES NOT LODGE THE ENDURING POWER OF ATTORNEY WITH THE COURT FOR REGISTRATION. CAN THE ATTORNEY EXERCISE HIS/HER POWERS UNDER THE ENDURING POWER OF ATTORNEY? AFTER ALL, THE ENDURING POWER OF ATTORNEY STIPULATES THAT IT WILL TAKE EFFECT UPON THE DONOR BEING DIAGNOSED TO BE SUFFERING FROM DEMENTIA. IT APPEARS THAT THE ATTORNEY, WHILE BREACHING THE REQUIREMENT TO REGISTER IT, HAS NOT DONE

ANYTHING WRONG UNDER THE ENDURING POWER OF ATTORNEY. SO IS REGISTRATION REDUNDANT? 1. LET' S ASSUME THAT A DONOR SPECIFIES IN THE ENDURING POWER OF ATTORNEY THAT IT SHALL TAKE EFFECT WHEN THE DONOR IS DIAGNOSED TO BE SUFFERING FROM DEMENTIA. A FEW YEARS LATER, THE DONOR SHOWS SYMPTOMS OF DEMENTIA. THE ATTORNEY, HOWEVER, DOES NOT LODGE THE ENDURING POWER OF ATTORNEY WITH THE COURT FOR REGISTRATION. WHEN THE DONOR IS EVENTUALLY DIAGNOSED TO BE MENTALLY INCAPABLE, THE ATTORNEY STILL DOES NOT LODGE THE ENDURING POWER OF ATTORNEY WITH THE COURT FOR REGISTRATION. CAN THE ATTORNEY EXERCISE HIS/HER POWERS UNDER THE ENDURING POWER OF ATTORNEY? AFTER ALL, THE ENDURING POWER OF ATTORNEY STIPULATES THAT IT WILL TAKE EFFECT UPON THE DONOR BEING DIAGNOSED TO BE SUFFERING FROM DEMENTIA. IT APPEARS THAT THE ATTORNEY, WHILE BREACHING THE REQUIREMENT TO REGISTER IT, HAS NOT DONE ANYTHING WRONG UNDER THE ENDURING POWER OF ATTORNEY. SO IS REGISTRATION REDUNDANT? No. Let' s imagine this scenario: the attorney brings the unregistered EPA to a bank and tries to withdraw money from the donor' s bank account (on the assumption that this power is listed in the EPA). He/She also brings along a medical certificate confirming that the donor is suffering from dementia. The attorney tells the bank clerk: "Hey, take a look at this EPA; the donor signed it; the doctor signed it; and the lawyer signed it. I also have this medical certificate. So now give me the money." Will the bank clerk gladly comply? Probably not: Section 4(3) of the Enduring Powers of Attorney Ordinance (Cap. 501 of the Laws of Hong Kong) states: "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." The bank clerk probably would not comply with the attorney' s request based on an unregistered EPA. Registration of an Enduring Power of Attorney is therefore an essential step in ensuring that the Enduring Power of Attorney becomes effective, and accepted by all institutions.

7. REVOCATION

7. REVOCATION A. REVOCATION BY THE DONOR A. REVOCATION BY THE DONOR What if a donor, who has already executed an EPA, later changes his/her mind and wants to revoke the EPA? What does the donor have to do to carry out the revocation? Section 13 of the Enduring Powers of Attorney Ordinance (Cap. 501 of the Laws of Hong Kong) expressly allows a donor to revoke an EPA: when the donor is mentally capable; or if the donor recovers from his/her mental incapacity, makes an application to the Court for the revocation and the Court makes an order confirming the revocation. This means that as long as the donor is mentally capable, he/she can change his/her mind and revoke the EPA at anytime.

1. I MADE AN ENDURING POWER OF ATTORNEY A FEW YEARS AGO, APPOINTING MY ELDEST SON TO BE THE ATTORNEY. HOWEVER, RECENTLY I NOTED THAT HE WAS INDULGING IN GAMBLING AND I DON' T TRUST HIM ANYMORE. I NOW WANT TO APPOINT MY YOUNGEST DAUGHTER TO BE THE ATTORNEY. WHAT SHOULD I DO?

1. I MADE AN ENDURING POWER OF ATTORNEY A FEW YEARS AGO, APPOINTING MY ELDEST SON TO BE THE ATTORNEY. HOWEVER, RECENTLY I NOTED THAT HE WAS INDULGING IN GAMBLING AND I DON' T TRUST HIM ANYMORE. I NOW WANT TO APPOINT MY YOUNGEST DAUGHTER TO BE THE ATTORNEY. WHAT SHOULD I DO? First of all, you have to revoke your existing Enduring Power of Attorney. If you have the Enduring Power of Attorney with you, the most straight-forward method of revocation is simply to tear it into pieces. If you do not have the Enduring Power of Attorney with you (for example you may have already given it to your eldest son), you should get some legal assistance by asking a solicitor to prepare a formal written revocation to revoke your existing Enduring Power of Attorney. Then you will be able to proceed to execute a fresh Enduring Power of Attorney appointing your youngest daughter as the attorney.

