

Hong Kong's mental capacity regime for protecting property and affairs

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Introduction

As with many countries, Hong Kong's population is rapidly ageing. The proportion of the population aged 65 and over is projected to rise from 13% in 2011 to 30% in 2041, during which time the median age is expected to rise from 41.7 to 49.9. Life expectancies in Hong Kong are also projected to increase and unsurprisingly perhaps, local studies indicate that the prevalence rate of dementia has also increased and will continue to do so over the coming years. One study in 2012 predicts that the prevalence of dementia in Hong Kong in people aged 70 years or above will increase from 103,433 in 2009 to 332,688 in 2039.

This changing demographic profile raises the need for effective and efficient long-term care and support systems for the elderly. One aspect of this is how a person's property and affairs are protected and managed when they lose mental capacity. Whilst these issues are not unique to the elderly population, the statistics above indicate that they are nevertheless particularly relevant. In Hong Kong, unless a mentally incapacitated person ('MIP') executed an enduring power of attorney (which, before the person loses mental capacity, appoints someone to deal with their property and affairs after they lose mental capacity), decisions relating to her property and affairs may be determined by the court which might appoint a committee to manage them.

Our professional experience is that the appointment of committees is becoming increasingly common, particularly in relation to high net worth and ultra-high net worth individuals. The picture is complicated by the fact that very often the assets of the MIP

include significant holdings in family companies, some of which have not been run in the manner which one may otherwise expect of very valuable companies. The result is that the committee is often made up of independent accounting professionals who can bring relevant skills to the committee.

This article considers the effectiveness of Hong Kong's regime in protecting MIPs in relation to their property and affairs (assuming that an enduring power of attorney was not executed). Comparisons will be drawn with equivalent regimes in Singapore and the UK (which are broadly similar to each other) to show that the regime in Hong Kong has not developed in the same way both in terms of its legislative framework and its practical implementation. Whilst Hong Kong courts seem to be influenced by UK cases on mental health protection, it is submitted that government policy-makers will need to direct greater attention to these matters as time goes on in order to provide more effective protection for the growing elderly population. Reported cases show that the current system is open to deliberate or inadvertent abuse and the anticipated rise in the number of MIPs demonstrates the increasing significance of this area.

Determining mental incapacity

In Hong Kong, the law relating to the management of the property and affairs of an MIP is contained in the Mental Health Ordinance ('MHO'). For the purposes of this article, an MIP is defined as 'a person who is incapable, by reason of mental incapacity, of managing and administering his property and affairs'. 'Mental incapacity' means a mental disorder or a mental handicap. The latter essentially refers to

someone with an IQ of 70 or below. 'Mental disorder', on the other hand, is defined as:

- (a) a mental illness;
- (b) a state of arrested or incomplete development of the mind amounting to significantly impaired intelligence and social functioning associated with abnormally aggressive or seriously irresponsible conduct;
- (c) psychopathic disorder; or
- (d) any other disorder or disability of mind which does not amount to mental handicap.

The various categories of mental incapacity seem rather vague; for example, it is not clear what constitutes a 'mental illness' and how that differs from the other categories. What is clear; however, is that mental incapacity is a broad concept. This is not without potential difficulties as the consequences of determining that a person lacks mental capacity are significant: an MIP may lose the right to make personal decisions ranging from daily decisions, such as which bank account to use for paying household expenses, to major ones, such as whether to buy or sell property. In light of this, some suggest it is important that legislation ensures that persons with decision-making disability are afforded as much autonomy as possible. In this respect, the MHO curbs any unnecessary interference with an MIP's rights by requiring that she must also be incapable of administering her property and affairs as a result of her mental incapacity before the MHO can apply. However, unfortunately, the test does not make any allowance for the fact that decisions relating to property and affairs are extremely wide ranging. Whilst an MIP may have capacity to decide whether to continue living in a property and paying rent on it, she may not have capacity to decide whether to make a business loan, or who should benefit under her will. The MHO's all-or-nothing approach to determining MIP status risks taking away an MIP's ability to make decisions on matters in relation to which she may have the capacity to decide.

