

Highlight on Mental Capacity Law in Hong Kong

Presented by Sherlynn Chan, Partner
Hazel Wong, Senior Associate



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Outline

- Introduction to the concept of mental capacity
- Overview of Mental Health Ordinance (Cap. 136)
- Committee and Guardianship Orders under Part II and Part IVB of Mental Health Ordinance
- The use of Enduring Powers of Attorney under Cap. 501
- Q&A

What is mental capacity ?



The Concept of Mental Capacity

Mental Capacity refers to the **mental competence** and **decision-making ability** of an individual.

Mental Capacity is:

Presumed

Task - Specific

Time - Specific

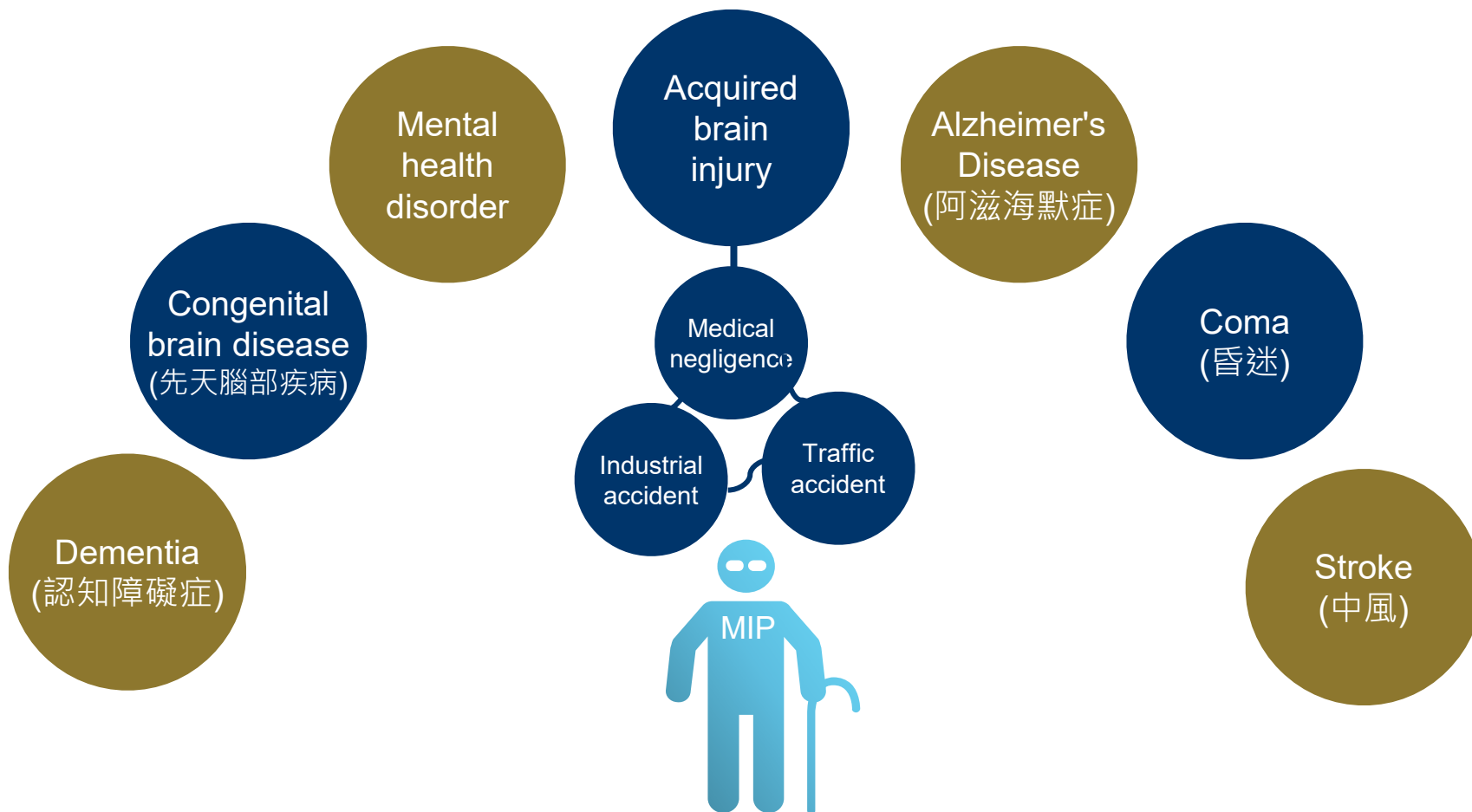
The **level of understanding** required to make a decision must be relative to the **nature and complexity** of the subject matter.

