



An Underutilised Wealth Planning Tool – The Enduring Power of Attorney

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Introduction

In Hong Kong, a general Power of Attorney (“PoA”) is widely recognised and used by individuals to grant third party(ies) the authority to handle legal or financial affairs on a donor’s behalf. It is a particularly useful and convenient tool allowing one to appoint someone else, such as a family member, to handle affairs on his/her behalf especially when one is overseas. However, a PoA will automatically become invalid upon the donor becoming mentally incapacitated. This creates practical difficulties in handling the donor’s affairs which could previously only be resolved by obtaining a court order, and can be a time-consuming and costly exercise.

To address these issues, the Enduring Powers of Attorney Ordinance (Cap. 501) was enacted in 1997 (“**the Ordinance**”). An Enduring Power of Attorney (“EPA”) provides a donor the opportunity to plan ahead by appointing attorney(s)

to manage his financial affairs within his desired ambit in the event of incapacity. This provides a quick and simple method for the donor to ensure his affairs are taken care of, easing the potential difficulties and distress that may otherwise be suffered by his family members.

Despite the benefits of EPA, it is surprising that its use remains remarkably low in Hong Kong. Third party entities such as banks encounter problems when faced with EPAs as many are unfamiliar with the instrument as well as the law and relevant procedures. This article aims to identify the reasons behind the limited usage of EPA in Hong Kong and explore potential changes that could increase its adoption.

Requirements on Witness

Despite the introduction of EPA in Hong Kong in 1997, the Report on Enduring Powers of Attorney prepared by the Law Reform Commission of Hong Kong (“**LRC**”) published in March 2008 revealed that only 21 EPAs were registered within the first 10 years of its introduction. Following more recent efforts made by the Hong Kong government and Judiciary to raise public awareness, there has since been a notable increase in the adoption of EPAs. According to the Secretary for Labour and Welfare’s reply to the Legislative Council on 28 June 2023, a total of 4,012 EPAs were registered from 2018 to 2022. This figure is still significantly lower compared to other common law jurisdictions such as England and Wales, which had over 6,000,000 Lasting Power of Attorneys (“**LPA**”) registered by October 2023 (since its introduction in 2007), and Singapore, which recorded 152,000 LPAs registered by June 2022 (since its introduction in 2010).

One of the major reasons for the low take-up rate in Hong Kong, as identified by the LRC in 2008, was due to the cumbersome requirement in the original ordinance which required the simultaneous presence of a medical practitioner and a solicitor to witness the execution of the EPA. Following the recommendation of the LRC, this requirement was relaxed to allow a donor to sign the EPA before a medical practitioner and solicitor



separately, but the solicitor must witness the donor’s execution within 28 days after the donor signs the EPA before a medical practitioner (Section 5(2) of the Ordinance). Nevertheless, the requirement of a medical witness presents an additional obstacle and poses increased costs associated with preparation of an EPA, which is a barrier to wider adoption of EPA by members of the public.

The Hong Kong requirement of having both a medical practitioner and solicitor witness an EPA is well-intended. By a doctor witnessing the donor signing the EPA, it can help safeguard and ensure that the donor has the requisite mental capacity, and that he fully understands his decision to delegate the overall decision-making power (or part of his financial affairs) to his attorney. It is however interesting to note that Hong Kong has one of the most stringent execution requirements compared to other common law jurisdictions.

In our neighbouring common law jurisdiction, Singapore, a donor is only required to engage one of the following professionals as an LPA Certificate Issuer (“**CI**”) to witness and certify his LPA:-

- i. a medical practitioner accredited by the Public Guardian in Singapore; or
- ii. a practising lawyer holding a Singapore Practising Certificate; or

iii. a registered psychiatrist.

The role of the CI is to ensure that the donor has made the LPA voluntarily, without coercion or deception, and that he comprehends the purpose of the LPA and the powers granted. The CI is responsible for maintaining detailed records of the steps taken to ascertain the donor’s mental capacity and the basis for concluding that the donor indeed possesses the required mental capacity.

Further, in England and Wales, a more humanized and flexible regime has been established whereby an LPA can be certified by either a (i) knowledge-based group, comprising individuals who have known the donor personally for at least two years; or (ii) skills-based group involving registered health care professionals, UK-admitted barristers, solicitors or advocates, and others with relevant expertise.

