GUARDIANSHIP OF ELDERLY DEMENTIA PATIENTS

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Background

The potential target population for guardianship of the elderly with mental disabilities in Hong Kong is quite large. In 1994, 56,630 persons aged 65 or over were identified as having organic psychoses1. The 1997 Deloitte and Touche Consulting Group report found that 25% of over 2,000 persons living in the community, aged 60 and above, had some degree of cognitive impairment (200,000 in the general elderly population). 5% of these had moderate or severe cognitive impairment, (50,000 in the general elderly population). In contrast the rate estimated by the Chinese University study was 25,000 over 65 suffering from dementia2.

There are 14,661 vulnerable elderly on the list of the ‘Social Networking for the Elderly Project’3. It is not known how many of these would fall into the category of mentally incapacitated persons.

Part IVB of the Mental Health (Amendment) Ordinance (No. 81 of 1997) inserted the new guardianship provisions for mentally incapacitated persons into the Mental Health Ordinance (Cap. 136) (“the ordinance”). The Guardianship Board is empowered to make orders appointing guardians as substitute decision-makers for adults who are unable to make decisions about their personal, medical or financial affairs because they have a mental incapacity.

The Guardianship Board, an independent statutory corporation, though funded by the Health and Welfare Bureau, was established on 1 February 1999. The Board has a multi-disciplinary composition of the Chairperson, the only full time member and 60 part-time members4. For a hearing, the Guardianship Board must have one member at least from each of the following panels: -

a) barristers or solicitors who act as presiding members (“Panel A”);
b) persons with experience in assessing or treating mentally incapacitated persons, including registered medical practitioners, social workers and clinical psychologists (“Panel B”); and
c) persons with personal experience of mentally incapacitated persons (“Panel C”).

Functions of the Board

Section 59K (1) sets out the Board’s functions: -

(a) to determine applications for guardianship;
(b) to make orders in respect of mentally incapacitated persons, taking account of their individual needs, including emergency orders when they are in danger of being maltreated or exploited;
(c) to review existing guardianship orders;
(d) to give directions to guardians as to the nature and extent of orders, including directions as to the exercise, extent and duration of their particular powers and duties.

Grounds of application

The grounds for a guardianship application are: -

(a) that a mentally incapacitated person, who is mentally disordered/mentally handicapped, is suffering from mental disorder/mental handicap of a nature or degree which warrants his reception into guardianship5; and
(b) that it is in the interests of his welfare or for the protection of other persons that he should be so received.

Grounds for emergency application

To protect the vulnerable or abused mentally incapacitated persons, the Guardianship Board may make an emergency guardianship order if the Board has reason to believe that: -

(a) the mentally incapacitated person is in danger, or is being; or likely to be maltreated or exploited;
(b) the mentally incapacitated person is incapable by reason of mental incapacity of making reasonable decisions in respect of all or a substantial proportion of the matters which relate to his personal circumstances; and
(c) it is necessary to make immediate provision to protect that person6.

Mental disorder

Section 3 of the amendment ordinance provides that a mentally incapacitated person is a person who has a mental disorder or mental handicap. Mental disorder means: -
(a) a mental illness; or
(b) a state of arrested or incomplete development, which amounts to a significant impairment of intelligence and social functioning, which is associated with abnormally aggressive or seriously irresponsible conduct; or
(c) a psychopathic disorder; or
(d) any other disorder or disability of mind which does not amount to mental handicap.

One commentator has criticized similar criteria set out in the English Mental Health Act 1983, as they do not overlap completely with the diagnostic criteria in the ICD or DSM-IV. There is an issue here as to whether dementia comes under the heading of “mental illness”, or as “any other disorder or disability of mind”. Section 2 (5) provides that a person will not be treated as having a mental disorder by reason only of “promiscuity or other immoral conduct, sexual deviancy or dependence on alcohol or drugs”.

