

# **Ascertaining the need for Special Needs Trusts in Hong Kong**

**– Survey administered jointly by Faculty of Law, The University of Hong Kong and the Concern Group of Guardianship System and Financial Affairs**

## **Information Sheet**

You are invited to participate in a research study conducted by Associate Professor Rebecca Lee & Professor Lusina Ho in the Department of Law at the University of Hong Kong.

### **PURPOSE OF THE STUDY**

The purpose of the attached questionnaire survey is to ascertain the views and preferences of parents/caregivers in relation to the existing legal tools for financial planning for persons with intellectual disability, as well as the possibility of establishing a special needs trust in Hong Kong.

### **PROCEDURES**

You will be asked to complete the attached questionnaire on an anonymous basis. This should take no more than 30 minutes.

### **POTENTIAL RISKS / DISCOMFORTS AND THEIR MINIMIZATION**

You may find reflecting on your personal experience during the procedure somewhat uncomfortable and upsetting. Such discomforts, however, should be no greater than what we experience in everyday life.

### **COMPENSATION FOR PARTICIPATION**

Your participation is on an entirely voluntary basis. No monetary remuneration will be offered for your participation.

### **POTENTIAL BENEFITS**

Your participation in the questionnaire will help us understand (1) the difficulties encountered by you in finding a safe and reliable mechanism to manage assets devoted for the long-term care of your dependents with intellectual disability; and (2) your wishes and preferences in setting up Special Needs Trusts for your dependents with intellectual disability. Such information in turn could help inform future developments of the relevant areas of the law.

### **CONFIDENTIALITY & DATA RETENTION**

All information obtained from the questionnaire survey will remain strictly confidential and be used for research purposes only. There are no personal identifiers in the questionnaire, and the information provided by you in this questionnaire will not be used in a manner which would allow identification of your individual responses. The anonymized data will be kept for a maximum of three years after publication of the first paper arising from the research project.

### **PARTICIPATION AND WITHDRAWAL**

Your participation is voluntary. This means that you can choose to stop at any time without negative consequences.

### **QUESTIONS AND CONCERNS**

If you have any questions or concerns about the research, please feel free to contact Associate Professor Rebecca Lee or Professor Lusina Ho at the Department of Law, The University of Hong Kong, Cheng Yu Tung Tower, Centennial Campus, Pokfulam Road, Hong Kong (Phone: 3917 2951; Email: [snt.support@hku.hk](mailto:snt.support@hku.hk)).

If you have questions about your rights as a research participant, contact the Human Research Ethics Committee for Non-Clinical Faculties, HKU (2241-5267).

**Date of Preparation: 1 March 2016**

**HRECNCF Approval Expiration date: 8 December 2019**

**HRECNCF Reference Number: EA1511038**

## **Ascertaining the need for Special Needs Trusts in Hong Kong**

### **– Survey administered jointly by Faculty of Law, The University of Hong Kong and the Concern Group of Guardianship System and Financial Affairs**

Dear Parents / Caregivers of Persons with Intellectual Disability,

According to government statistics, about 70,000 to 100,000 persons in Hong Kong have intellectual disabilities. While these individuals have the legal right to own assets, they may require support and guidance from their parents or caregivers to help them make complex financial decisions, and sometimes even to make these decisions on their behalf. When their parents or caregivers are no longer around, they need a safe and reliable mechanism of financial management. Such needs have become imminent as their parents or caregivers age.

To ascertain the needs and demands for such mechanisms in Hong Kong, the Faculty of Law of the University of Hong Kong and the Concern Group of Guardianship System and Financial Affairs\* are jointly carrying out a survey through the attached questionnaire. Among the available mechanisms such as the will, guardianship order, enduring power of attorney, and special needs trust we would like to know, in particular, your preferences in relation to the possibility of setting up a Special Needs Trusts in Hong Kong.

In order to avoid double-counting, we would like to invite the main caregiver to only fill up one copy of the questionnaire for each dependent with intellectual disability that you or your family are looking after. An electronic copy of this questionnaire can also be downloaded from <http://snt.support> after March 9, 2016. You may also fill out this questionnaire online from the same website. Please rest assured that all information and data are collected without personal identifiers and will be kept confidential and used for the sole purpose stated above.