The requirement of a professional witness is not mandatory because the Law Commission of England and Wales recognized that their opinion would turn on subjective considerations, and assessment would be difficult solely based on a short acquaintance which could potentially lead to varying conclusions regarding the donor’s mental capacity. Indeed, it is not uncommon to encounter conflicting expert opinions. Instead, the Law Commission was of the

view that individuals who are close to the donor or who have known the donor for a considerable amount of time, particularly relatives, are better positioned to assess the donor's mental capability to create an LPA. It was also noted that mandating a mental assessment could be an intimidating process for the donor, causing discomfort and embarrassment for both the donor and the witness, thereby discouraging the donor from establishing an LPA.

Although there has been a rise in family disputes relating to the mental capacity of donors when creating an EPA, it should not prevent the relaxation of witness requirements in Hong Kong which could certainly help to increase the uptake and use of EPAs. Despite there being no mandatory requirement of a medical witness under the England and Wales regime, legal practitioners are still advised to ensure that the donor possesses the necessary mental capacity and to obtain the assistance of a medical opinion (if needed) when preparing LPA. In borderline cases of capacity, it is also recommended for the donor to undergo an assessment by a doctor or relevant professional who will record their findings.

In addition to considering a donor's mental capacity, legal practitioners in England and Wales are also advised by the Law Society to pay heed to other factors when preparing an LPA, including thoroughly examining the donor's personal and financial background and where necessary, to meet with

the donor alone to ensure there is no fraud or undue pressure involved. This comprehensive approach which goes beyond only considering a donor's mental capacity provides effective mechanisms to safeguard the interests of the donor even though it is not mandatory for a medical doctor to witness an LPA.

Scope of Coverage

The growing popularity of LPAs in England and Wales can be attributed to another significant factor, namely the extensive reform brought by the Mental Capacity Act 2005, which expanded the scope of the LPA beyond the management of property and financial affairs to also encompass health and welfare decisions.

The advanced application of the LPA is in stark contrast to the current regimes in Hong Kong which confers authority to different bodies to deal with a donor's financial affairs and medical/welfare decisions. The streamlined approach and simplified execution process of the LPA in England and Wales is comparatively a more attractive tool and undoubtedly contributes to the high up-take rate.

Conversely, the current regime in Hong Kong is inherently difficult. A Hong Kong donor can only confer authority over his financial affairs through an EPA. If there is no EPA, a High Court application would need to be made on behalf of the mentally incapacitated person to appoint a committee of estate to handle his property and affairs. In respect of medical and welfare decisions, a guardian would

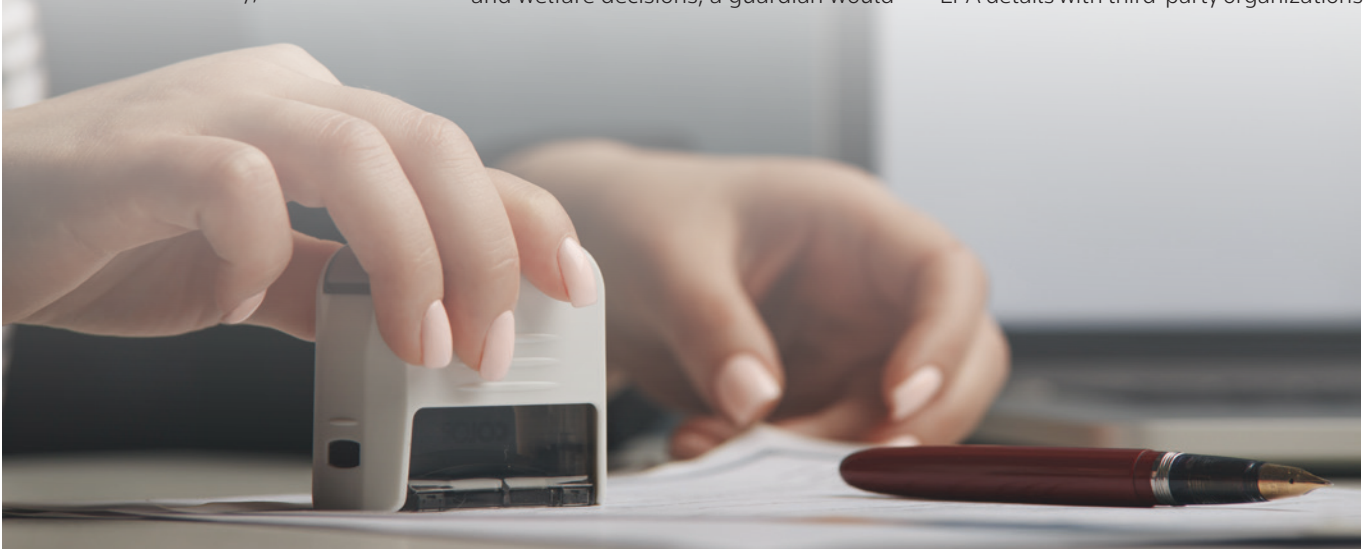
need to be appointed by the Guardianship Board for the mentally incapacitated person, and the guardian has limited financial authority currently set at a maximum of HK\$20,000 per month.