In Singapore, the test for MIP status is more nuanced. The relevant legislation is the Mental Capacity Act 2008 ('MCA 2008') which is based on, and similar to, the UK's Mental Capacity Act 2005 ('MCA 2005'). Both statutes provide that a person lacks capacity 'in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain'. Therefore, unlike the MHO, MIP status under the MCA is assessed according to the ability of a person to make a specific decision about a matter at the time that that decision needs to be taken, rather than an ability to make decisions in general. This means that a person who does not have capacity to determine complex financial matters should still be allowed to decide more straightforward ones if they are within her decision-making abilities.

In practice, this may not always be achieved to full effect. As explained below, the court, when determining what to do in relation to an MIP's property and affairs may appoint a deputy to make decisions on the MIP's behalf. If so, the court will have to define the scope of the deputy's decision-making powers and in this situation, the Singapore court in *Re BKR* [2013] SGHC 201 noted that it may not always be possible to carve out specific decisions and that 'the court may on occasion have to err on the side of generality'. Therefore, in practice, the form of order appointing the deputy may not always be any more precise than one made under the equivalent regime in Hong Kong. However, the effectiveness of the 'issue-specific' approach in protecting autonomy should not be underestimated as it is still a high hurdle for intervening with an MIP's property and affairs.

Dealing with property and affairs

Once MIP status is determined, the regimes in Hong Kong, Singapore and the UK are broadly similar in that the courts may make a decision regarding that person's property and affairs. This can include appointing another person (or persons) to make a decision, or decisions, on the MIP's behalf. In Singapore and the UK, this appointed

decision-maker is known as a 'deputy'. In Hong Kong, one or more persons may be appointed and they are referred to as a 'committee'. Where the court makes such appointment, it must define the scope of the deputy or committee's powers and the deputy or committee can only act within the terms of the appointing court order. Any decision beyond the powers conferred in the order requires court approval.

Appointment of deputies and committees

Under the MHO, the court appears to have a broad discretion to 'do or secure the doing of all such things as appear necessary or expedient' for administering the MIP's affairs. This includes decisions regarding the maintenance or benefit of the MIP, her family or any other person for whom she might be expected to provide (s 10A(1), MHO). In performing this function, the court must have regard 'as a paramount consideration, to the requirements of the mentally incapacitated person' (s 10A(2), MHO).

The 'requirements' of the MIP are undefined and some cases suggest that the courts tended to focus on material considerations. For example, in *Re CS* [2005] HKEC 1852, the court appointed the Official Solicitor as the committee instead of the MIP's wife. This was because considering the wife's application would involve investigating allegations of her unsuitability for the role which would 'entail a lengthy trial and the legal costs involved would be significant'. Whilst appointing the wife might save the costs of managing the estate charged by the Official Solicitor, those costs were unlikely to be significant. On the other hand, the estate would be 'substantially depleted by the legal costs pertaining to the trial'.

The advantage of adopting a cost-benefit analysis is that the court ensured that the MIP's assets were preserved for their maintenance. However, the individuals concerned may effectively lose the right to make decisions affecting their property and affairs as no enquiry of their views or wishes is made. Whilst it might be argued

that material well-being is more important than less tangible values such as autonomy, the approach adopted in Singapore and the UK suggests that respecting the individual's views and wishes does not necessarily undermine asset preservation. In this respect, the regime in Hong Kong could go further.

Under the MCAs, greater emphasis is placed on the MIP's own wishes and views when determining whether and who to appoint as deputy. In particular, the court (and any other decision-maker) must act in the MIP's 'best interests' which is defined by way of a checklist of matters the decision-maker must consider, or steps she must take. These include considering, so far as is reasonably ascertainable, the MIP's past and present wishes and feelings; and the beliefs, values and other factors that would be likely to influence her decision if she had capacity. These provisions are consistent with the principle of minimal interference with the MIP's autonomy and the requirement to take into account present wishes, even if irrational or unfounded, is particularly illustrative of this (*Re BKR* [2013] SGHC 201, para [157]).