Upon completion, please return the questionnaire through your organization or by mail to the Faculty of Law, The University of Hong Kong, Cheng Yu Tung Tower, Centennial Campus, Pokfulam Road, Hong Kong [Attn: Special Needs Trust]. We appreciate your help in completing this survey. If you have any questions, you may contact Rebecca Lee or Lusina Ho of HKU Law at [snt.support@hku.hk](mailto:snt.support@hku.hk).

Rebecca Lee & Lusina Ho  
Faculty of Law, The University of Hong Kong

Concern Group of Guardianship System and Financial Affairs

***Please return the questionnaire on or before 28 May 2016.***

\*NB: The Concern Group of Guardianship System and Financial Affairs is established by a group of parents and caretakers of persons with intellectual disability. Its mission is to strive for a better adult guardianship system through examining its current weaknesses and seeking for improvements of the policies and institutions pertaining to adult guardianship. It is hoped that these efforts will enhance personal care and financial management arrangements for individuals with intellectual disability in Hong Kong.

## Part A: Background information

**1. Please provide information about yourself.**

Gender:                     Female                     Male

Age:     20 and below     21-29                     30-39                     40-49  
           50-59                     60-69                     70 and above

**2. What is the age of your dependent with disability?**

20 and below     21- 29                     30-39                     40-49  
 50-59                     60-69                     70 and above

**3. What is your dependent's degree of intellectual disability?** Please tick one box.

- Mild grade
- Moderate grade
- Severe grade
- Profound grade

**4. What is the secondary diagnosis of your dependent with intellectual disability?** You may tick more than one box.

- None
- Physical disability
- Autism
- Other (please specify: \_\_\_\_\_)

**5. Is your dependent with intellectual disability currently receiving social welfare benefits?**

- Yes, Comprehensive Social Security Assistance
- Yes, Disability Allowance
- No

**6. Is your dependent with intellectual disability living together with the family or in a residential home?**

- Living with the family or relatives
- Living on his / her own and looked after by a full-time / part-time domestic helper
- Living on his / her own and looked after by full-time / part-time professional staff
- Staying in a government-subsidized hostel
- Self-financed home supported by the government
- Staying in a private home
- Others (Please specify \_\_\_\_\_)

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**Part B: Existing financial and personal welfare planning tools  
for people with intellectual disability**

**Wills**

Under the laws of Hong Kong, you may make a will to say how your assets will be distributed. You need to appoint an executor, who can be trusted to carry out your wishes under the will. You may leave your assets to anyone, such as your spouse and child(ren), including your children with intellectual disability. However, if your children do not have the capacity to manage the assets, a guardian will need to be appointed to manage it on their behalf. You may also set up a trust by will, in which case your assets will not be passed to your children with intellectual disability directly, but will be held on trust by the trustee (who may also be your executor), who will continue to manage your property throughout the lifetime of your dependent with intellectual disability.

If you do not make a will, your assets will be distributed according to the laws of Hong Kong. In general, this means that your surviving spouse will inherit all your personal chattels (such as personal effects, household items, cars and jewellery) and the first HK\$500,000 of the residual estate. Whatever that still remains will be divided into two halves, half for your surviving spouse and the other half will be shared by your children equally. If you do not have a surviving spouse, your assets will be shared by your children equally.

**7. Have you executed a will?**

- Yes
- No

**8. Do you think the will can satisfy your need for making financial provisions for your dependent with intellectual disability after your passing?**

- Completely satisfies my need (Please jump to Question 10.)
- Partly satisfies my need
- Unable to satisfy my need

**9. What are your reasons for not having executed a will or taking the view that the will cannot completely satisfy your need? You may tick more than one box.**

- I do not want to think about death
- I am still young and have not thought about this
- I do not know enough about the will
- Expensive fees
- I do not have enough assets to support my dependent's financial needs
- I am worried about the executor's trustworthiness (e.g. abusing his position and taking my estate)
- I am worried whether the executor can continue his service (e.g. his change of mind or health condition)
- I am satisfied with the legal provisions governing distributions without a will
- I have made other satisfactory arrangements

## **Guardianship**

As parent, you are the guardian of your dependent children only until they reach the age of 18. When your dependent with intellectual disability reaches 18, and when the occasion arises for a decision about his personal, medical and financial affairs needs to be made, you or a relative may apply to the Guardianship Board to appoint a guardian to make such decisions for him. However, the Guardianship Board will only consider applications if a need to make such decisions arises, so it is not possible for you to appoint a guardian as soon as he turns 18, in the absence of such occasions.