B. REVOCATION UNDER OTHER CIRCUMSTANCES B. REVOCATION UNDER OTHER CIRCUMSTANCES Apart from a revocation initiated by the donor, there are other circumstances which may render an EPA automatically revoked. They are: An EPA will be revoked on the bankruptcy of the attorney. The basic idea is: if the attorney cannot manage his/her own financial affairs, how can he/she be expected to be capable of managing the donor' s? The automatic revocation under this circumstance is therefore very reasonable. An EPA will be revoked if the Court makes an order under section 11(1)(b) or section 11(1)(c) of the Enduring Powers of Attorney Ordinance (Cap. 501 of the Laws of Hong Kong) to revoke an EPA or to remove the attorney. These sections will be triggered when the Court finds an EPA defective, or when it finds the attorney acting in breach of his duties. Under either of these circumstances, the revocation of the subject EPA is a logical consequence. An EPA will be revoked on the appointment of a

committee under Part II of the Mental Health Ordinance (Cap.136 of the Laws of Hong Kong). As discussed above, an EPA deals only with financial matters. It does not touch on decisions regarding the personal affairs of the donor, for example medical treatment and residence. On the other hand, Part II of the Mental Health Ordinance (Cap.136 of the Laws of Hong Kong) gives an appointed committee the wide power to do "all such things in relation to the property and affairs of the mentally incapacitated person" (section 11). The appointment of a committee will therefore annul the necessity of the attorney under an EPA. An EPA will be revoked on the death of the donor. The underlying essence of an EPA is the maintenance and management of the donor's assets while he/she is mentally incapacitated. If the donor passes away, the attorney no longer has the duties nor the legal authority to deal with those assets which will be governed by the donor's Will (if any) or the laws on intestacy. An EPA will be revoked on the death of the attorney. The attorney's death is fatal to the operation of an EPA because an EPA represents the donor's personal trust and confidence in the attorney. When the object of such trust and confidence has passed away, the EPA naturally has to cease to be operative. An EPA may also be revoked on any grounds on which a power of attorney is revoked under common law (see section 13(g) of the Enduring Powers of Attorney Ordinance (Cap.501 of the Laws of Hong Kong)). The usual and recognized common law grounds on which a power of attorney will be revoked are: the death, lunacy and bankruptcy of the donor. The consequence of a donor's death is discussed above. As for lunacy, if we equate lunacy with mental incapacity, lunacy will actually activate an EPA instead of revoking it. However, if a committee is appointed under Part II of the Mental Health Ordinance (Cap.136 of the Laws of Hong Kong) to take care of the property and affairs of a donor who has become mentally incapacitated, it would have the effect of automatically revoking that donor's EPA. If the donor is bankrupt, his/her assets will be taken up by the liquidator for the satisfaction of his/her debts. An EPA made by the donor will therefore be meaningless and should be revoked.

## 8. KEY ADVANTAGES OF AN EPA

It should now be clear that an EPA would enable a person to better prepare for the possibility that he/she may in the future become subject to mental incapacity. This is especially significant in light of the growing population of the elderly and the increasing number of cases of dementia in society. In March 2008, the Law Reform Commission of Hong Kong published the Report on Enduring Powers of Attorney and identified the key advantages of an EPA: "(a) it allows an individual to choose the person or persons who will look after the individual's affairs if he becomes incapable of doing so; (b) it avoids expensive and potentially distressing court proceedings for the appointment of [another person] to look after the individual's affairs; (c) it provides an efficient and cost-effective way of administering the individual's property." The Report also states that "The use of an EPA has benefits not only for the donor, but also for the donor's family who might otherwise be faced with considerable difficulties and distress in managing his affairs. From the wider community's point of view, an EPA can avoid the need to apply scarce court resources unnecessarily to the management of an individual's affairs."

## REQUIREMENTS AND PROCEDURES FOR MAKING AN EPA

### III. REQUIREMENTS AND PROCEDURES FOR MAKING AN EPA

The Enduring Powers of Attorney Ordinance (Cap.501 of the Laws of Hong Kong) and the Enduring Powers of Attorney (Prescribed Form) Regulation (Cap.501A of the Laws of Hong Kong) contain detailed descriptions of the requirements and procedures for making an EPA.

#### 1. THE USE OF PRESCRIBED FORM(S)

##### A. PRESCRIBED FORMS

A donor cannot draft an EPA out of thin air, nor can he/she instruct his/her solicitor to draft an EPA purely according to his/her wishes in any format he/she might desire. Section 3(1)(a) of the Enduring Powers of Attorney Ordinance (Cap.501 of the Laws of Hong Kong) provides that for an EPA to have legal effect, it must be made out using the "prescribed form"; and "prescribed form" means the Form(s) set out in the Schedules to the Enduring Powers of Attorney (Prescribed Form) Regulation (Cap.501A of the Laws of Hong Kong).

##### B. FORM 1 OR FORM 2?

Schedule 1 of the Enduring Powers of Attorney (Prescribed Form) Regulation (Cap.501A of the Laws of Hong Kong) contains Form 1, which is to be used when the donor intends to appoint only one attorney. Schedule 2 contains Form 2, which is to be used when the

donor intends to appoint more than one attorney. Therefore, depending on the donor's choice of the number of attorneys, either Form 1 or Form 2 must be used.

