

The principle of assessing mental capacity for enduring power of attorney

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ABSTRACT

With Hong Kong's rapidly ageing population, increasing numbers of people now have some form of cognitive impairment. Enduring power of attorney is a legal instrument that can allow individuals to manage their financial matters if they subsequently become mentally incapacitated. The law requires that the mental capacity of the individual making an enduring power of attorney should be certified by a registered medical practitioner and a solicitor. This paper discusses the principles involved in the assessment of mental capacity for making an enduring power of attorney and uses this example to illustrate various important considerations in the

formal assessment of mental capacity.

Hong Kong Med J 2014;20:59–62

DOI: 10.12809/hkmj134128

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Introduction

Case vignette

A 75-year-old man is diagnosed with mild dementia. His score in the Mini-Mental State Examination is 23 out of 30. He is a retired civil servant and lives with his wife, who is physically frail. The couple own the property they are living in and depend on his pension. He is worried that his cognitive function will deteriorate further and hopes that his only son will manage his pension and property when he becomes mentally incapable. How should his medical doctor advise him?

An enduring power of attorney (EPA) is a legal instrument under the Hong Kong Enduring Powers of Attorney Ordinance (Cap. 501)¹ that allows the donor (the person who wishes to give his or her power of attorney to someone) to appoint an attorney(s) to take care of his or her financial matters in the event that he or she subsequently becomes mentally incapacitated.² Conventionally, a power of attorney is only made by individuals who are mentally capable and the power of attorney lapses if the donor subsequently becomes mentally incapable. In contrast, an EPA is a special type of power of attorney that continues to have effect after the donor becomes mentally incompetent.² Its key advantage is that it allows individuals to extend their autonomy and to choose someone to look after their affairs if the donor becomes incapable of doing so in the future. For example, if a donor has a known set of values, an EPA can allow a substitute to make decisions based on his or her values. Therefore, an EPA is regarded as a useful tool for extending autonomous decision-

making power in the event of mental incapacity.

With Hong Kong's rapidly ageing population, the rates of cognitive impairment and dementia are increasing.³ Because the elderly in Hong Kong tend to have accumulated their own wealth and assets, the utility of an EPA in the context of elderly care has increasingly been recognised. Recently, the Hong Kong Mortgage Company Limited launched an initiative to encourage existing borrowers and new applicants to consider arranging for EPAs to handle their financial transactions.⁴ Thus, EPAs are expected to become more popular as people become more aware of their use.

The donors of EPAs are typically persons who are concerned that in the event that mental capacity deteriorates in future, they may be subject to undue influence and/or impaired judgement. To safeguard against abuses of EPAs, Section 5(2) of the Enduring Powers of Attorney Ordinance (Cap. 501) requires a registered practitioner and a solicitor to certify that the donor is mentally capable of executing (making) an EPA.¹ This paper discusses an approach to assessing an individual's mental capacity in making an EPA. We hope that this approach will also serve as a useful framework for formal assessments of mental capacity.

Assessing mental capacity in making an enduring power of attorney

Mental capacity denotes the ability to make decisions. It is pivotal in balancing the duty to maximise the autonomy of the vulnerable individual. Safeguarding the autonomy of a mentally capable person is as important as protecting the rights of a

簽立持久授權書時的精神行為能力的評估原則

雷永昌、趙宗義、高淑芬、林翠華

隨着香港人口急速老化，越來越多人有某種形式的認知功能障礙。持久授權書是一份法律文件，如果授權人其後變為精神上無行為能力，仍能根據其意願管理財產。法律規定，簽立持久授權書者必須由一名註冊醫生及一名律師核證其當時具精神上行為能力。本文討論了簽立持久授權書時的精神行為能力的評估原則，並利用例子說明正式評估精神行為能力時各種重要的考慮因素。

mentally incapable person. Although legally, a single test is used for mental capacity versus incapacity, the consequences of its certification can be very different. If the patient is found incapable of making a decision, protection is needed. The best interests approach or proxy consent from a legal guardian who has been vested with appropriate powers under the Mental Health Ordinance may apply.⁵ However, if the patient is certified to be mentally capable, he or she will be responsible for his or her behaviour or choices. Therefore, assessment of mental capacity must be performed with great care.