The guardian can make decisions on where the person with intellectual disability lives and what medical treatment he receives. The guardian also has power to handle money for him/her, but the law limits the amount the guardian can handle for his/her maintenance to HK\$15,000 per month. This amount is the median monthly earnings released by the Census and Statistics Department, and is adjustable according to the General Household Survey. This means that the guardianship order cannot be used to manage a flat for your dependent adult to live, or to pass your wealth to him.

**10. Are you aware of the availability of guardianship?**

- Yes
- No

**11. Do you consider the sum of HK\$15,000 per month sufficient to look after your dependent with intellectual disability?**

- Yes
- No

**12. Would you be able to find a suitable guardian?**

- Yes
- No

**13. If you are not the guardian, would you like to be consulted by the guardian before he/she makes any decision regarding your dependent with intellectual disability?**

- Yes
- No

### **Enduring Power of Attorney (EPA)**

Everyone faces the risk of losing mental capacity due to illness or accident. An enduring power of attorney allows someone (the donor) who is still mentally capable to appoint an attorney to take care of his financial matters in the event that he becomes mentally incapacitated. You may, for example, appoint an attorney to manage your financial affairs, even to sell or use your flats or other properties, when you are unable to do so; the attorney may use the assets to provide for your dependent with intellectual disability.

Unlike the guardian, there is no financial limit on the amount of property the attorney can handle on behalf of the donor. The attorney does not have the power to decide on where the donor should live and what medical treatment he receives. The attorney has full power to deal with the donor's assets without consulting the donor.

**14. Are you aware of the availability of EPA?**

- Yes
- No

**15. Have you set up an EPA?**

- Yes (Please jump to Question 17 of Part C.)
- No (Please proceed to Question 16.)

**16. What are your reasons for not having set up an EPA? You may tick more than one box.**

- I do not want to think about death
- I do not know enough about the EPA
- I am still young and have not thought about this
- Expensive fees
- I cannot find a suitable attorney
- I am worried that the attorney will abuse his position and take my property
- I have made other satisfactory arrangements

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**Part C: Special Needs Trust**

A trust is created where an individual (settlor) transfers his property to his trustee to manage it for the benefit of a designated person (the beneficiary). One may set up a trust during one's lifetime, or in one's will, to pass designated property to a trustee to manage it for the benefit of one's dependent with intellectual disability. Of course, in reality, it is not easy to find a trustworthy trustee who is willing to serve in this role gratuitously, and who is likely to survive both the settlor and the beneficiary. While there are professional trustees, not many people are able to afford the high fees charged by professionals to set up and manage an individual trust tailor made for just one's own dependent with intellectual disability. To overcome these difficulties, some countries have developed the Special Needs Trust. In the Chief Executive's policy address 2016, the government has announced that the Labour and Welfare Bureau will establish a working group to explore the feasibility of establishing a public trust, with a view to providing affordable services for people with intellectual disability.

The Special Needs Trust is an affordable trust specially designed for people with special needs (including people with intellectually disability). The Special Needs Trust pools together funds contributed by individual participating settlors for management and investment. This allows the sharing of fees and hence lower fees for individual participants. To reduce the fees, such trusts usually only handle cash but not flats or shares. These assets will need to be liquidated before they could be transferred into the trust

To participate in such trusts, the caregivers with the help of the trustee and its case manager devises a care plan, which sets out the expenditures needed

for the dependent, write a letter of intent that appoints the caregiver to succeed them and explains how the trust fund should be disbursed for the benefit of the dependent and after the dependent passes away, and then transfer an amount of money (a small sum such as about HK\$5,000) to set up the trust. They also execute a will to transfer a substantial amount from their estate into the trust on their death, e.g. they may instruct the executor to sell their flat and put the proceeds into the trust fund. Like in an MPF, the amounts designated for each beneficiary will be segregated, although the pooled funds will be invested, usually with a view to preserving the capital.

When the caregivers pass away, the trust will be activated. The trustee will then make periodic distribution to the succeeding caregiver according to the letter of intent and care plan. The trustee's case manager can make periodic (e.g. twice a year) visits to the dependent to check that the caregiver is looking after the dependent. Upon the dependent's passing, the trustee will distribute the surplus to any person(s) indicated in the letter of intent.

