

Enduring Powers of Attorney (Amendment) Bill 2011

I. Introduction

This paper sets out the Administration's response to the following issues raised at the third meeting of the Bills Committee held on 25 October 2011:

- (a) Whether a defective enduring power of attorney ("EPA") may take effect as an ordinary power of attorney; and
- (b) With reference to the use of modal verbs in the prescribed forms in the proposed Schedules 1 and 2 of the Enduring Powers of Attorney Ordinance, Cap. 501 ("EPA Ordinance") (e.g. "must" and "should"), whether the legal consequences of the failure on the part of a donor to comply with the requirements should be clarified when the same modal verb is used in various places of the prescribed forms but with different meanings. The Administration was requested to conduct an overall review of the use of modal verbs in the prescribed forms and explain the drafting approach to be adopted.

II. Defective EPA taking effect as an ordinary power of attorney

2. At the meeting of 25 October 2011, Members queried whether a document intended to appoint more than one attorneys would still take effect as an ordinary power of attorney despite the donor's failure to specify whether the attorneys were appointed to act jointly or jointly and severally.

3. Section 15(1) of the EPA Ordinance stipulates that "An instrument which appoints more than one attorney cannot create an enduring power unless the attorneys are appointed to act jointly or jointly and severally." Members raised the question of whether an instrument which purported to create an EPA but failed to specify whether the attorneys were appointed to act jointly or jointly and severally would

nonetheless take effect as an ordinary power of attorney.

4. In the UK, section 11(1) of the Enduring Powers of Attorney Act 1985 (“the 1985 Act”) similarly provides that “An instrument which appoints more than one person to be an attorney cannot create an enduring power unless the attorneys are appointed to act jointly or jointly and severally”. Section 11(4) of the 1985 Act further provides that: “A failure, as respects any one attorney, to comply with the requirements for the creation of enduring powers, shall prevent the instrument from creating such a power in his case without however affecting its efficacy for that purpose as respects the other or others or its efficacy in his case for the purpose of creating a power of attorney which is not an enduring power.”¹

5. The legal position in the UK is that an instrument which does not satisfy the requirement of an EPA may, nevertheless, take effect as an ordinary power. It is pointed out that this is the intent of the Parliament as can be seen from section 11(4) of the 1985 Act (above)².

6. This question was further considered by Arden J in *Re E (a donor)*³. In that case an EPA was found to be technically invalid because of an inconsistency in the appointment of joint attorneys contrary to section 11(1) of the 1985 Act. It was held that the instrument took effect as an ordinary power even if it could not take effect as an EPA. (para. 22)

7. In Hong Kong, section 15(3)(a) of the EPA Ordinance contains a provision very similar to section 11(4) of the 1985 Act⁴. Therefore the above principle is likely to apply in Hong Kong. A failure of an instrument to comply with the requirements of the creation of EPA operates to prevent the instrument from creating such a power but the instrument may take effect as an ordinary power of attorney. If the

¹ The provision is re-enacted as para 20(4), Schedule 4 to the Mental Capacity Act 2005.

² *Cretney & Lush on Lasting and Enduring Powers of Attorney* (6th ed., 2009), para. 16.2

³ [2000] 3 WLR 1974

⁴ Section 15(3)(a) of the EPA Ordinance provides as follows:

“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”

instrument does not create a valid EPA and the ordinary power has been revoked by virtue of the donor's mental incapacity, section 14 of the EPA Ordinance provides legal protection for the interests of eligible third parties.

III. The use of modal verbs in the prescribed forms

8. At the meeting of 25 October 2011, Members noted that while the failure on the part of the donor to specify the appointment of more than one attorney to act jointly or jointly and severally will render the EPA invalid by virtue of section 15(1) of the EPA Ordinance (see paragraph 3 above), paragraph 3 of the "Information you must read" and paragraph 2 of Part A of Form 2 at Schedule 2 have not spelt out the legal consequence, although the modal verb of "must" is used. It is not apparent from the paragraphs whether a failure on the part of the donor to specify the appointment of more than one attorney to act jointly or jointly and severally will render the EPA invalid.