The Concept of Mental Capacity

Different levels of capacity e.g.

- **Contractual Capacity**
- **Capacity to act as company directors**
- **Capacity to marry**
- **Testamentary capacity**

Common Causes of Mental Incapacity



Why is mental capacity becoming more and more relevant ?



Aged Wealth Owners

South China Morning Post



Hong Kong's biggest ever gold bullion trading scam: elderly investor swindled out of US\$74 million

- The syndicate duped a total of seven investors from various countries, using cold calls and messaging on social media platforms
- Investors were persuaded to trade gold on the London commodities market and make other investments with the promise of high returns



Clifford Lo

Published: 5:30pm, 24 Jan, 2019

[Why you can trust SCMP](#)

South China Morning Post



Hong Kong / Law and Crime

One arrested after elderly Hong Kong woman swindled out of nearly HK\$4 million

- Police arrest the alleged fraudster at Kowloon Bay bank branch after employees report suspicious activity
- The perpetrator of the scam had posed as a mainland Chinese official, telling the victim she was accused of money laundering and needed to 'clear her name'

South China Morning Post

[#SCMP](#)

Hong Kong / Health & Environment

Six Hong Kong doctors rapped by medical watchdog for signing off on restraining procedures for elderly residents of care homes without proper assessments

None of the doctors contested the charges they faced and all were found guilty by the Medical Council of 'misconduct in a professional respect' Government also receives a slap on the wrist at hearing for the lack of resources provided to homes for the aged

Topic | Hong Kong health care and hospitals



Victor Ting

Published: 11:41pm, 10 Jun, 2020

[Why you can trust SCMP](#)

Ageing Population

Globally

In 2020:

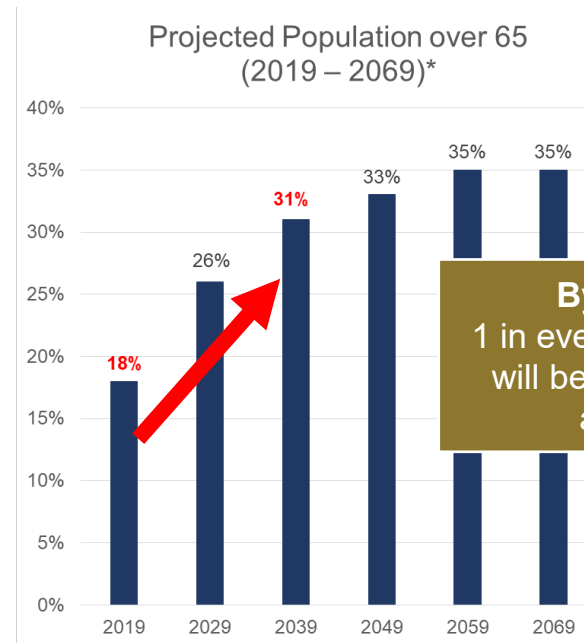
- **727 million** people aged over 65
- **143 million** people aged 80 or above

By 2050, it is projected:

- **Over 1.5 Billion** aged over 65
- **426 million** aged 80 or above

* Data extracted from: United Nations on Trends in Population Aging 2020

In Hong Kong



*Excluding foreign domestic helpers
Data extracted from the Hong Kong Population Projections 2020 - 2069 by the Census and Statistics Department HKSAR, 2020

Dementia Statistics

Globally

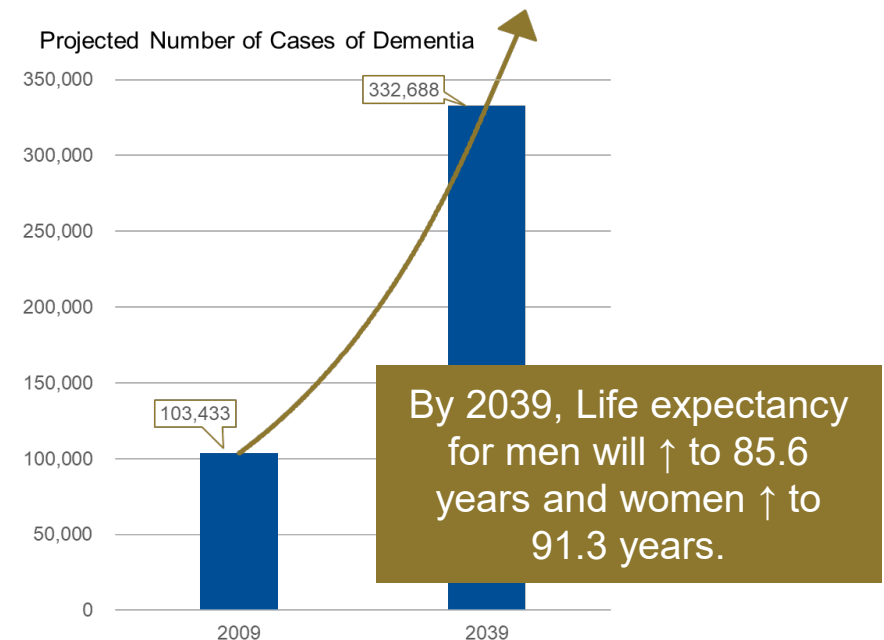
Dementia has physical, psychological, social and economic impacts, not only for people living with dementia, but for the carers, families and society at large.

