

Mental health ordinance

Can a mentally incapacitated patient refuse treatment? Can the family of a mentally incapacitated patient take control of the patient's financial affairs? For doctors facing such problems in clinical practice, the answers to these questions and many others can be found in the Mental Health Ordinance (MHO), explains *Albert Lam*.

Who is mentally incapacitated?

Under the MHO, mental incapacity means either mental disorder or mental handicap, and mentally incapacitated shall be construed accordingly. Mental disorder is further defined to mean mental illness; a state of arrested or incomplete development of mind which amounts to a significant impairment of intelligence and social functioning which is associated with abnormally aggressive or serious irresponsible conduct; psychopathic disorder; or any other type of disorder or disability of mind which does not amount to mental handicap. Accordingly, patient in a coma or suffering from dementia can be regarded as mentally disordered. Mental handicap on the other hand means sub-average general intellectual functioning with deficiencies in adaptive behavior.

A person suffering from dementia, mental handicap, disability of mind or mental illness to an extent which limits their capacity to make reasonable decisions can be regarded as mentally incapacitated.

Appointing guardians

The Guardianship Board is established pursuant to Part IV B of the MHO. The Board is empowered to appoint guardians for adults who are unable to make decisions about their personal, medical or financial affairs because of mental incapacity.

However, there is a restriction on the amount of patient's finances the guardian can deal with, which currently is HK\$10,000 per month. It is therefore not appropriate to use the Guardianship Order to deal with the patient's financial affairs, if he has substantial amount of assets. The order is most useful and commonly employed, for instance, where the person refuses to attend medical treatments.

Application to the Board is simple and no payment is required. The standard application form can be obtained from the Board. The proposed guardian must be over the age of 18 and willing and able to act as the guardian. Usually it is a relative or friend. If there is no appropriate person, the Board will appoint the Director of Social Welfare as the guardian.

Appointing a committee of the estate

The High Court has power under the MHO to appoint a next-of-kin to be a committee of the estate of the patient, if it satisfies that the patient who is alleged to be mentally incapacitated is, in fact, incapable, by reason of mental incapacity, of managing and administering his property and affairs.

The application has to be supported by two medical certificates, which are issued by registered medical practitioners. At least one of the two medical certificates is given by a practitioner approved by the Hospital Authority for the purposes of the MHO as having special experience in the diagnosis or treatment of mental disorders or having special experience in the assessment or determination of mental handicap, as the case may be. The certificate to be given and signed by the

registered medical practitioner should contain details of the diagnosis and indicate whether the patient is a mentally incapacitated person who is incapable, by reason of his mental incapacity, of managing and administering his property and affairs.

Once the court is satisfied that the patient is mentally incapacitated, it may, if it thinks fit, appoint a person or a group of person to be the committee of the estate. The Court will normally prefer a close relative of the patient who has personal knowledge of the patient's assets and affairs, to take up this appointment. In absence of a next-of-kin to take up this appointment or if no one is unwilling to act, an official solicitor may be so appointed.

A committee of the estate appointed under the MHO shall have power to do all such things in relation to the properties and affairs of the mentally incapacitated person as the Court orders or directs. Hence, the committee will be in a position to pay for all the medical expenses and provide for the patient's maintenance and future medical needs out of the available assets from the estate. The ordinance, however, provides various safeguards against wrong doings of the committee.

In summary, appointing guardians and a committee of the estate are the main aids the MHO has to offer to the families of mentally incapacitated patients. Where there is any potential dispute over who should be appointed as the guardian or committee and how the estate should be utilized, it is advisable for the intended guardian and/or committee to seek legal assistance before so acting.

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