

## Guideline on Banking Services for Persons with Dementia – Fine balance between autonomy and protection

Sherlynn Chan and Hazel Wong

The Hong Kong Association of Banks (HKAB) issued a new Guideline on Banking Services for Persons with Dementia on 10 December 2021 (Guideline). The Guideline is applicable to all banks providing retail banking services and aims to ensure that persons with dementia can continue to enjoy banking services while protecting their assets in banks and promoting good management of their banking affairs.

### Background

The Guideline was introduced in light of Hong Kong's ageing population and the increasing number of elderly who are affected by dementia – a progressive deterioration of cognitive functioning of the brain, affecting amongst other things, the ability to make complex decisions and which interferes with daily activities.

The Guideline provides retail banks with principles to follow in dealing with customers with dementia and allows the banks to provide basic banking services to persons with dementia with withdrawal and transfer limits so that such customers can continue to maintain autonomy in handling their daily expenses, while the more substantial assets and funds are protected and accessible only by the duly appointed Attorney under an Enduring Power of Attorney (EPA). Banks are also required to take appropriate protective measures, including not to promote any investment, insurance, MPF, credit card or credit facility products to customers suffering from dementia.

The Guideline aims to strike a balance between offering adequate protection to persons with dementia while respecting their autonomy and freedom, which is often a difficult line to draw. For those who retain some mental capacity, the Guideline promotes assisted decision-making, meaning that persons with dementia are supported and assisted in making their own financial decisions, insofar as practicable. This is contrasted with substitute decision-making, where all financial decisions are made on behalf of a mentally incapacitated person (MIP) who has lost decision-making abilities to manage his/her financial affairs by reason of mental incapacity.

Furthermore, the Guideline is particularly useful in light of the risks of elderly financial abuse, both generally and in the context of banking services, as trading or investment scams and cases of transferring assets of the elderly without consent are on the rise.

### Current legal framework in Hong Kong

The cornerstone legislation in Hong Kong on mental capacity related issues is the Mental Health Ordinance, Cap 136 (MHO), which was enacted in 1962. It consolidates all previous laws relating to the protection of mentally incapacitated persons in respect of their healthcare, medical treatment and management of their property and affairs.

Part II of the MHO deals with the management by a Court appointed Committee of the property and financial affairs of a person who, after being certified by doctors that by reason of their mental incapacity, is unable to manage their own financial affairs.

Usually family members are appointed, but in highly contentious family disputes or where there is alleged improper dealing of financial assets, an independent Professional Committee (usually lawyers or accountants) may be appointed. The Committee is under the supervision of the court and is required to submit annual accounts with supporting invoices to ensure that funds of the person without mental capacity are not being used improperly.

It is also possible for a person with mental capacity to execute an EPA under the Enduring Powers of Attorney Ordinance, Cap. 501, to appoint Attorney(s) to manage specific financial affairs in case the person suffers from mental incapacity at a later stage.

### **Recent Court cases**

In recent years, the court has dealt with more and more cases involving MIPs and banking service providers, which brings into light the importance of mental health, the elderly and capacity law in the banking and finance industries.

In *Dynamic Assets Management Ltd v Choi Chau Chung by Choi Lam Hung, Guardian ad Litem* (HCA 1566 of 2015), Dynamic Asset Management Limited (Dynamic Asset) was a registered money lender. In 2015, Dynamic Asset entered into a loan agreement with Mr. Choi, the defendant borrower, under which a loan of HK\$1.5 million was advanced to Mr. Choi (Dynamic Asset Loan Agreement). At the relevant time, Mr. Choi was aged 74 years old and had been diagnosed with dementia. Dynamic Asset claimed against Mr. Choi for his default under the Loan Agreement, and in defence it was argued that Mr. Choi was mentally incapacitated at the time of signing the Dynamic Asset Loan Agreement and could not understand the nature and effect of it. It was further argued that such mental incapacitation was apparent to any persons dealing with Mr. Choi, and Mr. Choi was being manipulated. The judge found on a balance of probabilities that Mr. Choi was not ostensibly sane and that Dynamic Asset knew, or ought to have known of his incapacity. Consequently, the loan was unenforceable and illegal.

In *K Cash Limited v So Wang Fung by So Wang Ming his guardian ad litem* (CACV 93/2020), K Cash Limited (K.Cash) was a licensed money lender. In 2014, a Mr. Chan who befriended the Defendant told the Defendant he could borrow money on their behalf, and persuaded and arranged for the Defendant to enter into a Loan Agreement for HK\$600,000 (K.Cash Loan Agreement). At the relevant time, the Defendant was a MIP who was capable of performing the ordinary activities of daily living but vulnerable to exploitation by others and mentally incapable of managing and administering his property and affairs. K.Cash commenced proceedings when the Defendant failed to make any repayments and the District Court held that the Defendant entered into the K.Cash Loan Agreement as a result of collusion between K.Cash and others (including Chan) to cheat him of the money purportedly borrowed. In upholding the decision, the Court of Appeal held that the evidence spoke for itself that the Plaintiff knew of the Defendant's incapacity and that the K.Cash Loan Agreement was therefore illegal and unenforceable against the Defendant under s.27 of the Money Lenders Ordinance.

From these two cases, we can see how prevalent financial abuse in relation to MIPs is and the recent approach of the court.

### **The fine balance between autonomy and protection**

Since dementia is a progressive disease and mental capacity is time and task-specific, it is possible for early-stage dementia patients to retain a certain level of mental capacity which allows them to perform simple transactions such as paying for groceries and other daily necessities.

Hence, persons with dementia also need to access basic banking services to meet their daily needs. In view of the prevalence of dementia across the elder population in Hong Kong, it is important for banks to account for the different needs of persons affected by dementia and ensure their financial assets are adequately protected.

Based on the current legislation, it is important for the general public and financial institutions to be aware of these risks and seek proper legal advice in the administration and management of the financial affairs of persons without mental capacity.

While persons with early dementia may benefit from the scheme under the Guideline, in the absence of a validly executed EPA, applications under Part II of the MHO will still be required for those who are certified to have lost their mental capacity in managing their property and affairs to ensure that their assets are protected and properly managed under the court's supervision.

## Conclusion

Our Vulnerable Client and Private Wealth practice welcomes the publication of the Guideline (<https://www.hkab.org.hk/DisplayArticleAction.do?sid=5&ss=31>) and believe this is a positive way forward for both the banking and legal industries as well as the general public. Retail banks are given 12 months to formulate operational details and implement the recommendations included in the Guideline. We hope that the Guideline will increase public awareness of mental capacity issues in light of the pressing phenomenon of an ageing population.

## Want to know more?

**Sherlynn Chan**

**Partner**

sherlynn.chan@deacons.com

+852 2825 9328

**Paul Kwan**

**Partner**

paul.kwan@deacons.com

+852 2826 5354

**Cecilia Lau**

**Consultant**

cecilia.lau@deacons.com

+852 2826 5330

The information contained herein is for general guidance only and should not be relied upon as, or treated as a substitute for, specific advice. Deacons accepts no responsibility for any loss which may arise from reliance on any of the information contained in these materials. No representation or warranty, express or implied, is given as to the accuracy, validity, timeliness or completeness of any such information. All proprietary rights in relation to the contents herein are hereby fully reserved.

0222 © Deacons 2022

[www.deacons.com](http://www.deacons.com)