## 2. EXECUTION (SIGNING) BY THE DONOR AND THE ATTORNEY

For an EPA to have legal effect, it must be "executed in the prescribed manner by the donor and the attorney", though "not necessarily at the same time" (section 3(1)(b) of the Enduring Powers of Attorney Ordinance (Cap. 501 of the Laws of Hong Kong) and section 3(1) of the Enduring Powers of Attorney (Prescribed Form) Regulation (Cap. 501A of the Laws of Hong Kong) respectively).

### A. 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 once before a solicitor. The ideal situation would of course be the case where the donor, the registered medical practitioner and the solicitor are all present, so that everybody can sign his/her respective part of the prescribed form in one go. For the less ideal situation, the law allows the donor to 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 (section 5(2)(a) of the Enduring Powers of Attorney Ordinance (Cap. 501 of the Laws of Hong Kong)). One should also note that an EPA is executed only after the donor signs it in front of a solicitor. It means that if there is a time gap between the signing before the medical practitioner and the signing before the solicitor, the EPA is only a few pages of useless paper during this time gap. Section 5(2)(b) of the Enduring Powers of Attorney Ordinance (Cap. 501 of the Laws of Hong Kong) caters for the scenario where a donor is mentally capable but physically incapable of signing: "if the donor is physically incapable of signing, 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."

### B. EXECUTION (SIGNING) BY THE ATTORNEY

Naturally an attorney has to sign the EPA to indicate his/her consent to act as an attorney. He/She "must sign in the presence of a witness", where the witness "must sign the instrument and provide his or her full name and address in the instrument" (sections 3(2) and 3(3) of the Enduring Powers of Attorney (Prescribed Form) Regulation (Cap. 501A of the Laws of Hong Kong)). Basically anybody can witness the attorney's signature, except that: 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. (section 3(4) of the Enduring Powers of Attorney (Prescribed Form) Regulation (Cap. 501A of the Laws of Hong Kong))

### C. EXECUTION (SIGNING) IF THERE IS MORE THAN ONE ATTORNEY

If more than one attorney is appointed, the donor must use Form 2 and indicate in it whether the attorneys will be acting (i) jointly or (ii) jointly and severally (section 15 of the Enduring Powers of Attorney Ordinance (Cap. 501 of the Laws of Hong Kong)). If the attorneys are to act jointly, then of course 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 (section 4(1) of the Enduring Powers of Attorney (Prescribed Form) Regulation (Cap. 501A of the Laws of Hong Kong)). 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 (section 4(2) of the Enduring Powers of Attorney (Prescribed Form) Regulation (Cap. 501A of the Laws of Hong Kong)). 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.

## 1. I AM GETTING OLD AND I WANT TO LET MY DAUGHTER TAKE CARE OF MY FINANCIAL AFFAIRS IN CASE I BECOME MENTALLY INCAPACITATED. I KNOW THAT THERE IS SOMETHING CALLED AN ENDURING POWER OF ATTORNEY, WHERE I CAN APPOINT MY ATTORNEY TO HANDLE MY FINANCIAL AFFAIRS IF DEMENTIA STRIKES ME. THAT SOUNDS GOOD. SO I CAN JUST WRITE A FEW WORDS MAKING THE APPOINTMENT, SIGN IT, AND PERHAPS GET A FRIEND TO WITNESS MY SIGNATURE. THEN THAT'S ALL THERE IS TO IT, RIGHT?

## 1. I AM GETTING OLD AND I WANT TO LET MY DAUGHTER TAKE CARE



OF MY FINANCIAL AFFAIRS IN CASE I BECOME MENTALLY INCAPACITATED. I KNOW THAT THERE IS SOMETHING CALLED AN ENDURING POWER OF ATTORNEY, WHERE I CAN APPOINT MY ATTORNEY TO HANDLE MY FINANCIAL AFFAIRS IF DEMENTIA STRIKES ME. THAT SOUNDS GOOD. SO I CAN JUST WRITE A FEW WORDS MAKING THE APPOINTMENT, SIGN IT, AND PERHAPS GET A FRIEND TO WITNESS MY SIGNATURE. THEN THAT' S ALL THERE IS TO IT, RIGHT? No. Under the present law, an Enduring Power of Attorney must be in the prescribed form, which means the Form(s) set out in the Schedules to the Enduring Powers of Attorney (Prescribed Form) Regulation (Cap. 501A of the Laws of Hong Kong). There are also specific requirements as to who can or cannot be the witness of your and the attorney' s signatures on an Enduring Power of Attorney. It is therefore suggested that you seek legal advice if you are serious about making an Enduring Power of Attorney.

3. EXPLANATORY INFORMATION

3. EXPLANATORY INFORMATION Section 3(1)(c) of the Enduring Powers of Attorney Ordinance (Cap. 501 of the Laws of Hong Kong) provides that for an EPA to have legal effect, it must contain "at the time of execution by the donor the prescribed explanatory information". Again both the prescribed Form 1 and Form 2 contain a section "Information you must read", which sets out in detail all the necessary information, thus ensuring compliance with the aforesaid section 3(1)(c).