This bifurcated process imposes significant practical difficulties to the family of mentally incapacitated persons who need to assist with both significant financial matters as well as healthcare decisions. Even with a valid EPA in place, a duly appointed attorney can only deal with the financial matters under the EPA, and a guardianship application would still be necessary to enable the attorney (or another family member) to assist with medical and welfare decisions.

Digital Platform

England and Wales have recently taken a further step towards modernizing the process of creating an LPA by introducing a fully digital LPA through the Powers of Attorney Bill which received royal assent on 18 September 2023. Although there is yet to be a timeline for implementing the fully digital LPA, the purpose of the bill is primarily to transition the registration process to a digital platform. This shift will simplify the procedure, making registration of LPAs faster and facilitate greater accessibility by the public.

More importantly, the current system allowing attorneys and donors to share LPA details with third-party organizations will remain in place after the reform, facilitating attorneys and donors to share LPA details with third-party organizations



such as banks or healthcare providers through online channels.

A central registration system and the sharing of LPA details with third-party organizations enhances coordination among various parties involved, including the donor, attorney, and relevant entities. For example, each attorney is provided with a secure code, which when submitted to the online portal will promptly verify his status as attorney and the extent of his authorized power. These security measures no doubt help to foster wider adoption of LPAs by different organizations and can alleviate concerns of third parties such as validity of the instrument.

Additionally, it ensures efficient management of assets and financial matters. By sharing LPA details with third-party organizations, attorneys and donors can guarantee that authorized individuals

can promptly access the required information when necessary. This is particularly crucial in urgent situations or when quick decision-making is necessary for the mentally incapacitated person. Moreover, it eliminates the need for repetitive verification or documentation since the organizations can directly access the essential information.

In a similar fashion, Singapore has introduced its e-service on 14 November 2022, aiming to streamline the registration process for LPAs. As a means of promoting proactive planning and applications, Singapore is also currently implementing an application fee waiver for Singapore citizens who apply for an LPA that grants the donee(s) general powers with basic restrictions. This fee waiver will be in effect until 31 March 2026 and is an effective measure to encourage more people to adopt LPAs.

Conclusion

EPA is a useful tool to ensure one's financial affairs can be properly managed by a trusted proxy decision maker in the event of mental incapacity. It provides a clear record on who the donor has appointed to act on his behalf and helps to minimise uncertainty and potential disputes faced by family members who would otherwise need to apply for a court order.

Despite Hong Kong having one of the world's highest life expectancies and its growing elderly population, the use of EPAs remains staggeringly low compared to other common law jurisdictions. This is particularly concerning considering that EPAs have been available for over 20 years. It is high time to reconsider the execution requirements of EPAs in Hong Kong and to find ways to promote greater awareness and accessibility to EPAs by the Hong Kong public. ■

持久授權書是遭忽略的財富規劃工具

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引言

在香港，一般授權書獲個人廣泛認可和使用，用於授予第三方權力代表授權人處理法律或財務事宜。這是尤其有用且方便的工具，讓個人指定他人（例如家庭成員）代表其處理事務，尤其是若他／她身處海外。然而，當授權人精神上無行為能力時，授權書將自動失效，令處理授權人的事務出現實際困難。這種情況以往只能透過法庭命令來解決，過程耗時且昂貴。