Mental handicap
Section 3 (1) (f) defines mental handicap as sub-average general intellectual functioning with deficiencies in adaptive behaviour. Sub-average general intellectual functioning “means an IQ of 70 or below according to the Wechsler Intelligence Scales for children or for an equivalent scale in a standardized intelligence test”.

Principles
The Guardianship Board must apply certain principles in the performance of its functions or the exercise of its powers, namely: -
(a) that the interests of the mentally incapacitated person are promoted, including overriding his views and wishes where the Board considers that such actions are in his interests; and
(b) despite this, that his views and wishes are, in so far as they may be ascertained, respected.

Criteria
In determining whether to make a guardianship order or not, the Guardianship Board shall apply the above principles and also apply the following criteria: -
(a) that it is satisfied that a mentally incapacitated person has a mental disorder or mental handicap of a nature or degree which warrants his reception into guardianship;
(b) the mental disorder or handicap limits him in making reasonable decisions in respect of all or a substantial proportion of the matters which relate to his personal circumstances;
(c) that his particular needs may only be met or attended to by being received into guardianship and that no other less restrictive or intrusive means are available in the circumstances; and
(d) that it is in the interests of his welfare or the protection of others that he should be so received.

Policy approach
Guardianship is a positive intervention to promote and protect the interests and needs of mentally incapacitated persons, including elderly dementia patients. The Guardianship Board is sympathetic to the principles of therapeutic jurisprudence, that is, mental health law should advance therapeutic outcomes without violating legal principles. Such an approach includes:
(a) identifying appropriate persons in need of the service;
(b) negotiating and mediating differences;
(c) holistic interface with social, medical, and other health care professionals;
(d) using our experience to seek reform in the law and services of the target groups;
(e) incorporating best practices of those professionals involved with the target group; and
(f) focusing on process as a way of ensuring qualitative outcomes.

Guardianship should only be triggered to meet the needs and best interests of the mentally incapacitated person. In any conflict between the needs of the family, and the needs of the mentally incapacitated person, his needs must take priority. In the United States there were complaints that nursing homes for the elderly were placing applicants under guardianship as a pre-condition to admission because of concerns about their medical and financial decision making.

Alternatives to guardianship
An enduring power of attorney is an alternative to guardianship as an elderly person may be competent to appoint the attorney, though they may be showing signs of early dementia. The Enduring Power of Attorney Ordinance (Cap. No. 501) only deals with property and financial affairs. If such an instrument gives authority, e.g. over health care matters or life sustaining treatment, then it cannot take effect as an enduring power of attorney. It is not an option that is well known to elderly persons, much less their advisors, whether legal or medical. So, in many cases it is not an alternative to guardianship.
When is there a need to apply?

Not all mentally incapacitated persons need guardianship. Informal arrangements are a least restrictive alternative. However, these are some situations where they are not working and an application for guardianship can be made: -
(a) when the mentally incapacitated person is suffering from, or at risk of abuse, neglect, self neglect or exploitation, or a danger to his health and his interests are not being protected sufficiently;
(b) when there are conflicts between relatives, between the mentally incapacitated person and his relatives, or between relatives and service providers, about decisions being made for his care and treatment;
(c) when the mentally incapacitated person objects to proposed care or treatment, e.g. placement in a residential facility;
(d) a family conflict resulting in inappropriate accommodation for the mentally incapacitated person or a failure to get him necessary medical treatment;
(e) if a doctor refuses to give him non-urgent medical treatment, despite Part IVC, unless he has a guardian to consent to that treatment13.

Least restrictive alternative

The order is for limited guardianship with the mentally incapacitated person only losing those rights, which he cannot exercise because of his incapacity. Only specific powers of decision-making are given to the guardian. It is a finding of incompetence of the mentally incapacitated person for specific purposes, not a generalized finding.

Is the intervention viewed as beneficent, or as a paternalistic interference with the mentally incapacitated person’s wishes14? Smith concludes that such orders promote and protect the best interests of the mentally incapacitated person, and so the restriction of rights is justified by the principle of “beneficent paternalism”14.