4. THE ATTORNEY' S AUTHORITY

4. THE ATTORNEY' S AUTHORITY A donor cannot just give to the attorney a general authority over all the donor' s property and financial affairs. He/She must expressly spell out the specific matters, property or financial affairs in relation to which the attorney(s) has authority to act. Both Form 1 and Form 2 contain a useful list of the most common authorities: 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 The above list certainly is not an exhaustive one. If the donor finds the above list not adequate, he/she may specify in further detail the property or financial affairs that the attorney is authorized to deal with. Please note that the donor may tick as many of the boxes as he/she wants, BUT must not leave all boxes with no tick and fail to list anything regarding the particular property or financial affairs for which the attorney(s) is to be given authority to act. That is, you must specify at least one particular area in which you want your attorney to act. Otherwise, the EPA will not be valid.

5. RESTRICTIONS ON THE ATTORNEY' S AUTHORITY AND NOTIFICATION OF NAMED PERSONS

5. RESTRICTIONS ON THE ATTORNEY' S AUTHORITY AND NOTIFICATION OF NAMED PERSONS A. RESTRICTIONS ON THE ATTORNEY' S AUTHORITY A. RESTRICTIONS ON THE ATTORNEY' S AUTHORITY One important aspect of an EPA is that no general authority over the donor' s property and financial affairs will be given to the attorney. The authority must be specified in adequate detail. For the same reason, the donor may include restrictions on the attorney' s authority in the EPA. Both Form 1 and Form 2 expressly address the donor: "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." This mechanism offers more flexibility and freedom to the donor when creating the EPA, so that he/she can retain a certain extent of control over his/her property and financial affairs. Note that if the donor does not intend to impose any restrictions on the attorney' s authority, the donor must delete the relevant section in the prescribed form(s). The donor cannot simply leave that section blank.

B. NOTIFICATION OF NAMED PERSONS B. NOTIFICATION OF NAMED PERSONS In line with section 6 of the Enduring Powers of Attorney (Prescribed Form) Regulation (Cap. 501A of the Laws of Hong Kong), both Form 1 and Form 2 contain a section where the donor can nominate person(s) to be notified by the attorney applying for the registration of the EPA. Note that if the donor does not intend to nominate any person to be notified, the donor must delete the relevant section in the prescribed form(s). The donor cannot simply leave that section blank.

1. THE IDEA OF AN ENDURING POWER OF ATTORNEY SOUNDS GOOD, BUT I STILL CANNOT BRUSH AWAY THE FEAR THAT MY ATTORNEY MAY BECOME VICIOUS WHEN I BECOME MENTALLY INCAPACITATED. IS THERE ANYTHING IN THE LAW WHICH CAN OFFER ME SOME PROTECTION?

1. THE IDEA OF AN ENDURING POWER

OF ATTORNEY SOUNDS GOOD, BUT I STILL CANNOT BRUSH AWAY THE FEAR THAT MY ATTORNEY MAY BECOME VICIOUS WHEN I BECOME MENTALLY INCAPACITATED. IS THERE ANYTHING IN THE LAW WHICH CAN OFFER ME SOME PROTECTION? An Enduring Power of Attorney cannot guarantee that the attorney will always be a trustworthy person. But the existing law provides that a donor can impose restriction on the attorney's power by stating those restrictions in the Enduring Power of Attorney. It also allows the donor to nominate person(s) to be notified by the attorney applying for registration of the Enduring Power of Attorney. Further, an "interested party" is entitled to raise queries on an attorney's behaviour and even ask the Court to remove the attorney. Therefore, you can restrict or limit your attorney's power in the Enduring Power of Attorney. You can also explicitly spell out the name(s) of the person(s) whom your attorney must notify before applying for the registration of the Power of Attorney, so that the notified person(s) can assist in monitoring your attorney's acts when you have become mentally incapacitated.

6. CERTIFICATES BY A SOLICITOR AND A REGISTERED MEDICAL PRACTITIONER

6. CERTIFICATES BY A SOLICITOR AND A REGISTERED MEDICAL PRACTITIONER A donor must sign the EPA in front of a registered medical practitioner and a solicitor. Further, 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 To order to safeguard against the remote possibility that the registered medical practitioner or the solicitor may exercise undue influence on the donor, section 5(2) (aa) of the Enduring Powers of Attorney Ordinance (Cap. 501 of the Laws of Hong Kong) prescribes that the registered medical practitioner or the solicitor witnessing the donor's signing of the EPA: cannot be the attorney; cannot be the spouse of the attorney; and cannot be any person related by blood or marriage to the donor or the attorney.