為了解決這些問題，《持久授權書條例》（第 501 章）（《條例》）於 1997 年實施。持久授權書為授權人提供提前規劃的機會，指定受權人在其無行為能力的情況下，在其所需範圍內管理其財務事宜，為授權人提供一種快速、簡單的方法，確保其事務得到處理，減輕其家人可能遭受的潛在困難和痛苦。

儘管持久授權書有許多好處，但它在香港的使用率仍然非常低。銀行等第三方實體在處理持久授權書時會遇到問題，因為許多人不熟悉該工具、法律和相關程序。本文旨在查找持久授權書在香港使用不高的原因，並探討增加其使用率的可能措施。

對見證人的要求

儘管香港於 1997 年已引入持久授權書，但香港法律改革委員會（法改會）於 2008 年 3 月發表的《持久授權書報告書》顯示，在推出的首 10 年內，只有 21 份持久授權書註冊。隨著香港政府和司法機構最近努力提升公眾意識，持久授權書的採用顯著增加。根據勞工及福利局局長於 2023 年 6 月 28 日給立法會的回覆，2018 年至 2022 年期間，共有 4,012 份持久授權書註冊。這個數字仍顯著低於其他普通法司法管轄區，例如英格蘭和威爾斯。截至 2023 年 10 月，英格蘭和威爾斯（自 2007 年推出以來）已有多過 6,000,000 份持久授權書註冊；而新加坡（自 2010

年推出以來）截至 2022 年 6 月已有 152,000 份持久授權書註冊。

法改會在 2008 年指出，香港使用率低的主要原因之一，是原條例的規定繁瑣，要求醫生和律師同時在場見證持久授權書的執行。根據法改會的建議，這項規定可被放寬，容許授權人分別在醫生和律師面前簽署持久授權書，但律師必須在授權人在醫生面前簽署持久授權書後 28 天內，見證授權人簽署持久授權書（《條例》第 5(2) 條）。然而，醫學證人的要求製造了額外的障礙，並增加了準備持久授權書的成本，成為公眾更廣泛採用持久授權書的障礙之一。



香港要求由醫生和律師見證持久授權書的原意是好的。醫生見證授權人簽署持久授權書，可協助保障和確保授權人有必要的精神能力，充分理解其將整體決策權（或部分財務事務）委託給其受權人的決定。然而有趣的是，與其他普通法司法管轄區相比，香港是簽署要求最嚴格的國家之一。

在鄰近的普通法司法管轄區新加坡，授權人只需聘請以下專業人士之一，作為持久授權書的証書簽發人（簽發人），來見證和證明該持久授權書：

- i. 新加坡公共監護人認可的醫生；或
- ii. 持有新加坡執業證書的執業律師；或

iii. 註冊精神科醫生。

簽發人的角色是確保授權人自願簽署持久授權書，沒有受到脅迫或欺騙，並且理解持久授權書的目的和授予的權力。簽發人有責任備存為確定授權人精神能力而採取步驟的詳細記錄，以及斷定授權人確實擁有所需精神能力的依據。

此外，英格蘭和威爾斯已經建立了更人性化和靈活的制度，根據該制度，持久授權書可以由以下群組的個別人士進行認證：(i) 知識團體，包含私下認識授權人至少兩年的個人；或 (ii) 技術團體，包括由註冊醫療專業人員、英國認可大律師、事務律師或辯護律師，以及其他具有相關專業人員。

專業證人的要求並非強制性，因為英格蘭和威爾斯法律委員會認為他們的意見基於主觀考慮，而僅基於短暫的認識很難進行評估，可能會導致關於授權人精神能力的不同結論。事實上，遇到專家意見衝突並不罕見。相反，法律委員會認為，與授權人關係密切或認識授權人相當時間的個人，特別是親屬，更有能力評估授權人訂立持久授權書的精神能力。也有人指出，強制進行精神評估可能令授權人畏懼，令授權人和證人不適和尷尬，因而阻礙授權人訂立持久授權書。

儘管授權人在訂立持久授權書時的精神狀況有關的家庭糾紛有所增加，但這不應妨礙香港放寬證人要求，因為這肯定有助增加持久授權書的採用和使用。雖然英格蘭和威爾斯的制度並沒有強制要求必須有醫學證人，但仍建議法律執業者在準備持久授權書時，確保授權人具備必要的精神能力，並獲得醫學意見的協助（如有需要）。倘若在授權人精神能力有限的情況下，也建議其接受醫生或相關專業人員的評估，並記錄其結果。

