

**Enduring Powers of Attorney (Amendment) Bill 2011**

**I. Introduction**

This paper sets out the Administration's response to the following issues raised at the first meeting of the Bills Committee held on 17 June 2011:

- (a) Legal test of the revocation of an EPA and in particular, whether a later EPA necessarily revokes an earlier one;
- (b) Circumstances under which a power of attorney is revoked at common law as referred to in section 13(1)(g) of the Enduring Powers of Attorney Ordinance (Cap. 501) ("EPA Ordinance"); and
- (c) How to tackle the issue of unintended ordinary power of attorney and to clarify the time of commencement of EPAs.

**II. Revocation of an EPA**

2. At common law, a power of attorney may be revoked by the donor. Normally a donor may do so in any circumstances and without obtaining any consent. Revocation may be express (in which case it will usually be by deed) or it may be implied by the doing of an act which is incompatible with the continued operation of the power.<sup>1</sup>

3. In *Re E (a donor)*<sup>2</sup>, it was held that the execution of a later EPA does not automatically revoke an earlier EPA. Arden J stated that: "The general law of agency in my judgment shows that to amount to revocation by conduct, the conduct must be inconsistent with the continuation of the agency. Contrary to [the appellant's] submission, this is in my judgment more than that the conduct should be reasonably understood as amounting to revocation. To be *inconsistent*, it must be unambiguous in its effect." (original emphasis) (para. 22)

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<sup>1</sup> *Creney & Lush on Lasting and Enduring Powers of Attorney* (6<sup>th</sup> ed., 2009), para. 20.1

<sup>2</sup> [2000] 3 WLR 1974

4. Arden J referred to a passage in the Law Commission 1983 report, *The Incapacitated Principal*<sup>3</sup>, which shows that it is not the policy of the Enduring Powers of Attorney Act 1985 to prohibit successive EPAs.

5. It was held in *Re E (a donor)* (above) that the later EPA in the case takes effect as an ordinary power even if it cannot take effect as an EPA. The later power is therefore capable of being used prior to the donor becoming mentally incapable. However the earlier EPA has not been revoked by the execution of the later power. To show that the earlier power has been revoked, it is not enough to show that the donor must have forgotten about the earlier EPA or made no reference to it. There is no contemporaneous evidence as to the donor's intention or even any later evidence from her as to what she intended. All that is known is that she did not expressly revoke the earlier power when she executed the later power. The court concluded that to have several simultaneous powers would be a legitimate and understandable wish, not an irrational one (para. 22)

6. In Hong Kong, the EPA Ordinance does not contain any provision which prohibits the grant of simultaneous or successive EPAs. Whether a later EPA will be revoked in such circumstances is a question of fact to be considered in the light of the legal principles enunciated in *Re E (a donor)* (above).

### **III. Circumstances under which a power of attorney is revoked at common law (as referred to in section 13(1)(g) of the EPA Ordinance**

7. In Hong Kong, the Powers of Attorney Ordinance, Cap. 31 ("PA Ordinance") was first enacted in 1972 (Ordinance 51 of 1972). In *Cali Enterprises Ltd v. Chongmark Ltd*<sup>4</sup>, Rhind J. held that when prior to the coming into operation of s. 5 of the PA Ordinance on the 1<sup>st</sup> October 1972, the question of whether the power had been revoked was one of fact. On page 818 H of the judgment, Rhind J. stated that "[w]hether the power

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<sup>3</sup> "And [the donor] could grant as many EPAs in favour of as many attorneys as he liked. This would merely reflect the general principle that people should be able to make such arrangements for the management of their affairs as they please." (para. 4.31), referred to at pp1978D-E and 1983G.

<sup>4</sup> [1986] HKLR 816

of attorney was revoked is a question of fact. Three possible ways have been suggested [in the context of the case] in which the power of attorney might have been revoked: they are death, lunacy and bankruptcy.”

8. It appears that the possible ways of revocation of a power of attorney at common law have been to some extent reflected in sub-section 13(1)(b) (bankruptcy of the attorney), (e) (revocation by direction of the court on the appointment of a committee pursuant to Part II of the Mental Health Ordinance (Cap 136)) and (f) (death of the donor or the attorney) of the EPA Ordinance<sup>5</sup>.

#### **IV. Unintended ordinary power of attorney and commencement of EPAs**

9. At the meeting of 17 June 2011, Members queried whether the document which is intended to take effect as an EPA is to take effect as an ordinary power of attorney after the medical certification by a doctor but before the solicitor’s witnessing as required in section 5 of the EPA Ordinance.