A. CERTIFICATE BY A REGISTERED MEDICAL PRACTITIONER

A. CERTIFICATE BY A REGISTERED MEDICAL PRACTITIONER The significance of the registered medical practitioner is obvious: a registered medical practitioner is certainly the right person to verify that the donor is mentally capable when the donor signs the EPA. Section 5(2) (e) of the Enduring Powers of Attorney Ordinance (Cap. 501 of the Laws of Hong Kong) specifies that the registered medical practitioner has to be "satisfied that the donor was mentally capable" when signing the EPA. This certification by a registered medical practitioner would also serve to minimize the chance of future challenges to an EPA on the ground that the donor was already mental incapacitated at the time of executing the EPA. One should note that this certification is to be given by a "registered medical practitioner", not necessarily a specialist such as a psychiatrist or neurologist. It is recognized that many people would hesitate to meet a psychiatrist or neurologist, lest being labeled as having something wrong mentally. The requirement for the donor to be certified by a registered medical practitioner would reduce the reluctance that a donor may have in this aspect. This would also lessen the costs to be incurred because the fees for a general practitioner would likely be lower than that of a specialist.

B. CERTIFICATE BY A SOLICITOR

B. CERTIFICATE BY A SOLICITOR One should note that an EPA has to be signed in the presence of a solicitor, not any lawyer. A solicitor, according to section 3 of the Interpretation and General Clauses Ordinance (Cap. 1 of the Laws of Hong Kong), means "a person admitted before the Court of First Instance to practise as a solicitor". Hence, as only a solicitor admitted (allowed) to practice in Hong Kong fits this criterion; the donor cannot sign the EPA before a barrister or a solicitor from another country. Section 5(2) (d) of the Enduring Powers of Attorney Ordinance (Cap. 501 of the Laws of Hong Kong) provides that the solicitor has to certify that "the donor appeared to be mentally capable". One may ask: how can a solicitor, not being a medical professional, be able to discern whether a donor is "mentally capable"? The gist here is the words "appeared to be". The solicitor will be required to exercise his/her common sense to verify that the donor appears to be mentally capable. For example, the donor will have to express to the solicitor that he/she is signing the EPA voluntarily or that he/she is directing another person to sign the EPA on his/her behalf. In this process, the solicitor will be able to observe the donor's actions and behavior. It should not be difficult for the solicitor, though not a medical professional, to discern whether or

not the donor “appeared to be mentally capable”. 1. I REALIZE THE ADVANTAGES OF MAKING AN ENDURING POWER OF ATTORNEY TO PREPARE FOR THE WORST. MY NEPHEW IS A PRACTICING MEDICAL DOCTOR. MY DAUGHTER IS A LAWYER IN USA AND SHE WILL RETURN TO HONG KONG FOR A HOLIDAY NEXT WEEK. I WILL JUST FILL IN THE PRESCRIBED FORM FOR AN ENDURING POWER OF ATTORNEY AND GET THEM WITNESS MY SIGNATURE. 1. I REALIZE THE ADVANTAGES OF MAKING AN ENDURING POWER OF ATTORNEY TO PREPARE FOR THE WORST. MY NEPHEW IS A PRACTICING MEDICAL DOCTOR. MY DAUGHTER IS A LAWYER IN USA AND SHE WILL RETURN TO HONG KONG FOR A HOLIDAY NEXT WEEK. I WILL JUST FILL IN THE PRESCRIBED FORM FOR AN ENDURING POWER OF ATTORNEY AND GET THEM WITNESS MY SIGNATURE. Your nephew, being related to you by blood, cannot be the medical practitioner to certify your mental capability under the Enduring Power of Attorney. Your daughter will also certainly express doubt as to whether she can be a witness to the Enduring Power of Attorney. As a lawyer trained in the USA, she may not be aware of the requirement under the Enduring Powers of Attorney Ordinance (Cap. 501 of the Laws of Hong Kong) that an Enduring Power of Attorney must be signed in the presence of a solicitor licensed to practice in Hong Kong. However, as every prudent lawyer will do, she will probably try to ascertain whether she is entitled to be a witness under an Enduring Power of Attorney. It should not be difficult for her to find out and tell you that an Enduring Power of Attorney must be signed in front of a Hong Kong solicitor who is not related to you by blood. 7. REGISTRATION OF THE EPA 7. REGISTRATION OF THE EPA Pursuant to the Enduring Powers of Attorney Ordinance (Cap. 501 of the Laws of Hong Kong), an attorney must bring the EPA to the High Court for registration as soon as he/she believes that the donor is or is becoming mentally incapable. This registration would be the final formal procedure in relation to an EPA as required by the law. WHEN WILL AN ENDURING POWER OF ATTORNEY TAKE EFFECT? IV. WHEN WILL AN ENDURING POWER OF ATTORNEY TAKE EFFECT? According to the prescribed forms as set out in Schedule 1 and Schedule 2 to the Enduring Powers of Attorney (Prescribed Form) Regulation (Cap. 501A of the Laws of Hong Kong), a donor has the option of having the EPA take effect: on the date it is signed before the solicitor; or on a later specified date; or upon the occurrence of a later event. This is consistent with section 10 of the Enduring Powers of Attorney Ordinance (Cap. 501 of the Laws of Hong Kong), which specifies that 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.” In other words, if a donor does not specify a date for the commencement of their EPA or an event to trigger its commencement, the EPA will commence upon its execution, i.e. as soon as it is duly signed before a solicitor (section 10(3) of the Enduring Powers of Attorney Ordinance (Cap. 501 of the Laws of Hong Kong)). It is therefore essential for a donor to be fully aware of his/her choice for the time at which the EPA will come into operation: upon its execution, at a later date or at a later event? The definition of “execution” under section 10(3) of the Enduring Powers of Attorney Ordinance (Cap. 501 of the Laws of Hong Kong) also makes it clear that an EPA remains an uncompleted and useless document unless and until the donor signs it in the presence of a solicitor. If there is a time gap between the signing before the medical practitioner and the signing before the solicitor, the EPA is not a valid enduring power of attorney during this time gap. It will not even constitute an ordinary power of attorney during such period; section 10(2) expressly states: “To avoid doubt, an enduring power does not commence as a power of attorney before it is executed.” THINGS TO CONSIDER WHEN CHOOSING THE PRESCRIBED FORM AND SPELLING OUT THE TERMS OF AN ENDURING POWER OF ATTORNEY V. THINGS TO CONSIDER WHEN CHOOSING THE PRESCRIBED FORM AND SPELLING OUT THE TERMS OF AN ENDURING POWER OF ATTORNEY 1. MORE THAN ONE ATTORNEY? 1. MORE THAN ONE ATTORNEY? The only difference between the 2 prescribed forms of EPA is: Form 1 is to be used when the donor intends to appoint only one attorney, and Form 2 is to be used when the donor intends to appoint more than one attorney. Before a donor starts filling in the right form, he/she therefore has to decide whether one or more attorney is required. Having a sole attorney will render the attorney able to react to different circumstances and make decision in a prompt manner. In the case of multiple attorneys, even if they are to act jointly and severally, one attorney may hesitate to exercise his/her power solely, lest he/she be accused of abuse of power if a dispute

