

English Translation of Transcript

Representatives of Department of Justice talked about Enduring Powers of Attorney on Commercial Radio

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Programme: Senior Bazaar (CR1)

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Q1: Mr Kaven Yau, Programme Host, Commercial Radio 1

Q2: Miss Cher Hung, Programme Host, Commercial Radio 1

A1: Mr WONG Hing Hong, Peter, Deputy Solicitor General, DoJ

A2: Mr LEE Tin Yan, Assistant Solicitor General (Acting), DoJ

Purpose of enduring powers of attorney (EPAs)

Q1: How can EPAs be of help to elderly dementia sufferers who are progressively losing their ability to take care of themselves or even their power of judgment?

A1: The characteristic of a general power of attorney is that it enables a donor to authorise another person (whom we call an attorney) to manage his property for him. Under general legal principles, the power of the attorney will be automatically revoked if the donor loses mental capacity. The *Enduring Powers of Attorney Ordinance* (Cap. 501), however, enables a donor to execute an instrument called “EPA”, which survives the onset of the donor’s mental incapacity due to e.g., dementia. It facilitates the donor to have his property managed during his lifetime even if he loses permanently the ability to manage his accounts, pieces of property etc. This is a salient feature of EPAs.

Q1: How is money, such as monthly long service payments deposited to his bank account, to be dealt with? Take another example, household expenses that have to be paid out of the account by transfer. Is it correct to say that they can be dealt with by the attorney authorised under an EPA?

A1: That's right.

Procedures for Making EPAs

Q1: Is it correct to say that the mental capacity of a donor making an EPA has to be certified by a medical practitioner?

A1: That's right.

Q1: Not when he is in the late stage of dementia?

A1: No, not so. A donor must sign an EPA while he is mentally sound, so the presence of a medical practitioner as witness is very important. The execution of the EPA must be witnessed by a solicitor within 28 days. This time limit will give the donor more flexibility in making the EPA. Besides, from our past experience, arranging for a medical practitioner and a solicitor to be present together would involve extra steps and more difficulties. We hope that, as a result of this amendment made in response to the Law Reform Commission's recommendation, members of the public will find the instrument easy to use.

A2: The amendment also included improvements to the prescribed forms to make them easier to understand and use by the users.

Q1: An elderly person will have to approach a medical practitioner and a solicitor if he wishes to create an EPA. What is the actual application procedure? Will a general medical practitioner be able to answer enquiries in this regard? Or will it be necessary to secure the assistance of a law firm before the whole application procedure to execute an EPA can be commenced?

A1: As EPA is an instrument to be made on a voluntary basis, social workers or health care professionals may recommend that an EPA be executed when they

see their clients have such needs. Whether to seek the assistance of a solicitor is up to the individual concerned. In the past, some of the instruments registered with the Registrar of the court were prepared by law firms. To complete the application procedure, all it takes is for a solicitor to use the prescribed forms to prepare the instrument, arrange for a medical practitioner to certify that the donor is mentally capable and then make the certification himself.

A2: Furthermore, as the prescribed forms and associated explanations are available, a donor and an attorney can first discuss the powers and obligations involved (Which pieces of property are to be looked after? What matters are to be taken care of?). Once a clear consensus has been reached, the parties can take the document to a solicitor for execution and certification. Legal advice is sought on a need basis. In this way time and legal costs may be saved.

Q2: Does an EPA commence on the day of its execution? How to decide when an EPA will be invoked?

A1: According to the current *Enduring Powers of Attorney Ordinance*, amended at the end of last year [2011] and effective since 3 July this year [2012], an EPA commences basically under three scenarios. First, the date specified in the EPA as the commencement date, for example, the donor may choose 1 June 2014 as the commencement date. Second, the occurrence of a specified event, such as “when I become mentally incapable”, and he may even put down additional conditions specifying “after a medical practitioner has certified” and the like in respect of the condition “when I become mentally incapable”. This is an event scenario. Third, where no such date or event is specified, the EPA commences upon its execution. In theory, the EPA commences under any of the three scenarios described above. In practice, however, one can expect the attorney to register it with the court once he foresees that the donor is becoming mentally incapable. It is only after registration that the EPA can be fully utilised.

A salient feature of this legislative amendment is the changes made to the execution requirements of the instrument. Under the original Ordinance (enacted in 1997), a solicitor and a medical practitioner had to be present at the same time when the donor signed the instrument. While streamlining the procedures, the legislative amendments facilitate the use of the EPAs by donors as they (the solicitor and the medical practitioner) are no longer required to be present at the same time. It can be expected that usually it is the medical

examination that takes place first since it is crucial to prove that the donor is mentally capable.