- **50 million** people have dementia*
- **10 million** new cases every year

By 2050: 152 million cases projected

* Data extracted from: World Health Organization Global action plan on public health response to dementia 2017-2025 and publication on 9 August 2021

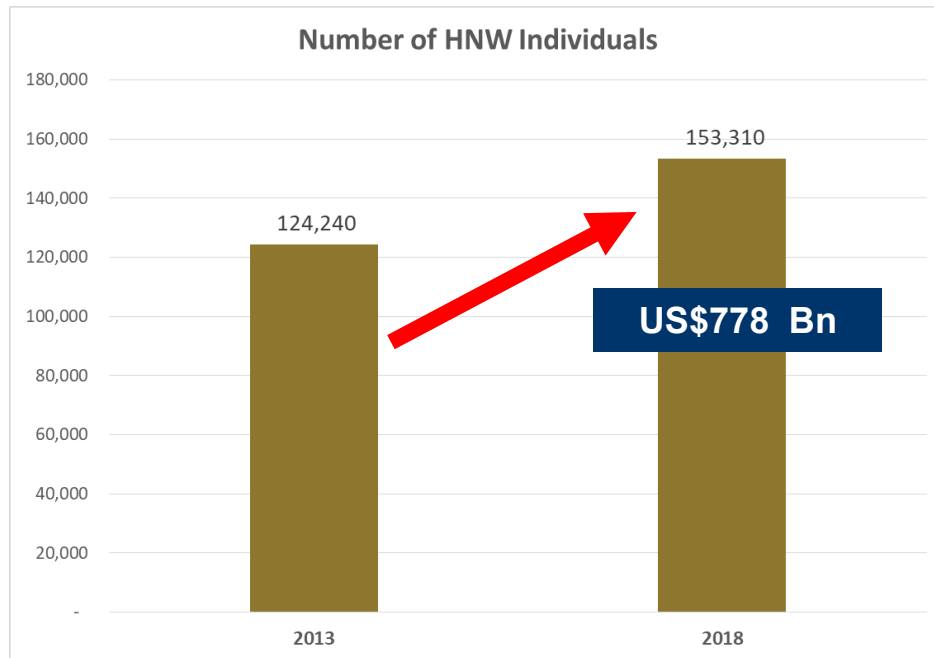
In Hong Kong



*Hospital Authority. (2021). Dementia

**Trends in Prevalence and Mortality of Dementia in Elderly Hong Kong Population: Projections, Disease Burden, and Implications for Long-term Care", 2012

World Wealth Statistics



Sources: Financial Services Development Council Report 2020, Capgemini's World Wealth Report, and Wealth-X's Billionaire Survey 2019



Case Sharing – Re: Madam L*

- Elderly widow suffering from bipolar and dementia
- Frequently visited by a volunteer in the hospital
- Executed Power of Attorney and letter of authorisation to grant volunteer power to sell her property and collect sale proceeds
- Social worker in hospital and DSW intervened.
- Committee appointed to protect Madam L's interests and took legal action to set aside the transaction



* *Re Madam L [2004] HKEC 1269*

Case Sharing – Re: Madam L*



POA
Sep 2003



Certified as
MIP
Nov 2003

Nov 2003

**Director of social welfare
appointed as public guardian***

*Section 59O Part IVB of MHO



Mr T

Aug 2004

**Official solicitor appointed as
committee**

*Section 10D of MHO

* Re Madam L [2004] HKEC 1269

How to manage the financial affairs of someone who has lost mental capacity?



The Mental Health Ordinance (Cap. 136) is the consolidation of all laws relating to the protection of MIPs in respect of their healthcare, consent to medical treatment and management of their property and affairs.

Mental Health Ordinance (Cap. 136)

- The Mental Health Ordinance (MHO) was first enacted in 1960. No significant amendments have been made since then.
- According to the MHO, “Mentally Incapacitated Person” (“MIP”) means:
 - for Part II, a person who is **incapable of managing and administering his property and affairs**;
 - for Part IVB, a person who is **incapable of making reasonable decisions** in respect of all or most of the matters **relating to his/her personal circumstances**.