arises later among the attorneys. However, this may exactly be the reason why more than one attorney is needed: they will monitor and restrain each other so as to minimize the chance of any one attorney abusing his/her authority. Please note that the donor must choose whether his/her attorneys are to act jointly or jointly and severally, and delete the inappropriate option set out in the prescribed form. Otherwise, the EPA will not be valid.

**2. EXTENT OF THE ATTORNEY'S AUTHORITY**

Even if a donor has absolute trust in the attorney, he/she cannot give the attorney a general authority over all the donor's property and financial affairs by means of an EPA. For example, the donor cannot state in the EPA: "I have complete confidence in my attorney and he/she has authority to do whatever he/she deems fit in relation to my property and financial affairs." A donor is required to specify in the EPA the particular matters, property or affairs in relation to which the attorney has authority to act. In other words, before making an EPA, a donor should carefully and seriously consider the following matters: The value of the donor's assets; The variety of the donor's assets, e.g. how much of them are in cash, real property, shares in private companies, shares in publicly listed companies, bonds, antiques, jewellery, vehicles, yachts, etc.; How the donor wants the attorney to manage these assets in case of the donor's mental incapacity, e.g. to sell part of them, to maintain them to generate rental income or interests, to use part of them for the donor's daily living, to give part of them as gifts to designated person(s), etc.; and Whether or not the attorney has to seek professional advice (e.g. for legal or financial aspects) if he/she intends to enter into a transaction the value of which exceeds a specified amount. The above list simply provides some examples and is not an exhaustive list. Depending on the different circumstances of different donors, there can be various other matters to be considered by each donor.

**3. NOTIFICATION OF NAMED PERSONS**

In the prescribed form(s) for an EPA, a donor is allowed to nominate person(s) who will be notified in case the attorney applies for the registration of the EPA. Even though the donor may have total trust and confidence in the attorney, it is not a bad idea to nominate other persons (which may include the donor himself/herself) to receive notification of the EPA's registration.

**5. FINDING THE REGISTERED MEDICAL PRACTITIONER AND THE SOLICITOR**

The donor may complete the prescribed form on his/her own and then get a registered medical practitioner and a solicitor to witness the donor's signing of the EPA document. Generally speaking, it should not be difficult to find a registered medical practitioner and a solicitor to witness a donor's execution of the EPA. However, the donor should note that if he/she finds a solicitor merely to witness the execution of the EPA, this solicitor does not have the duty to give the donor legal advice regarding the EPA. Given that the legal consequences of an EPA can be very significant, it is suggested that a donor should engage a solicitor from the moment the donor first ponders the idea of making an EPA, so that the solicitor can give proper legal guidance and advice throughout the entire process.

**6. WHO SHOULD KEEP THE EPA?**

After the due execution of an EPA, who would be the most appropriate person to have custody of the EPA? The donor himself/herself, the attorney, the solicitor who prepares the EPA, or some other person(s)?

**A. THE DONOR?**

The donor obviously is not a good choice: in the event that the donor becomes mentally incapable, he/she probably will not be able to locate the whereabouts of the EPA, or it might even be locked in a safety deposit box to which the attorney does not have access without the EPA. It is possible that the attorney will never be able to get hold of the EPA and thus will not be able to assist in managing the donor's financial affairs although he/she is supposed to do so. It appears appropriate that even if the donor wants to keep the EPA in his/her own custody, he/she should at least let the attorney know where to find the EPA in case of the donor's mental incapacity.