除了考慮授權人的精神能力外，英格



蘭和威爾斯的律師會亦建議法律執業者在準備持久授權書時要注意其他因素，包括徹底審查授權人的個人和財務背景，並在必要時與授權人單獨會面，確保不存在欺詐或不當壓力。這種綜合方法超越了僅考慮授權人的精神能力，即使並無強制要求醫生見證持久授權書，但提供了保護授權人利益的有效機制。

覆蓋範圍

持久授權書在英格蘭和威爾斯日益普及的另一個重要因素，是 2005 年《精神能力法案》的廣泛改革，該法案將持久授權書的範圍擴大至財產和財務管理之外，至涵蓋健康和福利的決定。

持久授權書的進一步應用，與香港現行制度形成鮮明對比，香港現行制度賦予不同機構權力處理授權人的財務事宜和醫療 / 福利決定。英格蘭和威爾斯持久授權書的精簡方法和簡化執行流程，相對而言是更具吸引力的工具，無疑有助於提高採用率。

反之，香港目前的制度本質上是困難的。香港的授權人只能透過持久授權書授予管理其財務事宜的權力。如果沒有持久授權書，則需要代表精神上無行為能力的人士向高等法院申請任命產業受託監管人來處理其財產和事務。在醫療及福利決定方面，須為精神上無行為能力的人士向監護委員會申請委任一名監護人，而監護人的財務權力目前定為每月最多港幣 20,000 元。

這個分開處理的過程為需要別人處理重大財務事宜和醫療決策的精神上無行為能力人士的家庭帶來重大實際困難。即使擁有有效的持久授權書，正式指定的律師也只能處理持久授權書下的財務事宜，他們仍然需要申請監護令，以便律師（或其他家庭成員）能夠協助作出醫療和福利決定。

數碼平台

英格蘭和威爾斯最近朝著實現持久授權書現代化進一步邁進，透過《授權書法案》引入完全數碼化的持久授權書，該法案於 2023 年 9 月 18 日獲得皇室批准。儘管目前還未有全面實施數碼持久授權書的時間表，該法案主要旨在將註冊過程過渡至數碼平台。這項轉變將簡化程序，加快持久授權書的註冊速度，讓公眾更方便地進行註冊。

更重要的是，改革後現行允許授權人和授權人與第三方分享持久授權書詳細資訊的制度將繼續存在，方便律師和授權人透過線上管道與銀行或醫療機構等第三方分享持久授權書的詳細資料。

中央登記系統以及與第三方共享持久授權書詳細資訊，可加強各相關方（包括授權人、律師和相關實體）之間的協調。例如，為每位授權人提供一個安全代碼，在網站輸入安全代碼即可驗證他的授權人身份及授權範圍。這些安全措施無疑有助促進不同機構更廣泛地採用持久授權書，並可減輕第三方對文書有效性等擔憂。

此外，它亦可確保資產和財務的有效管理。透過與第三方分享持久授權書的詳細信息，受權人和授權人可保證授權個人在必要時能夠及時存取所需資訊。這在緊急情況或精神上無行為能力人士需要迅速作出決定時，尤其重要。此外，它消除了重複驗證或記錄的需要，因為機構可以直接存取基本資料。

新加坡於 2022 年 11 月 14 日亦推出了類似的電子服務，旨在簡化持久授權書的註冊流程。目前，申請授予有基本限制一般權力持久授權書的新加坡公民，也獲豁免申請費用，豁免生效直至 2026 年 3 月 31 日，可鼓勵更多人採用持久授權書的有效措施。

總結

持久授權書是有用的工具，可確保在精神上無行為能力的情況下，個人的財務事宜可由值得信賴的代理決策者妥善管理。持久授權書是授權人指定誰代表其行事的明確記錄，有助最大限度地減少家庭成員面對的不確定性和潛在糾紛，避免他們需要申請法庭命令。

雖然香港是世界上人均壽命最長的地區之一，而且老年人口不斷增加，但與其他普通法司法管轄區相比，持久授權書的使用率仍然低得驚人。考慮到持久授權書已推出 20 多年，這點的確令人擔憂。現在是時候重新考慮香港持久授權書的簽署要求，並尋找方法來提高香港公眾對持久授權書的認識和普及度。■