Overview of MHO

- Part I: Preliminary (s1- s6)
- Part II: Management of property and affairs of MIP (s7 – s28)
- Part III: Reception, detention and treatment of patients (s29 – s44)
- Part IIIA: Guardianship of persons concerned in criminal proceedings (s44A – s44B)
- Part IIIB: Supervision and treatment orders relating to persons concerned in criminal proceedings (s44C – s44I)
- Part IV: Admission of mentally disordered persons concerned in criminal proceedings, transfer of mentally disordered persons under sentence and remand of MIP (s45 – s59)
- Part IVA: Mental Health Review Tribunal (s59A – s59H)
- Part IVB: Guardianship (s59I – s59Z)
- Part IVC: Medical and dental treatment (s59ZA – s59ZK)
- Part V: General provisions (s60 – s74)

Part II of the Mental Health Ordinance (Cap.136) (“MHO”)

Who can apply?

- a) Relatives
- b) Director of Social Welfare
- c) The Official Solicitor
- d) Guardian appointed under Part IVB of MHO

Committee Candidates

- a) Family members
- b) The Official Solicitor
- c) Accountants and solicitors (Professional Committee)



Powers, Roles and Duties of the Committee

- **Court Order**

- The Committee's powers are derived from Court Order(s)
- See sample order "Annex F" in Practice Direction 30.1

- **Roles and Duties***

- Open Committee bank account
- Ascertain, verify and manage mentally incapacitated person's (MIP's) assets
- Prepare annual accounts to Court
- Act in the best interests of the MIP at all times

- **Cessation of Powers**

- when MIP dies or recovers (s.27, MHO)
- when another Committee is appointed (s.26B)



* Guidance Note to Persons Appointed as Committee of Estate of a Mentally Incapacitated Person published by the Judiciary

Committee Order and Relevant Clauses

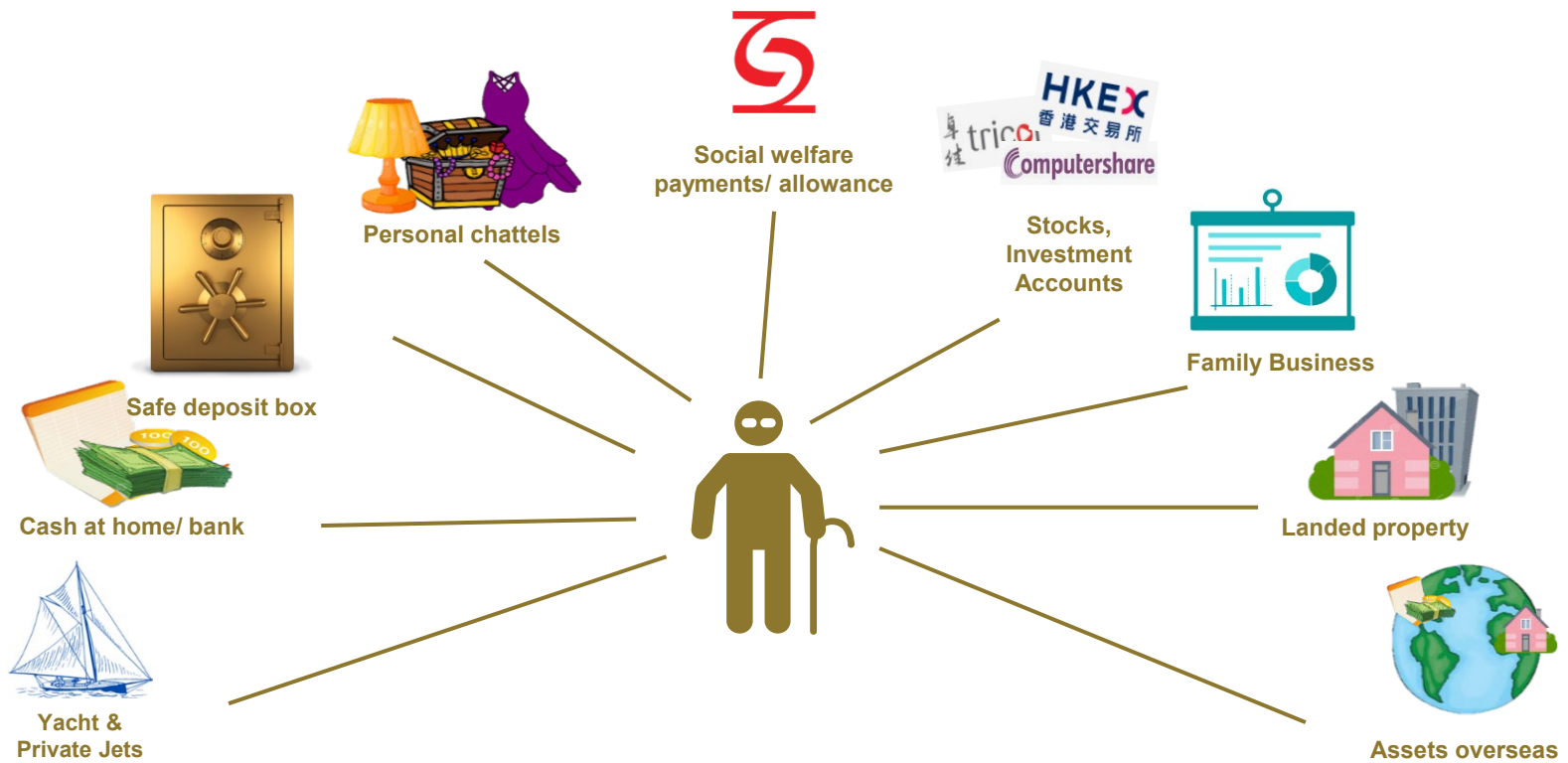
Draft Order (Practice Directions 30.1 Annex F) – Key Points

