

Legal Eye: How best to protect the assets of the mentally incapacitated

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Losing a loved one is painful, but it is equally distressing if a family member becomes mentally incapacitated because of ageing, a stroke or an accident. How best can you serve their interests, and what matters most? Protecting the assets of a mentally incapacitated person is an important duty because it allows you to ensure these resources will be preserved and properly utilised towards their care and well-being.

Mentally incapacitated person refers to people who lose their capacity to make informed decisions in managing their financial affairs and disposing of their assets. This disability is relatively apparent to family members if the person is diagnosed with Alzheimer's disease or has suffered a stroke or accident.

In some situations, however, the mental deficiency may not be immediately noticeable; for example, when an aged person is in the early stage of dementia. Family members may not notice or see behavioural changes promptly if they are not living with the elderly person, or if their relative is in an old people's home. As the population ages, these problems are likely to increase and families need to understand the available options.

There is considerable concern that a vulnerable person may be manipulated into giving away their money. In extreme cases, family members may start disputing arrangements once it is clear the person is no longer capable of managing their own finances.

Therefore, it is important to protect loved ones who are unable to handle their finances due to lack of mental capacity.

Every case is different, depending on factors such as the individual's role, the types of assets they have, marital status, the dynamics between the family members and any dependents other than a spouse or children.

The options for helping to manage a vulnerable person's assets are either through an application to the Guardianship Board to be appointed a legal guardian, or by applying to the High Court for a committee to be appointed under the Mental Health Ordinance. Though each application has its unique features, the person who assumes either role must act in the best interest of the mentally incapacitated person.

A guardianship application may only be made when the person is suffering from a mental disorder and it is in his or her interest. If the person only has deposits with financial institutions and has been living modestly, a guardianship order may be preferable to the appointment of a committee since the maximum monthly sum authorised by the Guardianship Board is only up to HK\$12,300 a month (as of the last quarter of 2013).

If no family members or friends are willing to take up the appointment as legal guardian, the board can appoint the Social Welfare director to be the public guardian. In extreme cases, if the person is in danger, or is being or likely to be maltreated or exploited, the board can make an emergency guardianship order.

Where the assets of the person exceed the powers of legal guardianship, an application under Part II of the Mental Health Ordinance is more suitable, as the committee is given wider financial powers to make decisions, including selling the person's landed properties, stocks and any investments. If the person has sufficient funds for their expenditure, whether for the benefit of themselves or their dependents, the committee is likely to be granted directions to draw funds from the estate. This provision will allow the person and their family to maintain their lifestyle.

The court, assisted by the official solicitor, will consider the following before directing how properties and affairs should be managed, as well as how much they can spend:

- existing and future care arrangements for the person and life expectancy;
- maintenance of family members;
- the income and expenditure of the family
- the views of those close to the person and who might be affected, including those with an interest in the estate in the event of death.

Composition of the committee is also decided in the Part II application. It can comprise one individual or several people. For estranged family members, the court's supervision will give some form of comfort to those who are not committee members.

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