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Some Practical Considerations on the Enduring Power of Attorney

23 January 2026

An Enduring Power of Attorney ("**EPA**") is a legal document that allows its donor, while he is still mentally capable, to appoint his desired attorney(s) to take care of the donor's financial matters in Hong Kong in the event that the donor subsequently becomes mentally incapacitated.

A general power of attorney will cease to have effect as soon as its donor becomes mentally incapacitated, and a Will only takes effect when the testator dies. An EPA continues to be in effect in the event that its donor becomes mentally incapacitated.

Our previous article "*The Three Instruments of Peace: Legal Pathways to Living Well and Carefree Passing*" outlines the scope, effects and requirements for the "Three Instruments of Peace", namely the EPA, the Will, and the Advance Medical Directive (Please note that the Advance Decision on Life-sustaining Treatment Ordinance (Cap. 651) came into effect on 31 July, 2026). This article provides some practical considerations a donor should consider when preparing an EPA.

Who should be appointed as the attorney(s) under the EPA?

It is advised to appoint someone you trust as your attorney. The attorney's role under the EPA is onerous as he has to act in the best interests of the donor. The attorney owes a fiduciary duty to the donor. The attorney has a duty :-

(a) to exercise his powers honestly and with due diligence;
(b) to keep proper accounts and records;
(c) not to enter into any transaction where a conflict of interest would arise with the donor; and
(d) not to mix the property of the donor with other property.

If there is more than one attorney, the donor should also consider whether the attorneys act (i) jointly *or* (ii) jointly and severally. Attorneys **acting jointly** have to act together and cannot act separately (i.e. a decision made by any one of the attorneys alone will not be valid). Attorneys acting **jointly and severally** can act together but can also act separately if they wish (i.e. any one of attorneys will be able to make a decision by himself). It is advised to appoint attorneys who have a good

relationship with each other so that they can resolve their differences amicably and act in the best interests of the donor.

What is the attorney's authority?

In the EPA, the donor can specify the attorney's authority over his properties and financial affairs in Hong Kong.

It is common for the donor to give the general authority to his attorney to collect and spend his income, to collect and spend his capital, to sell his movable properties and/or to sell, lease or surrender his immovable properties.

On the other hand, the donor may wish to confer authority only for the particular properties or financial affairs. In such case, it is advised that the donor specifies clearly in the EPA which properties or financial affairs the attorney has authority to act and what the attorney can do in relation to such properties or financial affairs. For example, in relation to bank accounts, the donor should specify the name of the bank and the power given to the attorney such as to make deposit, transfer and withdrawal with respect to the bank account and to buy or dispose of any securities or investments under the bank account.

What are the restrictions on attorney?

One of the most common restrictions in the EPA is that the attorney cannot act on the donor's behalf until a medical certificate is issued by a Hong Kong registered medical practitioner certifying that the donor has become mentally incapable. The purpose of such restriction is to prevent the attorney's abuse of power when the donor is still mentally capable. The donor may also consider specifying other restrictions in the EPA.

When should the EPA be registered?

Once the donor has become mentally incapable, the attorney will not have the authority to act unless the EPA has been registered at the Court. The law requires that if the attorney has reason to believe that the donor is or is becoming mentally incapable, he must, as soon as practicable, register the EPA. The law only sets out the latest point in time for registration of the EPA. It is therefore possible to register the EPA earlier while the donor is still mentally sound.

The advantage of early registration is that the donor can address any defects or queries raised by the Court while the donor still has capacity. Early registration, however, may have the following disadvantages :-

(a) It undermines the mechanism to prevent abuse: if the attorney attempts to act under the EPA and breaches his duties, the donor or the persons who are to receive notifications of registration would not receive any further notifications and therefore may not be able to object the registration and stop the attorney from acting in a timely manner.

(b) It may be costly and time consuming to revoke a registered EPA: Provided that the donor is still mentally capable, he may apply to the Court for the revocation and the Court may grant an Order to confirm such revocation.

(c) The EPA becomes public information: Once registered, any person may inspect and obtain copies of the registered EPA on payment of the prescribed fee. This may raise certain confidentiality issues.

When should the EPA commence?

An EPA can commence on a date or an event specified in the EPA.

It is possible for an EPA to commence even before the donor becomes mentally incapable. If a donor does not specify a date for the commencement of the EPA or an event to trigger its commencement, the EPA will commence upon its execution (i.e. as soon as it is signed before a solicitor).

If you have any questions or require our assistance on preparing an EPA, please feel free to contact us and we will be happy to assist you.

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