- Para 3. “The Committee is **authorised to withdraw and receive money** of MIP”
- Para 4. “The Committee is **authorised to revoke all mandates and authorities** given by the MIP”
- Para 5. “The Committee is **authorised to open safe deposit boxes** of MIP”
- Para 6. “The Committee is **empowered to make payments** on behalf of MIP”
- Para 7. “The Committee be **empowered to open up a Committee account(s) and security/investment account(s)** in the name of “ABC as Committee of the Estate of XYZ”

Other specific powers:

Investment powers, authority to engage stock brokers and financial advisers etc.

Common Types of Assets of MIP



Re: LMY

- Elderly widow who ran a porcelain business with her late husband
- Closest relatives in HK are her nieces and nephews
- Certified as MIP by High Court, dispute on candidate for Committee
- Court appointed independent Professional Committee to manage her property and affairs and obtain probate grant to her late husband's estate



Re: LMY

Cash

- Counting
- Collating
- Depositing



Chattels

- Inventory Taking
- Valuing



Real Property

- Managing repairs
- Attending IO meetings



Tenancy

- Collecting rent
- Negotiating tenancy terms



Working alongside **public guardian** appointed on accommodation and medical expenses

What about the welfare and care of the mentally incapacitated person?



Part IVB of the Mental Health Ordinance (Cap. 136) provides for the establishment of the Guardianship Board and appointment of guardians for MIPs in relation to their personal welfare matters

Guardianship Board

- An independent body corporate established and operates under Part IVB of MHO (s.59J)
- A legal quasi-judicial tribunal of HKSAR with the Labour and Welfare Bureau as its sponsoring government bureau
- Its central statutory role is to conduct hearings in order to make and review Guardianship Orders for mentally incapacitated persons aged 18 or above

Guardianship vs Committee

Guardianship Order

A Guardian primarily deals with personal welfare, medical/dental treatment and residence matters

HEALTH & WELFARE

and finances capped at \$19,000 per month*

*A Guardian is allowed to hold, receive or pay a sum up to HK\$19,000 per month, which is based on the median monthly employment earnings specified in the Quarterly Report on General Household Survey for 4th Quarter (Oct-Dec 2022) published by the Census and Statistics Department (as of 28 February 2023).

Committee Order

A Committee has wider powers to deal with the management and administration of the property and financial affairs of MIP

PROPERTY & FINANCES

6 Powers of a Guardian*

- to require the person concerned to **reside at a specific place**;
- to **bring the person concerned to a specific place** and use reasonable force for the purpose;
- to require the person concerned to **attend at a place and time for medical or dental treatment, special treatment, occupation, education or training**;
- to **consent to medical or dental treatment** if the person concerned is incapable of understanding the general nature and effect of the treatment;
- to **require access to the person concerned** to be given to any doctor, approved social worker or other person specified in the guardianship order;
- to **hold, receive or pay a specified monthly sum** for the maintenance or other benefit of the person concerned (currently maximum at HK\$19,000 per month).

*Please refer to s59R of MHO.

Part IVB of the MHO

Who can apply?