Mental capacity should be distinguished from functional or physical capacity, as impairment leads to different kinds of interventions. For instance, a donor who has a stroke may be mentally capable but physically unable to sign an EPA because of limb weakness. Section 5(2)(b) of the Enduring Powers of Attorney Ordinance (Cap. 501) provides that donors can ask others to sign on their behalf, if they cannot sign because of physical disability.¹

Section 5 of the Enduring Powers of Attorney Ordinance (Cap. 501) does not impose any restriction on the solicitors or registered medical practitioners who can carry out the certification. However, the certifying practitioners should be aware of the relevant legal criteria according to the requirements specified in Section 2 of the Enduring Powers of Attorney Ordinance (Cap. 501). In complex cases or when mental illness is present, it may help to seek advice from a psychiatrist.

Preparing for formal assessment of mental capacity

The preparatory work before an assessment is important but can be very variable, depending on the complexity of the case or the EPA. Before the assessment, it is essential that the practitioner gathers all the necessary information relevant to the decision. In general, the decisions to be made in an EPA include assigning the attorney and stating their powers. Understanding the health condition of the donor can help facilitate the interview and assessment arrangements. If the donor has difficulty communicating, the certifying practitioner should

ensure that suitable communication aids are available. For example, if the donor has a hearing impairment or speaks a dialect, a hearing aid or interpreter may be needed. If the donor has a mental disorder, prior psychiatric assessment can help provide information on his or her mental capacity and stability. Additional information from a reliable informant may also be needed to complete the psychiatric assessment. However, caution is necessary in regard to confidentiality and any potential conflicts of interest relating to the EPA.

The EPA to be executed should be explained clearly to the donor before the mental capacity assessment. A solicitor who has a good understanding of EPAs is usually the most appropriate person for this job. During the mental capacity assessment, the donor may forget relevant information about the EPA that may require re-explanation. Therefore, it is more expedient for the solicitor and the registered medical practitioner to assess the donor's mental capacity on the same occasion rather than having separate interviews.

Mental capacity is task-specific, which means that the mental capacity required to create an EPA is not the same as the capacity needed to manage one's property and financial affairs. An individual's mental capacity should not be judged based on his or her age and/or appearance. Mental capacity is also time-specific, focusing on the particular time when a decision is made or has to be made. These characteristics of mental capacity are generally accepted in the literature^{6,7} and endorsed by courts.⁸ The time and task requirements for making an EPA are further discussed in the coming sections.

Some practitioners may wish to assess the donor's general cognitive function, which is generally measured with the Mini-Mental State Examination (MMSE). Gregory et al⁹ found that the degree of cognitive impairment as measured by the MMSE correlated significantly with the capacity to make an EPA as assessed by a structured interview. However, given the complex nature of mental capacity in making individual EPAs, there is no literature supporting the isolated use of the MMSE or similar measures for assessing mental capacity. These kinds of cognitive assessment scales cannot by themselves prove an individual's mental capacity nor replace clinical judgement.

When the assessment should be performed

There are different legal requirements for registered medical practitioners and solicitors regarding the time of mental capacity certification in relation to the execution of an EPA. Section 5(2) of the Enduring Powers of Attorney Ordinance (Cap. 501) requires that an EPA should first be signed before a registered medical practitioner and that the donor

and the solicitor should then sign the EPA within the next 28 days.¹ Simultaneous legal and medical assessment at the time an EPA is made can be costly and, in some circumstances, too onerous for some individuals, such as an elderly person or someone with mobility problems. The “28 days” provides a degree of flexibility and facilitates completion of this legal instrument.

It is worth noting that compliance with these time requirements does not necessarily prevent others from challenging the validity of an EPA in the future. If an EPA is signed by a donor who lacks sufficient mental capacity, it will be void and of no effect. The mental capacity of a donor, especially if he or she is a frail elderly person, can fluctuate for a variety of reasons, including delirium and mood change. If there is reason to believe that a donor’s mental capacity may fluctuate or deteriorate, the mental capacity assessment by the registered medical practitioner should be done simultaneously with the certification by the solicitor at the time of execution.

Assessment of tasks required in making an enduring power of attorney

The legal test of mental incapacity for the creation of an EPA is defined under Section 2 of the Enduring Powers of Attorney Ordinance (Cap. 501)¹ and Section 1A of the Powers of Attorney Ordinance (Cap. 31).¹⁰ In essence, the certifying practitioner should be satisfied that: the donor understands the implications of an EPA, is capable of making the decision, and is able to communicate his or her wish to grant an EPA.

It is useful to note how the courts have assessed mental capacity for EPA. Although there is no case law in Hong Kong, in the United Kingdom, the degree of understanding required to create an EPA was considered in *Re K, Re F*.¹¹ According to this ruling, the donor should understand the following four pieces of information:

- if such be the terms of the power, that the attorney will be able to assume complete authority over the donor’s affairs;
- if such be the terms of the power, that the attorney will in general be able to do anything with the donor’s property which the donor could have done;
- that the authority will continue if the donor should become mentally incapable; and
- that if he should be or becomes mentally incapable, the power will be irrevocable without confirmation by the court.