Further, recent UK cases indicate that, whilst the MIP's best interests are paramount, having her views and wishes respected is a significant aspect of this. For example, in *Re S (Protected Persons)* [2010] 1 WLR 1082, the court held that neither of the MIPs' (who were married) daughters could be their sole deputy even though the daughter making the application had been capably administering her parents' property and affairs for a number of years. This was because the MIPs had expressed, by means of an enduring power of attorney, that they wished the daughters to act jointly, rather than jointly and severally. Whilst the enduring power of attorney was valid, its exercise became impracticable in the absence of jointly appointed attorneys who were willing to act together. The court held that where an MIP expresses a wish that is not irrational, impractical or irresponsible:

'... that situation carries great weight, and effectively gives rise to a presumption in favour of implementing those wishes, unless there is some

potential sufficiently detrimental effect for P of doing so which outweighs this Given the policy of the Act to empower people to make their own decisions wherever possible, justification for overruling P and “saving himself from himself” must, in my judgment be strong and cogent’.

Compared to *Re CS*, *Re S* suggests a more holistic approach to determining best interests.

It is noteworthy that recent Hong Kong cases seem influenced by UK law on this point. In *Re THM* [2008] HKEC 1343, the court considered extracts from ‘Haywood and Masey: Court of Protection Practice’ including:

‘... the criteria as established by the authorities that should be taken into account. They include . . . the patient’s own wishes and feelings . . . [and] love, devotion and affection between the committee and patient ...’.

The court held that in light of the bitterness between the MIP’s second wife and his son, neither would be appointed as his committee. The court was concerned that the appointment of either one of them would prevent access to the MIP by the other. Therefore the Official Solicitor was appointed so that both camps could continue visiting and supporting the MIP. This suggests a move towards greater respect for the MIP’s autonomy although it is suggested that the MIP’s views would still be better protected if such considerations were built into the legislative framework.

Supervision of committees and deputies

Regarding the performance of their duties, the courts in Hong Kong, Singapore and the UK have made it clear that committees and deputies owe fiduciary duties to the person whose property and affairs they manage. For example, in *Re MFY* [2006] HKEC 1818, the Hong Kong court held that one of the committee members, who was a solicitor, breached his fiduciary duty to avoid potential conflicts of interest by

engaging his firm to act for the MIP in relation to his property and affairs. Likewise, in *In the Matter of Buckley* [2013] EWHC 2965 (COP), the English court held that an attorney breached her duty to act in her aunt’s best interests by making ‘a highly unsuitable investment’ of her funds in a reptile breeding business. The court suggested that, whilst not expressly applicable to attorneys, they should comply with the requirements of the Trustee Act 2000 to obtain and consider proper advice regarding investments, having regard to the standard investment criteria (ie suitability and the need for diversification). Whilst equivalent provisions do not appear in Hong Kong’s Trustee Ordinance, this high duty expected of deputies in relation to investments may influence a Hong Kong court considering similar issues.

In light of the strict duties imposed on committees and deputies, Singapore and the UK have introduced a detailed Code of Practice, as well as separate guides for deputies, explaining how the MCAs apply. In both jurisdictions, the office of the Public Guardian was also established to, amongst other functions, supervise deputies and investigate any alleged violation of the MCAs. The Public Guardian’s functions are also supported by ‘visitors’ whose role is to visit MIPs or their deputies to ensure deputies’ duties are being properly performed.