Heginbotham15 suggests that “true” guardianship meets the criteria of a least restrictive alternative as it is concerned with building autonomy and is weakly paternalistic. It links a best interests judgment by the guardian with the ability of the mentally incapacitated person to influence decisions.

Application process

Section 59N provides that a guardianship application may be made by: -
(a) a relative of the mentally incapacitated person16;
b) a social worker17;
c) a registered medical practitioner; or
d) a public officer in the Social Welfare Department (SWD)18.

The application for guardianship must be in the prescribed form19, and accompanied by two medical reports20. At least one of the doctors must be approved by the Hospital Authority21 as being a specialist in the diagnosis or treatment of mental disorder, or has special experience in the assessment or determination of mental handicap.

Each medical report must state that the grounds of application are satisfied, in the medical or other opinion22 of the doctors with reasons given to justify their opinion. As there is no medical report form in the rules, the Secretariat has drafted a pro forma report in consultation with the Board and relevant consultees.

Social inquiry report

A social inquiry report is a mandatory requirement for the Board to consider before it makes a decision to appoint a guardian23. It contains the views and wishes of the mentally incapacitated person, an assessment of his family background, and his social and financial situation24. The Guardianship Office of the Social Welfare Department has the role of liaising with the Guardianship Board on such matters as the preparation of social inquiry reports by staff of the department including checking on the suitability and supervision of guardians.

Guardians

Section 59S of the amendment ordinance sets out the criteria for suitability of a guardian: -
(a) A person must be capable of taking care of the mentally incapacitated person;
(b) His/her personality is generally compatible with the mentally incapacitated person;
(c) there is no undue conflict of interest, especially of a financial nature;
(d) the interests of the mentally incapacitated person will be promoted by the guardian, including overriding his views and wishes where it is in his interests, yet his views and wishes are ascertained and respected;
(e) the proposed guardian has consented in writing to act;
(f) the guardian is at least 18 years old; and
(g) if there is no “appropriate” person available, the Director of Social Welfare will be appointed as guardian.
The guardian is the substitute decision-maker, not the substitute carer or case manager. In Hong Kong there is no provision for a corporate guardian, e.g. a non-governmental organization (NGO). Social workers of NGO’s would be treated as private guardians. NGO’s have expressed concern about the interface between their staff’s role as private guardians and their duties as employees and as professionals.

The United States Associated Press study found that 70% of guardians are family members. Of the family members, 35% were children, 6% are spouses, 8% are siblings, and 20% are other relatives such as grandchildren or nieces. Of those who were not family members, attorneys were 5%, friends 7%, agencies 7%, Public Guardian 2%, banks 4%, others 3% and unknown 3%. It is too early to say what the pattern will be in Hong Kong.

Powers
Evidence is needed as to why a particular power is requested, so that the powers granted are the least restrictive alternative. The guardian can be empowered to:

- require the mentally incapacitated person to reside at a specified place;
- require him to attend at a specified place and time for treatment, or special treatment, occupation, education or training;
- require access to him to be given to any doctor, approved social worker or other person specified in the guardianship order;
- convey him to specified places and use such reasonable force as may be necessary;
- give consent to his medical or dental treatment but only to the extent that he is incapable of understanding the general nature and effect of such treatment;
- to hold, receive or pay a monthly sum for the maintenance or other benefit of the mentally incapacitated person.

Hearing
The proceedings before the Board are to be conducted with “as little formality and legal technicality and form as the circumstances of the case permit”27. Bearing in mind the health and welfare of the mentally incapacitated person, the Board may interview the mentally incapacitated person before an application is determined. In practice, every effort will be made to have the mentally incapacitated person present and participate at the hearing.

The Hong Kong model does not follow Canadian and United States guardianship models where decisions are made by a judge only in an adversarial setting which can make the process more traumatic for the mentally incapacitated person. In fact, the Australian New South Wales model influenced our legislation. The multi-disciplinary composition of the Guardianship Board and its powers to adopt informal procedures and an inquisitorial process ensures the protection of the interests and rights of the mentally incapacitated person.