- a) Relatives
- b) Social worker
- c) Registered medical practitioner
- d) Public officer in the Social Welfare Department

Guardian Candidates

- a) Relative or any person who is over 18 and has no undue conflict of interest to that of the MIP*
- b) Director of Social Welfare

*Please refer to s59S of MHO.



What can we do when we are still mentally capable?



An Enduring Power Attorney (“EPA”) made under the Enduring Powers of Attorney Ordinance (Cap. 501) allows a mentally capable person to appoint attorney(s) to manage his/her financial affairs even when the person becomes mentally incapacitated in the future.

General Power of Attorney vs Enduring Power of Attorney



- Powers can be **general***: Attorney can do anything which a donor can lawfully do
- Becomes **invalid** when the Donor is mentally incapacitated
- Suggested form – Schedule to POAO
- **Specific** powers and restrictions**
- **Remains valid and “endures” the Donor’s mental incapacity**
- **Prescribed** forms – Sch. 1 & 2 of EPA (Prescribed Form) Regulation, Cap. 501A

*s.7 of Powers of Attorney Ordinance (POAO), Cap.31

** s.8 of Enduring Powers of Attorney Ordinance (EPAO), Cap. 501

EPA vs Committee

EPA

- Choice of Attorney(s)
- Autonomy re powers/restrictions on Attorney(s)
- Relatively lower costs \$

Committee

- Court appointed
- Powers from Court Orders
- Higher costs \$\$\$ involving legal proceedings in High Court

5 main elements of EPA

1

Identity of
Attorney(s)
acting **jointly**
or
jointly and
severally

2

Specific
authority to
Attorney(s)

3

Restrictions on
Attorney(s)

4

Persons to
notify prior to
registration

5

Commencemen
t of EPA

Formalities of EPA

- The Donor must sign the EPA before a **medical practitioner** and a **solicitor** both registered in Hong Kong. The Attorney(s) must also sign the EPA.
- The EPA must be in the prescribed form under the Enduring Powers of Attorney Ordinance (Cap. 501)
- An EPA must not be general and must specify the Attorney's authority to act.
- An EPA must be registered with the Registrar of the High Court if the Attorney has reason to believe that the Donor is or is becoming mentally incapable



EPAO Prescribed Forms

Form 1

Form 1

Information you must read

1. This form is a legal document that allows you to create an enduring power of attorney (**EPA**). An EPA enables you to authorize another person (**your attorney**) to act on your behalf in relation to your property and financial affairs. You must use this form if you intend to appoint only one attorney. If you become mentally incapable, your attorney will be able to make decisions for you after your attorney has registered this form with the Registrar of the High Court.

2. *(Repealed 13 of 2013 s. 59)*

3. You must complete Part A.

4. **Paragraph 1 of Part A:** You must include the names and addresses of the persons you wish to appoint as your attorneys at paragraph 1 of Part A. The persons you appoint as your attorneys must be over 18 years of age and must not be bankrupt or mentally incapable. Your attorneys do not have to be solicitors. Your attorneys must complete Part B and each of them must sign this form in the presence of a witness.

5. **Paragraph 2 of Part A:** You may include any restrictions you like on the authority you give to your attorney. For example, you may decide to give your attorney authority over all your property and financial affairs, or you may decide to give your attorney authority over only a particular bank account, or a particular piece of property. Instead, you must specify at paragraph 2 of Part A what you authorize your attorneys to do with your property and financial affairs, or the particular property or financial affairs for which you have given your attorneys authority to act. For example, you may decide to give your attorneys authority only for a particular bank account, or a particular piece of property.

6. **Paragraph 3 of Part A:** You may include any restrictions you like on the authority you give to your attorney. For example, you may include a restriction that your attorney must not act on your behalf until your attorney has reason to believe that you are becoming mentally incapable, or that your attorney must not enter into a contract without first seeking legal advice if its value exceeds a specified amount. You should set out these restrictions at paragraph 3 of Part A.

7. Unless you include a restriction preventing it, your attorney will be able to use any of your money or property to make any provision which you might be expected to make yourself for the needs of your attorney or the needs of other persons. Your attorney will be able to use your money to make gifts, but only for reasonable amounts in relation to the value of your money and property.

8. Your attorney may recover out-of-pocket expenses for acting as your attorney. If your attorney is a professional person, such as an accountant or a solicitor, your attorney may charge for any professional services provided when acting as your attorney.

Form 2

Form 2

Information you must read

1. This form is a legal document that allows you to create an enduring power of attorney (**EPA**). An EPA enables you to authorize another person to act on your behalf in relation to your property and financial affairs. You must use this form if you intend to appoint more than one attorney. If you become mentally incapable, the persons you have appointed can act on your behalf after your attorneys have registered this form with the Registrar of the High Court.