**B. THE ATTORNEY?**

The attorney apparently would be the right person to keep custody of the EPA. After all, the attorney should be a person who is close to the donor and trusted by the donor. The attorney will also be the person responsible for exercising the authority as specified in the EPA. It seems that the attorney appears to be the appropriate person for keeping custody of the EPA. Despite the above ideal scenario, we have to face the sad reality that people can

change; after the execution of the EPA, the attorney may change to an extent that the donor loses all trust and confidence in the attorney. In such circumstances, if the donor wants to get back the EPA, the attorney may refuse to do so. The donor will then have to resort to revoking the EPA and perhaps having to make a new one by appointing another attorney. Therefore, a donor should act promptly to revoke an EPA if it is in the custody of an attorney whom the donor no longer trusts. C. THE SOLICITOR? C. THE SOLICITOR? What about the solicitor who prepares the EPA? The solicitor should be a trustworthy person having no interest at all in the donor's property and/or financial affairs. The problem is: in the event that the donor becomes mentally incapable, the solicitor will not know it unless he/she is a personal friend of the donor's family. The donor therefore has to ensure that his/her family member(s) and the attorney know that the EPA is in the custody of the solicitor, so that they can duly gain access to the EPA when necessary. One further advantage of letting the solicitor keep the EPA is: in case the donor loses faith in the attorney and wants to make a fresh EPA by appointing another attorney, the donor can easily get the old EPA back from the solicitor and destroy it. Having said that, we have to acknowledge the fact that law firms can close down, and individual solicitor may switch to another law firm or may even pass away (or become mentally incapacitated) earlier than the donor. The donor has to take these factors into account when choosing the solicitor. WHAT WILL HAPPEN IF A PERSON FAILS TO EXECUTE AN ENDURING POWER OF ATTORNEY BEFORE HE/SHE BECOMES MENTALLY INCAPACITATED? VI. WHAT WILL HAPPEN IF A PERSON FAILS TO EXECUTE AN ENDURING POWER OF ATTORNEY BEFORE HE/SHE BECOMES MENTALLY INCAPACITATED? Statistical figures indicate that the EPA is far from being a tool commonly used by Hong Kong citizens. Enough has been said here about the advantages of an EPA. Let's take a look at a hypothetical case where the protagonist fails to execute an EPA before he becomes mentally incapacitated. Hypothetical case: Mr. X Mr. X, who was 60 years old and financial relatively well-off, began to show signs of memory loss, decreased ability to think, language impairment, inability to recognize relatives, and other indicative signs of dementia. Mrs. X heard about the concept of an EPA and thought that it was a good idea to get Mr. X sign an EPA. She promptly got a solicitor to advise her on the feasibility of making an EPA for Mr. X. The solicitor told her that since Mr. X already showed signs of dementia, it was perhaps too late to try to do an EPA because Mr. X had to do it while he was still mentally sound. The solicitor then recommended Mr. and Mrs. X to consult a medical doctor as soon as possible to ascertain Mr. X's mental status. Mrs. X brought Mr. X to consult a few medical practitioners; and all of them diagnosed Mr. X as suffering from dementia and was no longer mentally capable. Naturally, none of these medical practitioners are prepared to certify on an EPA that Mr. X is mentally capable. Now apart from taking care of Mr. X's physical well-being, the X family has to face the following financial problems: While the family appears relatively well-off, most of the family assets, including cash in banks and shares in publicly listed companies are held in Mr. X's sole name. Therefore, Mrs. X is not able to touch or liquidate those assets to cater for the family's fiscal expenses and Mr. X's medical expenses. Mr. and Mrs. X have a joint account at a bank, with a balance of several hundred thousand dollars. Mrs. X will be able to withdraw money from this account. But it is expected that the money in this account will be depleted within a few years (or maybe within an even shorter period). Mrs. X will now have to rely on her own savings to support the family. Mrs. X will also have to sell some of her jewellery to get some cash. Luckily most of her jewellery is kept in a safe deposit box in her own name. Mrs. X understands that Mr. X has kept some rare coins which would worth some money. Those coins were kept in a safe deposit box in Mr. X's sole name. So again Mrs. X cannot access them. The most disturbing matter is their son. Mr. and Mrs. X have a son, who unfortunately is a spendthrift and has never had a proper job even though he is already 40 years old. The relationship between the parents and the son is of course bitter. However, since this is their only son, Mr. and Mrs. X still love him and have tolerated him and financially supported him for years. Now Mrs. X is very worried that their son will take advantage of Mr. X's mental condition by, for instance, taking Mr. X to the bank to withdraw a large sum of money and get the money for himself. Evidently, none of the above