These criteria are considered to be the basic requirements for confirming that the donor understands the nature and effect of the EPA.^{7,12} There are several considerations in applying this test. First, the complexity of each EPA case is different.

Based on these legal criteria, practitioners should prepare their own questions for individual EPA donors. Second, the practitioner should avoid only asking closed questions, such as “Do you understand that your attorney will be able to assume complete authority over the donor’s affairs?” In this case, a “Yes” or “No” reply would provide little information for establishing mental capacity. The practitioner should try to ask open questions such as “What will your attorney do with your affairs?” The donor’s answers should be recorded verbatim. Third, it is possible that the criteria are too general and do not cover the modifications in a particular EPA. For example, the donor may impose restrictions on the EPA, such that the attorney can only manage specific affairs such as the mortgage on the donor’s property. In which case, the practitioner should specifically clarify that the donor understands the restriction on the attorney’s specific powers (authorities) and their effects.

More importantly, the *Re K, Re F* test does not directly address whether the donor is mentally capable of making the decision to create an EPA as required in the Enduring Power of Attorney Ordinance (Cap. 501). There is no consensus on how the donor’s answers should be analysed to determine or establish his or her mental capacity in making an EPA. One useful approach can be found in the literature, where mental capacity is conceptualised as consisting of four decision-making abilities. These are: the ability to understand relevant information, the ability to appreciate the situation and its consequences, the ability to reason about different options, and the ability to communicate a choice.¹³ The applicability of assessing these decision-making abilities has been evaluated in the local population in relation to various decisions.^{14,15} The certifying practitioners can evaluate and comment on the performance of the donor in relation to each decision-making ability, which can then be used to support the assessment of mental capacity.

Forming conclusions on mental capacity

There are no hard and fast rules for making a definite conclusion on mental capacity. In the context of medical treatment, the determination of mental capacity has been described as “a societal judgment about the appropriate balance between respecting the patient’s autonomy and protecting the patient from consequences of a bad decision.”¹⁶ This balancing process is also required in the creation of an EPA, as the required level of performance in assessing each decision-making ability is at once a value judgement. If the consequences of a donor’s decision to make an EPA are very serious or risky, a higher level of decision-making abilities will be required. Therefore, the required standard for mental capacity is context-dependent and should be tailored to the needs of the

individual case.

Documenting the assessment

The certification of mental capacity requires the legal and medical practitioners to duly sign a prescribed form under the Enduring Powers of Attorney (Prescribed Form) Regulation (Cap. 501A).¹⁶ The certifying practitioner should write his or her full name, address, and the date appropriately on the form. However, the certifying practitioner should also be prepared to produce the evidence used to establish the donor's mental capacity some years later in case of future dispute or challenge in court.

One good example can be found in testamentary capacity where certification of one's mental capacity is not mandatory. In *Kenward v Adams* (1975), Justice (later Lord) Templeman stated that:

*In the case of an aged testator or a testator who has serious illness, there is one golden rule which should always be observed, however straightforward matters may appear, and however difficult or tactless it may be to suggest that precautions be taken: [the rule is that] the making of a will by such a testator ought to be witnessed or approved by a medical practitioner who satisfies himself of the capacity and understanding of the testator, and records and preserves his examination and finding.*¹⁷

In addition to the formal assessment of mental capacity by a medical practitioner, the judge expects that the examination and findings should be recorded. This expectation illustrates the role of practitioners as expert witnesses in a formal forensic assessment. The practitioner's evidence should be able to help a judge make a proper determination of mental capacity in any future dispute.

Conclusions and recommendations

An EPA is a useful legal instrument that can extend the autonomy of a donor to a time when he or she is no longer mentally capable. Although the use of EPAs should be encouraged, the certification of mental capacity should be performed appropriately. In regard to the case vignette, the MMSE score neither proves nor disproves the patient's mental capacity. Some degree of general cognitive impairment does not specifically indicate whether or not a patient is mentally capable to make an EPA. Therefore, in this case, if the patient were able to clearly understand the nature and effect of an EPA, he should be advised to seek legal advice on making an EPA. A solicitor and a registered medical practitioner would be required to certify his mental capacity. Before the mental capacity assessment, the EPA to be executed should be explained to him clearly. Evaluating his decision-making abilities relevant to the EPA (to be executed) may help in establishing the mental capacity. Proper

documentation of the assessment is essential. In complicated cases or where mental illness is present, psychiatric consultation should also be considered.

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