



The Hong Kong Geriatrics Society

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30 September 2009

The Secretary
The Law Reform Commission
20th Floor, Harcourt House
39 Gloucester Road
Wanchai
Hong Kong

Re: Responses from the HKGS on Consultation Paper Enduring Power of Attorney: Personal Care of the Law Reform Commission (published in June 2009)

Dear Sir/Madam,

The Hong Kong Geriatrics Society writes in response to the Consultation Paper on Enduring Powers of Attorney (EPA) released by the Law Reform Commission of Hong Kong in July, 2009.

Founded in 1981, the Hong Kong Geriatrics Society is the only local professional society of doctors practicing geriatric medicine. All hospital consultant geriatricians and professors in Geriatric Medicine are regular members of our Society. There are up to now 180 members with 42 associate members in the Hong Kong Geriatrics Society. Geriatricians are responsible for the management of acute and chronic illness, severe disability and terminal conditions in elderly people.

We herein respond to the specific questions set out in the 'invitation to comment' section of the Consultation Paper. The paragraph numbering here corresponds to the question number of the 'invitation to comment' section.

(1) We recommend that EPA should be extended to include decisions about the donor's personal care (including health care). This would give effect to a person's autonomy and opens another option for him/her to handle matters arising after the onset of the loss of mental capacity.

(2)(a) We think that the donor should be allowed to delegate health care decisions to an entrusted person within the context of EPA.

We would like to state the following in support of the extension of the scope of EPA to include health care decisions:

(i) Health care is part and parcel of personal care.

(ii) The donor is able to appoint an attorney who can best represent his/her interests and wishes in the event that he/she has lost decisional capacity.

(iii) Advance directive has its limitations. It only deals with refusal to treatment. Its applicability is limited by the scope of the statements in the advance directive document. Without a statutory instrument there are practical difficulties in ascertaining the validity of an advance directive.

(iv) This development is in line with the trend in other jurisdictions in developed countries that health care matters have been included in EPA.

We would also like to see that decisions involving the giving or refusing of life-sustaining treatment are also included for the purpose of expanding the scope of EPA. Firstly in our view there is no overwhelming reason not to include life-sustaining treatment. Secondly, in daily clinical practice it is difficult to determine in absolute terms which treatments are life-sustaining or otherwise. While few would deny that tracheal intubation with mechanical ventilation is a life-sustaining treatment, there are far more conditions that are less clear-cut, for example, renal dialysis, anti-neoplastic chemotherapy, or even enteral feeding. Should these be construed as life-sustaining treatments? If so the attorney would be precluded in the decision making process of such interventions and of many others. On the other hand to safeguard against the possibility of unconscionable decision making behaviour of the attorney in life-or-death situations, the law should state that the EPA attorney be subject to a duty to act in the donor's best interests. A third party such as a health care team, in the belief that the attorney is acting against the best interests of the donor in breach of attorney's duty, should be able to apply to the authority (the court or a statutorily empowered body) for conflict resolution.

(2)(b) We agree that a statutory list of decisions should be included with the scope of an EPA. The list can serve as a guide to potential donors and their attorneys of what personal care matters are. The list should not be exhaustive. Rather typical and more common personal care matters are to be included.

(2)(c) We suggest adding to the list

1. whether the donor will attend day care centres,
2. whether the donor will receive home care services.

Moreover from some of our members' experience in dealing with cases of financial abuse of mentally incapacitate persons, we would suggest two further personal care decisions to be added:

3. deciding what contact, if any, the donor is to have with a named person
4. refusing a named person from having contact with the donor

(2)(d) We agree that there should be a statutory list of decisions which must be excluded from the scope of an EPA.

(2)(e) We assent to the contents of the list of such decisions set out in Recommendation 5.

(2)(f) We agree that a donor should be allowed to appoint separate attorneys for personal care decisions and for financial affairs decisions.

(2)(g) We support the requirement to give notice of intended registration of a person care EPA. The donor may nominate the person(s) to whom notice will be given.

(2)(h) We agree that it is not necessary to have separate witness requirements for personal care EPA and EPA pertaining to financial and property affairs.

(2)(i) We agree that the best interests principle should be applied to the acts of an attorney by a statutory declaration.

(2)(j) We agree with the Recommendation 9 proposal.

(2)(k) We agree that the court should be given a broader supervisory power in regulating the behaviour of an EPA attorney.

In general we believe that the extent to which the court or the Guardianship Board is given supervisory powers over the decisions made for the person who lack capacity should depend on the whether the decision is made by way of an advance directive, an EPA or a Guardianship Order. The formality requirements for an advance directive is the most relaxed, followed by an EPA, then with Guardianship Order having the highest degree of procedural requirements. This is understandable in the light of the principle of respecting autonomy. In the case of advance directive, the future directive is clearly the person's wish and therefore should be honoured where applicable. In an EPA, the attorney is entrusted by the donor under his/her freewill to act as a proxy, though the final decision is made by the attorney and not directly from the donor as he/her has already lost capacity. In guardianship situation, the guardian is appointed by the Guardianship Board without any reference to the person's prior wish. Therefore we recommend that an EPA attorney should be supervised and be called to account.

Some of our members opined that the standard and the extent to which the attorney's decisions are regulated should not be as high as that in guardianship situation. For instance, the way in which a guardian exercises his/her given power is closely regulated and scrutinized by the Guardianship board. An attorney under EPA should be given more flexibility for the fact that he/she is the chosen by the freewill of the donor.

However other members of our society stated that the notion that EPA requires a lower level of supervision should not be the case as the best interests of all mentally incapacitated persons, whether they are under Guardianship or EPA, should be safeguarded all the same.

(2)(I) We agree that the Guardianship Board should be given the powers to supervise an EPA attorney.

(3) and (4) We support that EPAs executed in a jurisdiction other than Hong Kong should be recognised in Hong Kong subject to the requirements stated in question (4)(i) and (4)(ii).

Yours sincerely,

Dr. Wu Yee Ming
Honorary Secretary
Hong Kong Geriatrics Society