disastrous events would happen if Mr. X had made an EPA while he was still mentally capable. WHAT WILL HAPPEN WHEN THE DONOR OF AN ENDURING POWER OF ATTORNEY EVENTUALLY BECOMES MENTALLY INCAPACITATED? VII. WHAT WILL HAPPEN WHEN THE DONOR OF AN ENDURING POWER OF ATTORNEY EVENTUALLY BECOMES MENTALLY INCAPACITATED? Let's take a look at Ms. Y's case. Hypothetical case: Ms. Y made her EPA when she was still mentally capable. Ms. Y's husband passed away years ago and left her with a reasonably generous estate. She had 2 sons. The elder one, unfortunately, was a prodigal who had left the family years ago. He broke Ms. Y's heart so much that she did not consider this man her son anymore. Fortunately Ms. Y's second son was a man with filial piety; he lived with and took care of Ms. Y who was approaching 70 years old. The second son was also the attorney under the EPA. The EPA expressly specifies that it would take effect when Ms. Y was diagnosed to be mentally incapable. The EPA also contained sufficiently clear and specific instructions as to how the second son should handle Ms. Y's property and financial affairs. It also empowered the second son to transfer Ms. Y's money to his bank accounts set up for the sole purpose of accommodating and administering Ms. Y's assets. Recently the second son noticed that Ms. Y was showing some obvious signs of dementia. This sad fact was verified by the family's doctor. The second son took the EPA to his solicitor and sought legal advice. Then: The solicitor assisted the second son by taking the EPA to the Court for registration. The second son was a righteous man but was not doing very good in his career. His income barely supported himself and could not maintain Ms. Y's living standard. Fortunately, pursuant to section 4(5) of the Enduring Powers of Attorney Ordinance (Cap. 501 of the Laws of Hong Kong), the second son was able to access Ms. Y's assets to a certain extent while waiting for the registration of the EPA. Upon the completion of the registration process, the second son was able to gain full access to Ms. Y's assets. With the assistance of the EPA, he was able to use Ms. Y's financial resources to take good care of her. Then the elder son appeared after years of disappearance. He asked the second son to give him his "share" in their parents' fortune. The second son of course refused. The elder son tried to approach Ms. Y and take advantage of her mental incapacity. Fortunately, as empowered by the EPA, the second son had set up a fresh bank account in his own name, where this bank account was used solely to take up Ms. Y's money. The second son was also wise enough to have withdrawn all money from Ms. Y's bank account and transferred the money into this fresh bank account in his name. Even if the elder son took Ms. Y to a bank and tried to withdraw money, there was no money in Ms. Y's account at all. The second son continued to take good care of Ms. Y. By comparing Ms. Y's case with Mr. X's, one would easily note that the difference is sufficiently evident to necessitate any further explanation. While the word "fortunately" is used a number of times in the above hypothetical case of Ms. Y, it is not fortune which brings forth such a difference. It is Ms. Y's good preparation for the future; and the key is the EPA. GUIDE TO PRESCRIBED FORMS OF THE ENDURING POWER OF ATTORNEY AND DOWNLOADING THE FORMS VIII. GUIDE TO PRESCRIBED FORMS OF THE ENDURING POWER OF ATTORNEY AND DOWNLOADING THE FORMS For an EPA to have legal effect, it must be made out in the "prescribed form". "Prescribed form" means the Form(s) set out in the Schedules to the Enduring Powers of Attorney (Prescribed Form) Regulation (Cap. 501A of the Laws of Hong Kong). Schedule 1 of the Enduring Powers of Attorney (Prescribed Form) Regulation (Cap. 501A of the Laws of Hong Kong) contains Form 1, which is to be used when the donor intends to appoint only one attorney. Schedule 2 contains Form 2, which is to be used when the donor intends to appoint more than one attorney. \*\*\*Note: Please read the section "Information you must read" in the form carefully and thoroughly before you complete the form. Download Prescribed Form of the EPA -- Form 1 Guide to Prescribed Form of the EPA -- Form 1 Download Prescribed Form of the EPA -- Form 2 Guide to Prescribed Form of the EPA -- Form 2 4. COMMENCEMENT OF THE EPA 4. COMMENCEMENT OF THE EPA As discussed, a donor has the option of having the EPA take effect: immediately -- on the date it is signed before the solicitor; or on a later specified date; or upon the occurrence of a later event. So what should the donor choose? Since the fundamental purpose for making an EPA is to cater for the situation where the donor loses mental capacity, it appears that letting an EPA commence upon its execution, i.e. when the donor is still mentally sound, is not

a very attractive idea. To let an EPA commence on a later specified date would be even more problematic because the donor will definitely ask this difficult question: "on what criteria should I specify this later date?" Looking again at the fundamental purpose of making an EPA, one would logically arrive at the conclusion that the most appropriate commencement event would be: when the donor shows signs of incapacity. The donor may use this as a general principle and fine-tune the wording of his instructions in the EPA. Some possible variations of this principle are: This EPA takes effect when the attorney reasonably believes that I am mentally incapable or am becoming mentally incapable. This EPA takes effect when I am diagnosed by a registered medical practitioner to have shown signs of mental incapacity. This EPA takes effect when I am diagnosed by a registered medical practitioner to be suffering from dementia, Alzheimer's disease or any form of mental incapacity.