

Series on Family disputes relating to mental capacity issues – Managing the property and affairs of persons with mental incapacity

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“My husband had a stroke and has been hospitalised for many months. Our two young children and I are financially dependent on him. My husband’s hospital bills are mounting up and I am unable to gain access to his assets. What can I do?”

In Hong Kong, the Mental Health Ordinance (Cap.136) (**MHO**) is the key legislation which offers protection to mentally incapacitated person(s) (**MIP(s)**) regarding their healthcare, medical treatment and management of their financial affairs.

Specifically, Part II of the MHO empowers the Court to appoint a Committee to manage the property and financial affairs of a person who has been certified by doctors as being unable to do so by reason of their mental incapacity.

Assuming that a MIP has not signed a valid Enduring Power of Attorney (**EPA**), his/her family members can make an application to the Court to be appointed as the Committee under Part II of the MHO, to manage the MIP’s property and financial affairs. In highly contentious family disputes or where there is alleged improper dealing of assets, an independent Professional Committee (usually comprised of lawyers or accountants) may be appointed.

The application must be supported by two medical certificates, at least one of which must be by an approved doctor under s.2(2) of the MHO, certifying that the MIP has lost his/her mental capacity.

It is important to note that the Committee’s powers are derived from Court Order(s). Such powers include, but are not limited to, the power to receive income and benefits for the MIP, use the MIP’s money for the MIP’s maintenance and benefit, open the MIP’s safe deposit boxes and take possession of the MIP’s powers of attorney, wills and codicils.

The Committee may also seek specific powers from the Court to, for example:-

- manage, lease or sell the MIP’s landed properties;
- institute legal proceedings against the MIP’s tenant to recover outstanding rent or to recover damages in a personal injury claim; and
- obtain sanction from Court on approval of settlement under Order 80 of the Rules of High Court (Cap. 4A).

While exercising the above powers, the Committee must act in the MIP’s best interests at all times. The Committee must also report to the Court on how they have been managing the MIP’s estate by preparing annual accounts. When the MIP recovers or passes away, or when another Committee is appointed, the Committee’s powers will cease.

The appointment of a Committee not only ensures that the MIP is well provided for and that his/her assets are well protected, it also relieves his/her family from financial stress by giving them access to his/her estate.

Having said that, the appointment of a Committee can be avoided where the MIP had validly executed an EPA with appropriate authorities given to trusted person(s) whilst he/she still had mental capacity. An EPA made under the Enduring Powers of Attorney Ordinance (Cap. 501) enables a mentally capable person (i.e. donor) to appoint and authorise other person(s) (i.e. attorney(s)) to manage his/her property and financial affairs if he/she becomes mentally incapacitated. Please stay tuned for our next article for more about EPA.

Our Vulnerable Client Team at Deacons is experienced in guiding families through the legal framework to protect persons without mental capacity. Please reach out to us if you would like to know more.

Want to know more?

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