Prescribed forms of and issues that can be dealt with by EPAs

Q2: At present, is there any specified document for use by donors of EPAs?

A1: An issue of legal technicality likely to arise in completing an EPA is that there are two forms prescribed in the *Enduring Powers of Attorney Ordinance* to cater for two scenarios. The first scenario is, a donor only authorises one attorney; the second scenario is, he authorises more than one attorney. If the donor opts for two or more attorneys, he must specify whether they are to act jointly or jointly and severally. This is a relatively technical concept. To act jointly means that the two attorneys must decide unanimously on how to act. To act jointly and severally means that the attorneys can act separately or they can all act together. If he authorises two attorneys without making any indication, the instrument may become invalid. It therefore requires particularly careful consideration.

Q1: Apart from this, what else should be made known to the donor beforehand so that he can make decisions early and complete the document quicker and easier?

A1: Apart from the important decision of appointing one or more attorneys, there are other key issues that have to be dealt with, such as in what way he wants his attorney to look after his property. He may wish to make a list of his accounts or pieces of property. He may even state in clear terms the purpose of the power of attorney itself (e.g. just to handle income-related issues / to cover or not the sale of the donor's movable property or immovable property). These are the decisions the donor has to make. If he wishes to authorise the attorney to make all such decisions, he has to indicate that intention clearly.

Q1: Take for example a donor has a flat and he wants to continue to live there. The attorney is not allowed to sell it at all, so he is not given the authority to act in this aspect. But the attorney can deal with bank deposits and other pieces of property. These are the matters that may be set out in detail in the EPA.

A1: A donor may add conditions to the EPA. Let's say a donor has a spouse. He may authorise the attorney to manage his property but its sale shall be subject to the approval of the spouse or the condition that "the attorney(s) must first consult if the value of property reaches a certain level / seek legal advice beforehand". These are conditions that can protect the donor's property and safeguard his family interests. The donor should therefore be careful in adding these relatively minute details to the EPA.

Q2: In other words, the donor should first gather information and have a clear idea of his own property before deciding on the allocation of the property or the kinds of decisions his attorney is to be authorised to make in respect of the property.

A1: In other words, the kinds of conditions that can be added to the EPA.

Q2: On stocks, houses and property, etc.

A1: There is a point of interest relating to notification. As a means of safeguard to the donor, he may, in executing the EPA, specify that before applying to the court for registration of the EPA, his attorney should notify certain people, including his named...

Q1: Relatives and friends, next of kin.

A1: That's right. It would be a safeguard for the donor to put down a couple of names. This is because in most cases, at the time the attorney is expected to exercise the power conferred by the instrument, the donor would be mentally incapacitated. The donor will have more protection if the attorney is required to notify certain people. This is another area that we should take note of.

Can the donor vary the contents of the EPA he created?

Q1: If an elderly person, whose medical condition is not serious enough to justify the commencement of the EPA he created, wants to change the attorney or vary some terms of the EPA, e.g. he has won the Mark Six and wants to make separate arrangement regarding the prize, is he required to create a new EPA or

can he vary the original EPA by adding some terms? What are the procedures involved?

A1: Under the existing legal framework, a possible option is to revoke the original EPA provided that the donor is mentally sound. But if the EPA has been registered with the court, it can only be revoked after the revocation is confirmed by the court even though the donor is mentally healthy. A new EPA can be executed after that.

Q1: That means a new EPA should be created?

A1: This is the most common practice if the donor has additional matters to deal with.

How to monitor an attorney (a donor) in exercising the power conferred by an EPA

Q1: Who plays the monitoring role? Because even though the EPA stipulates that the attorney has to notify some relatives and friends, if the attorney fails to give notice, it is possible that no one knows about it. Neither will the court. May be the attorney use the donor's money to line his own pockets, or others think that the money is not properly used. Who can monitor the attorney in this respect?

A1: There is actually a mechanism in our legislation that gives the court the monitoring role. Through judicial procedures, one can revoke an instrument or even remove an attorney.

A2: As to who may initiate the application procedure, the *Enduring Powers of Attorney Ordinance* refers to "an interested party".

Q1: Does the word "interested" necessarily mean "pecuniary interest"?

A2: Not necessarily. A broader interpretation has been adopted here as it involves the protection of the donor's interests.

Q2: That means, suppose I was a donor's friend or relative, and I saw that the attorney was not doing a good job, I could make a complaint to the court on the suspicion that the attorney has failed to duly exercise his power.