Since the end of 2014, the supervision of deputies by the Public Guardian in the UK has been undergoing a ‘fundamental redesign of [its] delivery model’ in light of research suggesting that the former system was ‘not robust enough to identify deputies struggling with their role’ (*Fundamental Review of the Supervision of Court Appointed Deputies by the Public Guardian: Report to Parliament*, December 2014). Under the former supervision system, cases were allocated categories with varying levels of supervision (close to minimal) at the start of the appointment based mainly on level of assets. However, the new system supervises cases according to deputy type (lay, local authority and professional deputies) with the aim of developing knowledge about, and

therefore dealing with, the particular challenges facing each deputy type. Case-workers now also carry out all the activities associated with the former supervision levels instead of handing-off cases when supervision levels change. According to the Public Guardian's December 2014 *Report to Parliament*, this 'allows the ability to supervise and support deputies in a way more tailored to their specific needs . . . [and] better addresses the need of the person without capacity'.

By contrast, the regime in Hong Kong is not as interventionist as it could be in terms of supervising committees to ensure compliance. Unlike the MCAs, the MHO does not establish an office, separate to the court, to supervise committees. Consequently, the court depends on committees to ensure that they do not act beyond the scope of their powers by seeking directions from the court every time the committee wishes to make a significant decision. However, for this to work, committees must be aware of their obligation to do so and in this regard, it is disappointing that there is no detailed guidance available to help committees understand their responsibilities. Unlike the Code of Practice, the only official guidance for committees is a relatively short (3-page) Guidance Note on the judiciary's website. This sets out the committee's duties such as the duty to act in the MIP's best interests; 'make sure that the MIP's money is being used to give him/her the best quality of life'; and look after the MIP's property. There are more specific duties listed such as the duty to prepare accounts. However, there is no guidance on how decisions are to be made; for example, what 'best quality of life' or 'best interests' mean. The lack of awareness by committees of their responsibilities is demonstrated by the numerous instances in which the court has had to remind committees of the need to apply for approval before commencing litigation (see, for example, *Re L* [2006] HKEC 834).

Removing committees and deputies

If a deputy or committee fails to protect the MIP's best interests, the court can ultimately replace her. There are few reported cases in

Hong Kong on the principles the court applies in this situation. However, the cases available demonstrate that the Hong Kong court does not hesitate to replace a committee where the circumstances seem to justify such action. For example, in *Re TYL* [2009] 5 HKLRD 100, the court, on its own motion, replaced the god-daughter with the Official Solicitor as the MIP's committee. The former breached her fiduciary duties by moving into, and paying rent on, her god-mother's flat and then renting her own home at a higher rate. It may well be of concern that the regimes considered in this article do not seem to demonstrate an effective way of detecting if a deputy or committee should be replaced. Cases suggest that courts are often reliant on applications to replace a deputy by family members for the matter to be brought to their attention. The implementation in the UK of the new supervision model may lead to more effective detection; however, there is no indication at present that Hong Kong will implement similar reforms. Bearing in mind the lack of guidance available to committees on how to perform their responsibilities, the absence of an effective system for detecting failures to do so is a concern for MIP protection. We would note that in our experience when committees approach the Hong Kong court for directions and guidance, the judges responsible for committeeships are quick to consider the matter and respond.

Conclusion

The issue of Hong Kong's ageing population is likely to become increasingly prominent in future policy-making. At least in relation to the management of a person's property and affairs when they lose mental capacity, the legal framework has not seen the same developments as Singapore and the UK. The MHO's provisions in this regard are not detailed and do not provide the same protection for a person's autonomy when they lose mental capacity. Whilst there are signs that UK court decisions are beginning to influence Hong Kong courts, greater respect for the MIP's views and wishes would be better protected if they were expressly recognised in the statutory rules. There is also a concerning lack of any

system dedicated to monitoring committees who are effectively expected to regulate themselves by applying for court approval in relation major decisions. However, in the absence of any clear and detailed guidance for committees on what their responsibilities are, it is difficult to gauge how effectively an MIP's interests are being protected under the

current regime. Clearly, there are numerous areas where the regime in Hong Kong could be developed further. Given that the legislative process can take some time, it is submitted that developing clear practice guidelines should be prioritised whilst broader legislative reform is explored.