2. *(Repealed 13 of 2013 s. 60)*

3. **Paragraph 1 of Part A:**

You must include the names and addresses of the persons you wish to appoint as your attorneys at paragraph 1 of Part A. The persons you appoint as your attorneys must be over 18 years of age and must not be bankrupt or mentally incapable. Your attorneys do not have to be solicitors. Your attorneys must complete Part B and each of them must sign this form in the presence of a witness.

You must also note that if your attorneys are to act jointly, on the death of any one of them this power of attorney becomes revoked under law.

4. You must complete Part A.

5. **Paragraph 1 of Part A:** You must include the names and addresses of the persons you wish to appoint as your attorneys at paragraph 1 of Part A. The persons you appoint as your attorneys must be over 18 years of age and must not be bankrupt or mentally incapable. Your attorneys do not have to be solicitors. Your attorneys must complete Part B and each of them must sign this form in the presence of a witness.

6. **Paragraph 3 of Part A:** You cannot give your attorneys a general authority over all your property and financial affairs. If you do, your EPA will not be valid. Instead, you must specify at paragraph 3 of Part A what you authorize your attorneys to do with your property and financial affairs, or the particular property or financial affairs for which you have given your attorneys authority to act. For example, you may decide to give your attorneys authority only for a particular bank account, or a particular piece of property.





7. **Paragraph 4 of Part A:** You may include any restrictions you like on the authority you give to your attorneys. For example, you may include a restriction that your attorneys must not act on your behalf until they have reason to believe that you are becoming mentally incapable, or that your attorneys must not enter into a contract without first seeking legal advice if its value exceeds a specified amount. You should set out these restrictions at paragraph 4 of Part A.

For 1 Attorney

For more than 1 Attorney

Clause 3: Attorney's Authority

(1) My attorneys have authority to act on my behalf:

- ☐ (a) to collect any income due to me; 
- ☐ (b) to collect any capital due to me; 
- ☐ (c) to sell any of my movable property;
- ☐ (d) to sell, lease or surrender my home or any of my immovable property;
- ☐ (e) to spend any of my income; 
- ☐ (f) to spend any of my capital. (13 of 2013 s. 60) 
- ☐ (g) (Repealed 13 of 2013 s. 60)

(2) My attorneys have authority to act on my behalf in respect of the following property or financial affairs: *[If you want your attorneys to act for you only in relation to some of your property or financial affairs, you must list them here.]*

.....

Clause 4: Restrictions on Attorneys

4. **Restrictions on attorneys**

This enduring power of attorney is subject to the following conditions and restrictions: *[If you want to put conditions or restrictions on the way your attorneys exercise any powers, you must list them here. For example, you may include a restriction that your attorneys must not act on your behalf until they have reason to believe that you are becoming mentally incapable. If you do not want to impose any conditions or restrictions, you must delete this paragraph.]*

Clause 6: Commencement of EPA

Clause 7: Power to Continue

Clause 8: Signatures

6. Commencement of EPA

[This EPA takes effect on the date it is signed before the solicitor in paragraph 8 or 9 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).

7. Power to continue

I intend this enduring power of attorney to continue even if I become mentally incapable.

8. Signatures

Signed by me as a deed *[sign here]*
on *[date]*
in the presence of *[name and address of registered medical practitioner]*
.....

Commencement & Registration of a EPA

If the EPA is specified to commence **IMMEDIATELY** upon signing



The EPA is **VALID** without the need to be registered with the Registrar of the High Court
If the Attorney has reasons to believe that the Donor is or is becoming mentally incapable, must register