Post-hearing
Orders are made for up to one year initially and then, if renewed, for up to 3 years28. This ensures that the guardian has to report to the Guardianship Board on the welfare plan and medical condition of the mentally incapacitated person to see if another order is justified or not. The Guardianship Board can review an order prior to its expiry, at the request of the mentally incapacitated person, the guardian, the Director of Social Welfare, any person with a genuine interest in the mentally incapacitated person, or on its own initiative29. This is one way of ensuring that the guardian complies with the order. The Guardianship Board can also give directions to guardians as to the extent and exercise of their powers30.

Monitoring of the guardian
The Director of Social Welfare has powers under the Mental Health (Guardianship) Regulations to supervise and support private guardians, including visiting the mentally incapacitated person at regular intervals. Hong Kong’s limited guardianship means that a balance can be struck between autonomy and restriction of rights.

In the United States the Supreme Court has not considered minimum standards or safeguards in guardianship law32. Some effort is being made to improve the standards of guardians. A Florida law provides for 8 hours of instructions to guardians covering their duties and the mentally incapacitated person’s rights, the preparation of annual reports and financial accounts33. Sales and Shuman supported sanctions for monitoring violations by guardians. They conclude, “although sanctions may discourage some persons from service as private guardians, the loss should be compensated for by an increase in the quality of their service”11.

Medical Treatment
A guardian with the power to consent to treatment may only exercise it to the extent that
the mentally incapacitated person is incapable of understanding the general nature and effect of such treatment. He must observe certain principles, that is, that the mentally incapacitated person is not deprived of treatment because he lacks the capacity to consent to that treatment, and ensure that the treatment is carried out in his best interests. Even if that power is given, a doctor may seek a court order from the Court of First Instance where the guardian is unable or unwilling to consent, or the guardian has failed properly to apply the principles.

Conclusion

Sales and Shuman concluded, “Guardianship should not be viewed as custodial arrangements that operate as institutions without walls. Guardians should see themselves as responsible for helping their ward maintain a quality lifestyle and for gaining or regaining independence to the maximum extent possible. Only then will guardianship ultimately fulfill its therapeutic potential.”

Reference:

4. Section 59J.
5. Section 59M.
6. Section 59Q.
8. Section 59K (2).
9. Section 59O (3).
10. Law Commission, Mental Incapacity; Law Com No 231; 1995:222-284; London, HMSO. Clause 2 (1) (a) of the draft Bill defined incapacity as “an inability to make decisions”.
13. Part IVC allows doctors to give medical treatment without the consent of the mentally incapacitated person, if it is in his best interests and it is necessary. This applies to urgent and non-urgent treatment.
16. This includes any person who resides or has resided with the mentally incapacitated person, so it would include a same sex partner or a cohabitee.
17. This would be from non-governmental organizations and those hospitals not staffed by medical social workers employed by the Social Welfare Department.
18. In practice, these would be social workers like medical social workers or social workers in the Family Service Centres.
20. Section 59M.
21. Section 2 (2) of the ordinance.
22. The section refers to “medical or other opinion”. The doctor can give the diagnosis of the mental disorder and also comments on social or psychological reasons, which support the medical diagnosis.
23. Section 59P (1).
24. Section 59P (3).
26. Section 44B (8) states that the “monthly sum” means a sum not exceeding the latest median monthly employment earnings of employed persons, ...specified in the Quarterly Report on General Household Survey, published by the Census and Statistics Department”. The latest figure, HK$10,000, is for the second quarter of 1999.
27. Section 59X (2).
28. Section 59R.
29. Section 59U.
30. Section 59K (1) (d).
31. This is L.N. No. 420 of 1989, as amended by the Mental Health (Guardianship) (Amendment) Regulations 1998 (L.N. of 1998).
34. Section 59ZB (3) of Part IVC of the Mental Health Ordinance.
35. Section 59ZG.
36. Sales and Shurman above at 217.