A2: In performing its monitoring role, the court will take note of the duties of the attorney as expressly provided in the *Enduring Powers of Attorney Ordinance*. They include the duty not to mix the property of the donor with the property of other people (including the attorney's own).

Q2: If an attorney has been determined to have breached his duties and removed by the court, who can take over his duties? Bear in mind that by that time the donor is likely to be not mentally sound.

A2: An EPA is an instrument that can be created by two parties privately with regard to the management of certain affairs. There is another legislation to provide protection if the person trusted by a donor abuses the power when the donor becomes mentally incapacity.

A1: That's right.

A2: Under the *Mental Health Ordinance*, the court can appoint other persons(s) (known as "guardian(s)") to act on the donor's behalf.

Q1: You mean the guardianship order?

A2: Yes. The Guardianship Board may also make a corresponding order.

Q1: For matters beyond the scope of an EPA?

A2: Yes.

Q2: Can a donor, for instance, in completing an EPA, name someone as reserve to manage his affairs (in case the attorney of the donor's first choice is removed)?

Q1: Or rather, would you recommend that a donor should put down a few more names at the outset so that they can monitor or watch over each other?

A1: As a matter of choice, there is an advantage in opting for more than one attorney at the outset. On the one hand, they can monitor each other; on the other, if one of them is removed, the others can assist / step in. This is worth considering.

Law reform on EPA

Q2: Have there been any registrations of EPAs since the *Enduring Powers of Attorney Ordinance* was enacted in 1997? Can you tell us some examples or cases?

A1: Actually, the take-up rate of EPAs has been low because so far (up to the last one month or two [mid 2012]) there have been just over fifty.

Q1: A few a year?

A1: It cannot compare with that of overseas countries. While the rate is low, we hope the parties will find the instrument easier to use with our recent legislative amendments.

Q2: We have been talking so far about the management of property and financial matters. Does the scope of EPAs only cover the administration of property? Can EPAs also take care of other matters, such as decisions relating to personal care or medical treatment? EPAs adopted in other countries can cover personal care and even dietary matters. Does the law of Hong Kong give protection to these matters as well?

A1: The current Ordinance deals with property matters only. In 2011, the Law Reform Commission published a new report examining personal care in the context of EPAs. A notable feature of the report is its proposal to extend the scope of EPAs to include how to take care of a donor and make certain decisions for him. Such decisions include whether to accept certain medical treatment, personal care arrangements, with whom the donor lives and where etc. Meanwhile, we have set up an inter-departmental working group to study the report and decide whether to accept all the views put forth or whether to change and amend some. A further consultation is expected upon the completion of the study as there will be issues that are more controversial, such as the scope of

power to deal with medical treatment, how to define the scope of treatment, whether critical treatments should be included in EPAs. These will be dealt with in the next stage. At this stage, the Ordinance focuses on property issues.

Information about EPA

Q2: Finally, I would like to know if the elderly wish to create EPAs after listening to the above, are there any institutions or welfare organisations other than solicitors from which they can seek assistance?

A1: Detailed information is available on the Community Legal Information Centre website of the University of Hong Kong. We are also preparing to publish some booklets to facilitate members of the public, in particular lawyers, social workers and health care personnel, to promote EPA to their clients. Of course, members of the public can also refer to such information.

A2: We strongly encourage interested parties to read the prescribed forms for EPAs and the relevant explanations before discussing the suitability of creating EPAs with their intended attorney(s). When they need to create such instruments, they should approach solicitors and medical practitioners for certification and witnessing. One needs to approach individual solicitors and medical practitioners to secure this type of service.

Q1: Elderly interested in creating EPAs may approach medical social workers or solicitors for more details, or browse the Community Legal Information Centre website (<http://www.clic.org.hk>) for information on EPAs.

A1: Chapter 501 of the Laws of Hong Kong and the relevant forms are also available on the Department of Justice's website (<http://www.doj.gov.hk>).

Elderly who wish to know more about EPAs can consider the following means: Firstly, the Government operates a free legal advice scheme to assist members of the public with legal problems. Those who want to make use of this service should make an appointment with a referral agency in advance. There are currently 28 referral agencies in Hong Kong, including all the district offices of the Home Affairs Department and Caritas centres. Besides, there are welfare organisations which provide legal advice service, such as St. James' Settlement which regularly arranges for lawyers to answer questions from the elderly on legal issues. Assistance can be sought from them for further information on EPAs. Finally, the elderly can also visit the Community Legal Information Centre website (<http://www.clic.org.hk>) which sets out detailed explanation regarding what is an EPA, its functions, the registration method, etc.

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