

LRC releases report on Enduring Powers of Attorney: Personal Care

The Law Reform Commission today (July 11) published a report proposing to extend the scope of an enduring power of attorney (EPA) to include decisions as to the donor's personal care. At present, an EPA can apply only to decisions about the donor's property and financial affairs and cannot be used to delegate decisions about the donor's personal care.

The report explains that a power of attorney is a legal instrument that is used to delegate legal authority to another person. By executing a power of attorney, the donor of the power gives legal authority to another person (the attorney) to make legal decisions on his behalf.

A conventional power of attorney can only be made by a person who is mentally competent, and it will lapse if the donor subsequently becomes mentally incompetent. It may be in just those circumstances, however, that the donor of the power would want his attorney to be able to act for him. To meet that difficulty, the Enduring Powers of Attorney Ordinance (Cap 501) allows a special type of power of attorney (called an "enduring power of attorney") to be executed while the donor of the power is mentally capable but which continues to have effect after the donor becomes incapable. At present, an EPA can apply only to decisions about the donor's property and financial affairs and cannot be used to delegate decisions about what may be termed the donor's personal care.

The Commission's Secretary, Mr Stuart Stoker, said that in a number of other jurisdictions the scope of an EPA is much less restricted. "In those jurisdictions, a donor can delegate to his EPA attorney decisions on what might be termed 'personal care' matters, such as where he should live (and with whom), his daily dress and diet and his health care," Mr Stoker said.

Mr Stoker said that the Commission proposes that a similar approach should be adopted in Hong Kong and that the scope of an EPA should be extended to include decisions as to the donor's personal care. "Personal care" would include decisions as to the donor's health care, but not decisions involving the giving or refusing of life-sustaining treatment or the making or revoking of advance directives.

The Commission recommends that the personal care decisions which an attorney may make under an EPA should include:

- (a) where the donor lives;

- (b) who the donor lives with;
- (c) whether the donor works and, if he does so, where and how the donor works;
- (d) what education or training the donor gets;
- (e) whether the donor applies for a licence or permit;
- (f) the donor's daily dress and diet;
- (g) whether to consent to a forensic examination of the donor;
- (h) whether the donor will go on holiday and where;
- (i) legal matters relating to the donor's personal care;
- (j) a power to refuse access to, or contact with, the donor by specific individuals; and
- (k) decisions as to the donor's health care.

At the same time, the Commission proposes that the following decisions should be statutorily excluded from the scope of an EPA:

- (a) making, varying or revoking the donor's will;
- (b) making, varying or revoking an EPA for the donor;
- (c) exercising the donor's right to vote in an election;
- (d) consenting to the adoption of a child of the donor who is under 18;
- (e) consenting to any change in the marital status of the donor;
- (f) removal of non-regenerative tissue from the donor while alive for donation to someone else;
- (g) sterilisation of the donor if the donor is, or is reasonably likely to be, fertile;
- (h) participation in medical research or experimental health care;
- (i) placing the donor in hospital for treatment of mental disorder against his will;
- (j) consenting to electroconvulsive therapy or psychiatric surgery; and
- (k) consenting to health care prescribed by regulation.

The Commission recommends that there should be a statutory duty imposed on an EPA attorney to act in the donor's best interests and that powers of supervision of an EPA attorney should be given to the court and to the Guardianship Board.

To avoid the difficulties which can arise through non-recognition of an EPA made overseas, the Commission recommends that an EPA made in a jurisdiction other than Hong Kong should be recognised in Hong Kong if:

- (a) it complies with the Hong Kong execution requirements (though witnessed by a solicitor/doctor registered in the other jurisdiction, rather than Hong Kong); or

(b) it complies with the EPA requirements of that other jurisdiction.

A further change proposed by the Commission is that the provision in the Enduring Powers of Attorney Ordinance which at present prohibits an EPA donor from giving his EPA attorney a general power over all the donor's property and affairs should be replaced with a provision to the effect that an EPA donor may authorise the attorney to act in relation to all of the donor's property and affairs or in relation to specified parts of the donor's property and affairs. In either case, the authorisation may be given subject to conditions and restrictions.

Copies of the report are available on request from the Secretariat of the Law Reform Commission at 20/F Harcourt House, 39 Gloucester Road, Wan Chai, Hong Kong. The report can also be accessed on the Commission's website at www.hkreform.gov.hk.

Ends/Monday, July 11, 2011