The main advantage of the Special Needs Trust is that financial assets devoted for the dependent are managed by a professional at an affordable fee. The trust also allows dependents to participate in the decision-making process of the caregiver if this is set out in the letter of intent.

*Financial planning for your dependent with intellectual disability*

**17. How would you want your dependent to be looked after when you are no longer capable of doing so?** Please indicate your order of priority, with 1 being the highest priority. There is no need to rank all options, but each option should receive a different ranking (ie no equal ranking for more than one option).

- \_\_\_\_\_ By family or relatives
- \_\_\_\_\_ Live on his / her own and looked after by a full-time / part-time domestic helper
- \_\_\_\_\_ Live on his / her own and looked after by full-time / part-time professional staff
- \_\_\_\_\_ Staying in a government-subsidised hostel
- \_\_\_\_\_ Self-financed home supported by the government
- \_\_\_\_\_ Staying in a private home
- \_\_\_\_\_ Others (Please specify \_\_\_\_\_)

**18. Are you able to set up an individual, customised private trust for the benefit of your dependent with intellectual disability by engaging a professional trustee (that charges about HK\$50,000 per annum) or a trusted friend who can serve as trustee for free?**

- Yes
- No, because
  - the fees are too expensive
  - I cannot find a reliable and gratuitous trustee

*Setting up and managing a Special Needs Trust*

**19. If a Special Needs Trust is to be established in Hong Kong, and the Government acts as trustee of such a trust, would you trust the government to play this role?**

- Yes.
- No.

**20. If the Government does not act as trustee, what kind of non-governmental organization would you trust to play the role of trustee?** Please indicate your order of priority, with 1 being the highest priority. There is no need to rank all options, but each option should receive a different ranking (ie no equal ranking for more than one option).

- \_\_\_\_\_ No, I only trust the Government to act as the trustee
- \_\_\_\_\_ An existing well-known charity accountable to the Government
- \_\_\_\_\_ A new charity accountable to the Government and formed by parent representatives of dependents with intellectual disability and professionals such as lawyers, accountants and social workers
- \_\_\_\_\_ A new charity formed by parent representatives of dependents with intellectual disability
- \_\_\_\_\_ A private financial institution
- \_\_\_\_\_ Others (Please specify \_\_\_\_\_)

**21. If the non-governmental organization listed in Q20 acts as the trustee, how much are you prepared to pay to such trustees to administer the trust?** 1% in the following choices represents management fee in HKD\$10,000 for each 1 million per annum. Please mark "N/A" if you are not prepared to pay for the trustee service.

- N/A
- Less than 1.0% p.a. of the managed assets
- 1.0% to less than 2.0% p.a. of the managed assets
- 2.0% to less than 3.0% p.a. of the managed assets
- 3.0% to less than 4.0% p.a. of the managed assets
- 4.0% p.a. and above of the managed assets

**22. If a Special Needs Trust can be set up, what services would you like it to provide?** You may tick more than one box.

- Custody and disbursement of your trust funds according to your wishes
- Investment of the trust funds in a prudent way
- Provision of a case manager to monitor and review the needs of your dependent who is living in the community with family or independently
- Provision of a case manager to monitor caring services provided by service provider to your dependent who is living in the government-subsidized hostel
- Other (please specify: \_\_\_\_\_)

**23. If a Special Needs Trust with the necessary features mentioned in Q22 is established, and the government acts as the trustee of such a trust, will you participate in such a Trust?**

- Very Unlikely (Please proceed to question 24.)
- Unlikely (Please proceed to question 24.)
- Not Sure (Please proceed to question 24.)
- Likely (Please proceed to question 25.)
- Very Likely (Please proceed to question 25.)
- Other (please specify: \_\_\_\_\_)

**24. What are the reasons for your reservation about a Special Needs Trust in which the government acts as trustee?** You may tick more than one box and please rank from 1 (primary reason) onwards. There is no need to rank all options, but each option should receive a different ranking (ie no equal ranking for more than one option).

- \_\_\_\_\_ There is no minimum guarantee of fund returns
- \_\_\_\_\_ I still need to make other arrangements to address the personal supervision of my dependent
- \_\_\_\_\_ Worried about the long-term sustainability of the Trust and embezzlement of funds by the government trustee
- \_\_\_\_\_ Other (please specify: \_\_\_\_\_)

**25. Other comments:**

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Thank you for your participation!