10. Section 2(1) of the PA Ordinance provides that “an instrument creating a power of attorney shall be signed and sealed by, or by direction and in the presence of, the donor of the power”. Except where the instrument is signed and sealed by a person by direction and in the presence of the donor of the power where s. 2(2) of PA Ordinance provides that two other persons shall be present as witnesses and shall attest the instrument, there are no legal requirements that an ordinary power of attorney should be witnessed by a solicitor or a doctor, or, indeed, by anyone at all. Moreover, it is contemplated by the EPA

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<sup>5</sup> Section 13(1) of the EPA Ordinance provides that an enduring power is revoked-

- (a) if the donor revokes it when he is mentally capable, or where the donor becomes mentally incapable after the grant and the instrument is registered, if the donor revokes it after his recovery and the court makes an order under subsection (2) confirming the revocation;
- (b) on the bankruptcy of the attorney;
- (c) if a court makes an order for its revocation under section 11(1)(b) or for the removal of an attorney under section 11(1)(c);
- (d) (Repealed 81 of 1997 s. 59)
- (e) on the appointment of a committee pursuant to Part II of the Mental Health Ordinance (Cap 136), if the court gives a direction revoking the enduring power;
- (f) on the death of the donor or the attorney; or
- (g) subject to this Ordinance, on any ground on which a power of attorney is revoked at common law.

Ordinance that an instrument which does not satisfy the requirements of an enduring power may, nevertheless, take effect as an ordinary power (see e.g. s. 14(1) and s. 15(3)(a)<sup>6</sup>)

11. Members raised the concern that the donor should be reminded about the legal effect of the document once he or she executes it. The attorney may dispose of the donor's properties under the authority given by the donor under an unintended ordinary power of attorney.

12. Members further pointed out that if 28 day period is allowed between the medical certification by a doctor and the solicitor's witnessing, it might cause concern if the document intended to take effect as an EPA, but which has yet to meet some of the specific statutory requirements of EPA (especially section 5 of the EPA Ordinance), could operate as an ordinary power of attorney before the relevant formalities for EPAs have been completed.

13. The Administration has given due consideration to the above concerns expressed by Members. The EPA Ordinance simply enables powers of attorney to be created which survive any subsequent mental incapacity of the donor. The EPA Ordinance addressed the need to provide a simple, effective and inexpensive method of allowing powers to continue despite the donor's incapacity. However in view of the Members' concern about the need to protect the donor's interests against possible abuse that may arise from the legislative proposal under the Bill, and specifically, in order to rule out any question of uncompleted EPA operating as an ordinary power before the relevant formalities for EPAs have been completed, the Administration is considering:

(i) whether to insert an express provision in the EPA Ordinance to

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<sup>6</sup> Section 14 (1) of EPA Ordinance provides as follows:  
“(1) The following applies where an instrument is framed in the prescribed form but does not create a valid enduring power (but creates a power of attorney) and the power is revoked by the donor's supervening mental incapacity (whether or not the instrument has been registered)-”

Section 15 (3)(a) of the EPA Ordinance provides as follows:  
“The provisions of this Ordinance apply to joint and several attorneys subject to the following-  
(a) a failure as respects one attorney to comply with the requirements of the creation of the power operates to prevent the instrument from creating such a power in relation to him, but does not affect its efficacy for that purpose as respects the other or other attorneys in relation to whom those requirements have been complied with or its efficacy for the purpose of creating a power of attorney which is not an enduring power;”

the effect that an instrument which is framed in the prescribed form of an EPA signed by a medical practitioner but which has not yet been signed by a solicitor does not take effect either as an EPA or an ordinary power of attorney; and

- (ii) whether to expressly provide, for the purpose of commencement of the EPA under section 10(b) of the EPA Ordinance<sup>7</sup> that the date of the execution is the date when the EPA is signed by the donor in the presence of the solicitor under the new s5(2)(a)(ii).

14. The Administration would like to consult the views of Members at the Bills Committee meeting on 4 July 2011 and invite Members to give their views on whether the above suggestions should be adopted to address the concerns raised by Members. The Administration may propose corresponding amendments at the Committee Stage (including appropriate amendments to the forms in the new Schedule 1 of the Bill) after taking into account the views expressed by Members at the Bills Committee meeting on 4 July 2011.

Department of Justice  
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<sup>7</sup> Section 10 of the EPA Ordinance provides as follows:  
“Subject to section 4(3), an enduring power commences-  
(a) where a date or an event is specified in the instrument creating it, for its commencement, on that date or the happening of that event; and  
(b) where no such date or event is specified, on its execution.”