9. Members also pointed out that the proposed new paragraph 4A of Part A in Form 1 and new paragraph 5A of Part A in Form 2 do not state clearly whether a failure to delete the sentence: "*This EPA takes effect on (insert a later date or event)." will render the EPA invalid. Although the modal verb of "must" is used in the sentence "You must delete that sentence if you wish this EPA to take effect on the date it is signed before the solicitor.", the legal consequences of failing to do so have not been clearly spelt out.

10. In the light of the above discussion, Members queried whether the legal consequences of the failure on the part of a donor to comply with the requirements should be clarified in the prescribed forms when the same modal verb (i.e. "must") is used in various places of the prescribed forms but with different meanings. The Administration was requested to conduct an overall review of the use of modal verbs in the prescribed forms and explain its drafting approach.

11. The Administration notes that the starting point is section 3(2)(b) of the EPA Ordinance, which stipulates that "where the instrument differs in any respect which is not material in form or mode of

expression from that prescribed, it shall be treated as being in the prescribed form.”

12. A similar provision can be found in the 1985 Act which requires the instrument creating EPA to comply with the prescribed form in the regulation (i.e. s.2(1)). This is to be read with s.2(6) of the 1985 Act which provides that if an instrument differs in an immaterial respect in form or mode of expression from the prescribed form the instrument shall be treated as sufficient in point of form and expression.⁵

13. Given the clear provision in section 15(1) of the EPA Ordinance (see paragraph 3 above), it is considered that a failure on the part of the donor to specify whether the appointment of more than one attorney should act jointly or jointly and severally will render the EPA invalid. The Administration therefore proposes that Committee Stage Amendments (“CSAs”) should be introduced to spell out clearly the legal consequence of such a failure in paragraph 2 of Part A in Form 2 after “does not apply.” by adding: “If you do not, your EPA will not be valid.”

14. On the other hand, the Administration would like to clarify its policy intent that the failure of a donor to delete the sentence “*This EPA takes effect on (insert a later date or event).” in the proposed new paragraph 4A of Part A in Form 1 and new paragraph 5A of Part A in Form 2 will not render the EPA invalid. The Administration has reviewed the wording of the proposed new paragraph 4A of Part A in Form 1 and 5A of Part A in Form 2 and will introduce CSAs to delete the words “You must” from the sentence “You must delete that sentence if you wish this EPA to take effect on the date it is signed before the solicitor.” in both cases. The removal of “must” here indicates that the deletion is directory rather than obligatory.

15. Whether other deviations from the prescribed forms in places other than paragraph 2 of Part A in Form 2, the proposed new paragraph 4A of Part A in Form 1 and new paragraph 5A of Part A in Form 2 will invalidate the EPAs and whether any other legal consequences will arise should be assessed individually as a matter of

⁵ A discussion of which differences or deviations from the prescribed form were considered to be “material” in the UK can be found in the article by P D Lewis, ‘Powers of Attorney -- The Enduring Powers of Attorney Act 1985’, 1986, *Law Society's Guardian Gazette*. at 3566

fact and degree in its proper legal/ statutory context. It seems that a hard and fast rule of employing a standard form of modal verbs in the prescribed forms may not be advisable. The Court is likely to consider and evaluate the legal effect of an action or default on the part of a donor in the particular circumstances of the case in question. The Court will construe the wording in a particular form against the factual matrix and statutory provisions of the EPA Ordinance that are applicable to the case before it and determine the legal effect of an action or default as appropriate in the particular case.

16. Having carefully considered the views expressed by Members at the third meeting of the Bills Committee held on 25 October 2011 and given the considerations set out in Part III of this paper, the Administration would like to propose the CSAs as explained in paragraphs 13 and 14 in order to address the concerns raised by Members. Attached at **Annex A** is a draft of the complete set of CSAs in English and Chinese that the Administration proposes to move in connection with the assumption of the Second Reading debate of the Bill.