If the EPA is specified to commence **UPON** mental incapacity of Donor



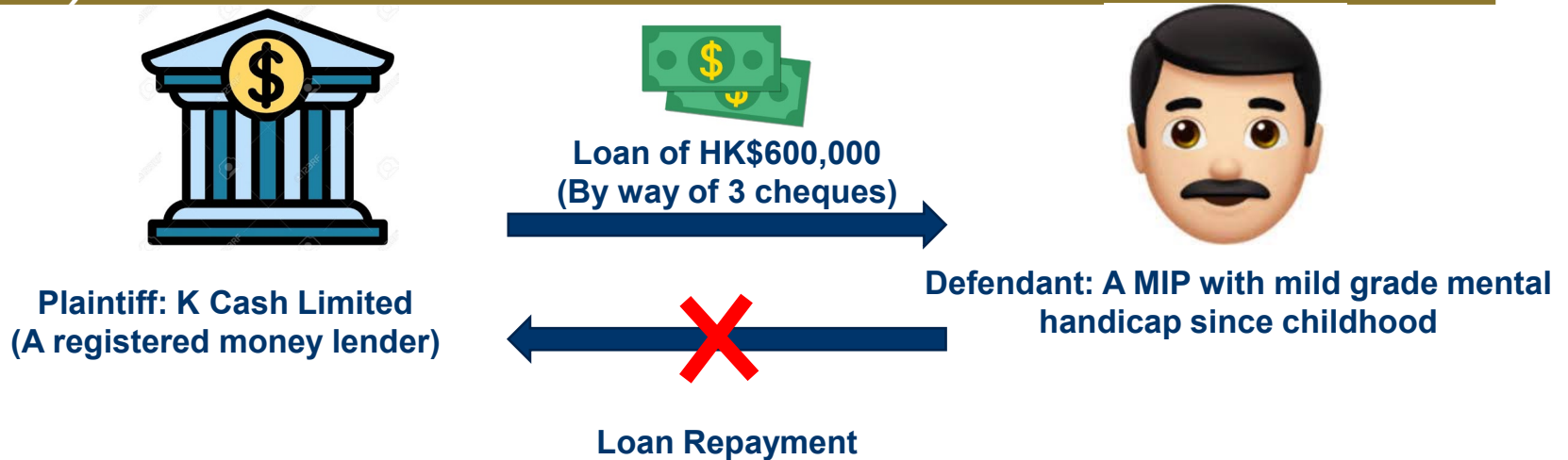
The EPA **MUST** be registered with the Registrar of the High Court



Recent Judgments

- K Cash Limited v So Wang Fung by So Wang Ming his guardian ad litem (CACV 93/2020)
 - Re NLS (HCMH 4/2020) [2021] HKCFI 2203
 - To Lee Wah Samuel v. Yum Huin Ming and Another [2019] HKCFI 1441
-

K Cash Limited v So Wang Fung by So Wang Ming his guardian ad litem (CACV 93/2020)



P sued D for
default in
payment



- Evidence spoke for itself that P knew of the D's mental incapacity
- Loan Agreement was entered into as a result of collusion between P and others (including Chan) to cheat him of the money purportedly borrowed
- Loan Agreement illegal under s.27 of MLO

Held: Loan agreement was unenforceable



Re NLS (HCMH 4/2020) [2021] HKCFI 2203

■ Inquiry under Part II MHO



A widowed elderly man of over 90 years old has 5 children, 4 sons and 1 daughter

- **Issue: Whether NLS is a MIP who is incapable of managing his property and affairs?**

Mental disorder?
Mental illness?

KEY QUESTIONS

- Whether NLS's mental incapacity caused by the mental disorder is serious to the extent that he is incapable of managing and administering his property and affairs?
- Ability to make all decisions relating to his property and affairs?
- An ongoing act and relates to a continuous state of affairs whose demands may be unpredictable and may occasionally be urgent?
- Has the applicant discharged his burden to show that the person is a MIP on balance of probabilities?

Re NLS (HCMH 4/2020) [2021] HKCFI 2203

Court's Reasoning

- **Consensus of the experts:** NLS is suffering from some kind of mental disorder at the material time
 - **NLS had very little idea as to how his money was managed**
 - He is not aware of his monthly expenses and withdrawals
 - He does not have ability to manage his property and said he wants help
 - He leaves his family members to make all decisions relating to his finances
 - **NLS is extremely vulnerable and memory is seriously impaired**
- ➔ **NLS is a MIP.**



To Lee Wah Samuel v. Yum Huin Ming and Another [2019] HKCFI 1441

- P, eldest son challenges validity of 2 EPAs executed by D1, father
- **Issue:** whether father had mental capacity required under s2 Enduring Powers of Attorney Ordinance, Cap 501 for the creation and execution of the EPAs
- **Test:** A person is mentally incapable of executing an EPA if:
 - He is suffering from a mental disorder or mental handicap
 - AND**
 - is (i) unable to understand the effect of the POA
 - OR**
 - (ii) by reason of his mental disorder or mental handicap unable to make a decision to grant a POA



Note: **Different** test from Part II MHO test !

To Lee Wah Samuel v. Yum Huin Ming and Another [2019] HKCFI 1441

Court's Reasoning

- **Plaintiff had failed to discharge the burden**
 - Considered various medical report and expert evidence
 - P unable to prove that father did not have requisite mental capacity to execute the two EPAs
- **Medical assessment and report adduced by P were prepared for purpose of Part II proceedings**
 - The test in assessing mental capacity is different from the current test under EPAO
 - Such evidence were of no use in this application



Thank you for your participation

Any questions?

