

Japan Elder Law Society Online Symposium

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Managing Incapacity in Hong Kong vs Singapore

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2 areas of decision-making

	Hong Kong	Singapore
1. Personal Welfare	Guardians (Guardianship)	Deputies (Deputyship); Donees (Lasting Power of Attorney)
2. Property & Affairs	Committee (Committee of Estate); Attorneys (Enduring Power of Attorney)	

Hong Kong

	Scope
Guardianship	Personal Welfare Six powers of guardians including residence, medical and dental treatment, power to manage USD2,300/month for maintenance of the mentally incapacitated person
Committee	Property & Affairs Time-consuming and costly court procedure; For mentally incapacitated persons who are relatively well-off
Enduring Power of Attorney	Allows the donor, while he is still mentally capable, to appoint attorney(s) to take care of the donor's financial matters in the event that he subsequently becomes mentally incapacitated

Mental incapacity test

Hong Kong		Singapore
Different tests of mental incapacity in different contexts		Unified test in MCA, s5(1)
Committee of estate	whether a person is incapable , by reason of mental incapacity, of managing and administering his property and affairs	(a) to understand the information relevant to the decision; (b) to retain that information; (c) to use or weigh that information; or (d) to communicate his or her decision
Guardianship	whether a person has been limited by mental disorder or mental handicap in making reasonable decisions in respect of all or a substantial proportion of the matters which relate to his personal circumstances	
Medical and dental treatment	whether a person is incapable of understanding the general nature and effect of the treatment or special treatment	
→ incoherent and inconsistent		

Best-interests framework

Hong Kong	Singapore
<p data-bbox="249 505 777 551">Guardianship / Committee:</p> <p data-bbox="249 619 1121 836">Guardian/committee's own views and beliefs concerning the best interests of the mentally incapacitated person; Substituted decision-making</p>	<p data-bbox="1212 505 2313 719">Statutory best-interests principle: MCA, s3(5): an act done, or a decision made, for or on behalf of a person who lacks capacity must be done, or made, in his best interests.</p> <p data-bbox="1212 791 2237 951">Best-interests framework: MCA, s6: eg take into account his past and present wishes and feelings; the beliefs and values</p> <p data-bbox="1212 1022 2288 1236">Statutory supported decision-making principle: MCA, s3(3): a person is not to be treated as unable to make a decision unless all practicable steps to help the person to do so have been taken without success.</p>

Recent developments in Hong Kong

- Reforming Enduring Power of Attorney
- Launching Special Needs Trust

Proposed new Continuing Power of Attorney Ordinance

- Major changes:
 - (1) Expands scope of authority to cover decisions in relation to a donor's personal welfare (in addition to property and financial affairs)
 - (2) Promotes respect for wishes of the donor

Enduring Power of Attorney

Proposed Continuing Power of Attorney

(1) Expands scope of attorney's authority

Only property and financial matters

Property and financial matters + **Personal welfare matters**

Non-exhaustive authority to:-

- decide on donor's accommodation, education / training; work; holidays;
- legal matters re personal care;
- access and share donor's record for the purpose of providing healthcare, & give consent to such access or sharing

No authority to decide on certain major medical decisions (eg life-sustaining treatment; organ donation or sterilisation; advance directive)

Possible to confer a **general power** in relation to all of the donor's property and financial matters

(2) Promotes respect for wishes of donor

No reference to ascertaining the will and preference of donor

- **act in donor's best interest, taking into account his ascertainable wishes and feelings**
- **consult caregiver and person nominated by donor to be consulted**

Conclusion

Singapore MCA 2008:

- unified statutory test for mental incapacity
- introduced a new planning regime with lasting power of attorney → allows pre-planning before loss of mental capacity
- replaced court-appointed committee of estate with deputyship application for people without LPA
- professional deputies and donees for people without family members or close friends to rely on to be their proxy decision makers; regulated by the Office of Public Guardian

Hong Kong:

- no overarching statutory framework such as the MCA
- some reforms in the pipeline