Department of Justice
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Enduring Powers of Attorney (Amendment) Bill 2011

COMMITTEE STAGE

Amendments to be moved by the Secretary for Justice

<u>Clause</u>	<u>Amendment Proposed</u>
2	By deleting “3” and substituting “3, 3A”.
3(5)	In the proposed section 5(2)(d)(iii), in the Chinese text, by deleting “確認該文書是在授權人在場並在其指示下由他人” and substituting “該文書是在授權人在場並在其指示下由他人代其”.
3(7)	In the proposed section 5(2)(e)(iii), in the Chinese text, by deleting “確認該文書是在授權人在場並在其指示下由他人” and substituting “該文書是在授權人在場並在其指示下由他人代其”.
New	By adding— “3A. Section 10 amended (Commencement) (1) Section 10— Renumber the section as section 10(1). (2) After section 10(1)— Add “(2) To avoid doubt, an enduring power does not commence as a power of attorney before it is executed. (3) For the purposes of subsections (1)(b) and (2), an enduring power is executed when it is duly signed before the solicitor in

compliance with the requirements in section 5.

- (4) Subsections (2) and (3) do not affect any enduring power executed before the commencement date of the Enduring Powers of Attorney (Amendment) Ordinance 2011 (of 2011).”.”.

9 In the proposed section 4(2), by deleting “donor becoming mentally incapable” and substituting “donor’s mental incapacity”.

10(1) In the proposed section 5(2A), in the Chinese text, by deleting “事預” and substituting “事項”.

12 (a) In the proposed Schedule 1, under the heading “**Information you must read**”, by adding—

“13. This form takes effect as an EPA in accordance with section 10 of the Enduring Powers of Attorney Ordinance (Cap. 501) when it is signed by you or the person signing on your behalf and under your direction before the solicitor. You should note that unless and until this form is so signed, it has no effect either as an EPA or an ordinary power of attorney. However, if you wish, you may choose a later date or later event, on which the EPA will take effect. In such case you must specify this later date or event in paragraph 4A of Part A.”.

(b) In the proposed Schedule 1, under the heading “**Form of enduring power of attorney (for appointment of only one attorney)**”, in Part A, by adding—

“4A. **Commencement of EPA**

[This EPA takes effect on the date it is signed before the solicitor in paragraph 6 or 7 below. If you want to specify a later date or later event on which this EPA will take effect, please fill in the gap in the sentence marked with an asterisk below. Delete that sentence if you wish this EPA to take effect on the date it is signed

before the solicitor.]

*This EPA takes effect on
 (insert a later date or event).”.

(c) In the proposed Schedule 2, under the heading “**Information you must read**”—

(i) in paragraph 3, in the Chinese text, by deleting “個” and substituting “各”;

(ii) by adding—

“14. This form takes effect as an EPA in accordance with section 10 of the Enduring Powers of Attorney Ordinance (Cap. 501) when it is signed by you or the person signing on your behalf and under your direction before the solicitor. You should note that unless and until this form is so signed, it has no effect either as an EPA or an ordinary power of attorney. However, if you wish, you may choose a later date or later event, on which the EPA will take effect. In such case you must specify this later date or event in paragraph 5A of Part A.”.

(d) In the proposed Schedule 2, under the heading “**Form of enduring power of attorney (for appointment of more than one attorney)**”, in Part A—

(i) in paragraph 2, after “*not apply.*”, by adding “*If you do not, your EPA will not be valid.*”;

(ii) in paragraph 2, in the Chinese text, by deleting “個” (wherever appearing) and substituting “各”;

(iii) by adding—

“5A. **Commencement of EPA**

[This EPA takes effect on the date it is signed before the solicitor in paragraph 7 or 8 below. If you want to specify a later date or later event on which this EPA will take effect, please fill in the gap in the sentence marked with an asterisk below. Delete that sentence if you wish this EPA to take effect on the date it is signed before the

solicitor.]

*This EPA takes effect on
..... (insert a later date or event).”.

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