



Guide to doctors / dentists

Consent to Medical and Dental Treatment of mentally incapacitated person (“MIP”) in the context of Part IVB & Part IVC, Mental Health Ordinance (Cap. 136)

Introduction

This Guide is given in the context of Part IVB and Part IVC of the Mental Health Ordinance (“MHO”), Cap. 136. The purpose of this Guide is to give more information to the medical and dental professions and to encourage the use of Part IVC powers by them.

What is mentally incapacitated person (MIP)?

They are adults with a mental disorder or mentally handicapped (“MIP”) (s.2(1); s.59M(4); s.59ZB(1)).

Can MIP consent for treatment?

A MIP may have global incapacity or may retain some capacity to make decisions. In case it appears to the treating doctor that a patient, lacks capacity to consent, the treating doctor would need to assess whether he/she has the capacity to make a choice to consent or not to the particular treatment. If in doubt, the treating doctor should seek an assessment of mental capacity from an approved doctor, i.e. a psychiatrist. There is a possibility that a MIP can still retain sufficient capacity to decide on his/her own treatment and in such case the common law principle of consent by patient will apply.

Any difference for general & psychiatric treatment?

Medical treatment includes any medical or surgical procedure, operation or examination (including dental procedures) (s.59ZA). Except psychiatric treatment in a mental (i.e. gazetted) hospital (or wards) (s. 59ZB), all medical treatments for MIP need to follow Part IVC and Part IVB, MHO (Cap. 136).

Best Interests

Best interests test means whether that the treatment will save the life of the MIP, prevent damage or deterioration, or bring about an improvement, to his/her physical or mental health and well being (s. 59ZA).

Part IVC provides that a doctor / dentist may give urgent or non-urgent medical or dental treatment to a MIP, who lacks capacity to consent, when the treatment is necessary and in his/her best interests (s.59ZF), e.g. a hernia repair surgery or a cataract surgery or a colonoscopy procedure can be processed when the doctor-in-charge finds them in the best interests of the MIP and neither any family member nor the MIP objects.

When to apply for guardianship?

■ *There is no need to apply for guardianship in most cases.*

If a MIP has the capacity to consent, he/she should make his/her own decision on medical treatment.

If he/she is unable to consent, the doctor can also provide **non-urgent (elective)** medical treatment, which is necessary and in his/her best interests, without his/her consent if the doctor has taken all reasonably practicable steps to ascertain whether a legal guardian has been appointed, and there is, or appears to be, no guardian appointed (s.59ZF(2) & (3)). In rare situations like a guardian cannot be reached, such medical treatment can still be provided without his/her guardian's consent.

If he/she is unable to consent, the doctor can provide urgent medical treatment, which is necessary and in his/her best interests without his/her consent (s.59ZF(1))

■ *Situations suggesting a need to apply*

- (i) If a family member is objecting to treatment that is in the best interests of the MIP, another family member, or a social worker, or the treating doctor, who wishes to protect the interests of his welfare, should apply to the Guardianship Board to have a guardian appointed.
- (ii) If a MIP is consistently and strongly refusing or resisting a treatment that is in his/her best interests, a family member, or a social worker, or the treating doctor should consider to apply to Guardianship Board to have a guardian appointed.

Doctor must note that notwithstanding refusal or resistance by the MIP and/or his/her family member, treatment can still be given under the powers of Part IVC without consent [s.59ZF(1), (2) & (3) and see "Best Interests" section above], e.g. in most cases of dental examination and treatment given to a mentally handicapped under general anaesthesia.

Guardian's powers (include power to consent for medical treatment)

In practice, most Guardianship Orders have entrusted a guardian with a power to consent to medical and dental treatment. For clarity, Part IVB does not provide for an express power to refuse treatment.

As a result of the joint efforts of the Guardianship Board and Hospital Authority in the past years, the use of Part IVC powers by doctors and dentists are getting more frequent. The Guardianship Board recorded continual and substantial decrease of applications solely for medical consent powers. During the past 14 years, this type of applications only represents less than 6.97% of the Board's caseload. For year 2017 and 2018, it represents only 3.29%. The bulk of Guardianship Board cases relate to financial and welfare matters of a MIP. In those cases, a guardian is usually given a package of four to six powers under S. 59R(3), to meet with the MIP's needs regarding residence, finance as well as medical treatment.

The Board will also decide on who should be appointed as a guardian along the criteria set out under s.59S. Generally, if no family members or close friends are suitable, the Guardianship Board will appoint the Director of Social Welfare as public guardian.

Application procedure for guardianship (s.59M)

Normally, a family member or a social worker (or a medical social worker) will act as the applicant.

The applicant should fill in the application form (Form 1). The law requires that two medical reports must be enclosed with the application form. One of the medical reports must be prepared by a doctor “approved” by the Hospital Authority. The second medical report can be prepared by any registered doctor. There is a standard medical report form each for the approved doctor and the other doctor, who does not have to be an approved doctor. The applicant must send the form and the two medical reports to the Guardianship Board within the period of 14 days after the person concerned has been examined by the 2nd doctor.

For further details, please refer to our leaflets on “*Application Procedure for a Guardianship Order*” and “*Flow chart for a normal guardianship application*”.

When to seek court order and how?

The need to apply to Court usually arises in the following rare situations: -

- (i) Where a guardian wrongfully refuses to give consent (s.59ZG).
- (ii) Treating doctors may consider to directly apply to Court of First Instance in complicated cases where, in their reasonable judgement, a private or public guardian, even appointed, might not be able to perform their role properly due to insurmountable resistance by family member or other special circumstances e.g. existence of a dubious advance directive or a resistive spouse on religious / supersititious beliefs or otherwise. Proper legal advice should then be sought from the Legal Advisory Division of Hospital Authority Head Office.
- (iii) Other unusual situations e.g. treatment of irreversible nature, withdrawal of artificial nutrition and hydration or other life-sustaining treatments. It is settled law that organ donation by a mentally incapacitated person and sterilization (special treatment) are outside the scope of Guardianship Board.

For more information, contact the Guardianship Board:

Address : Unit 807, 8/F, Hong Kong Pacific Centre, 28 Hankow Road,
Tsimshatsui Kowloon, Hong Kong

Tel : 2369 1999

Fax : 2739 7171

E mail : gbenquiry@adultguardianship.org.hk

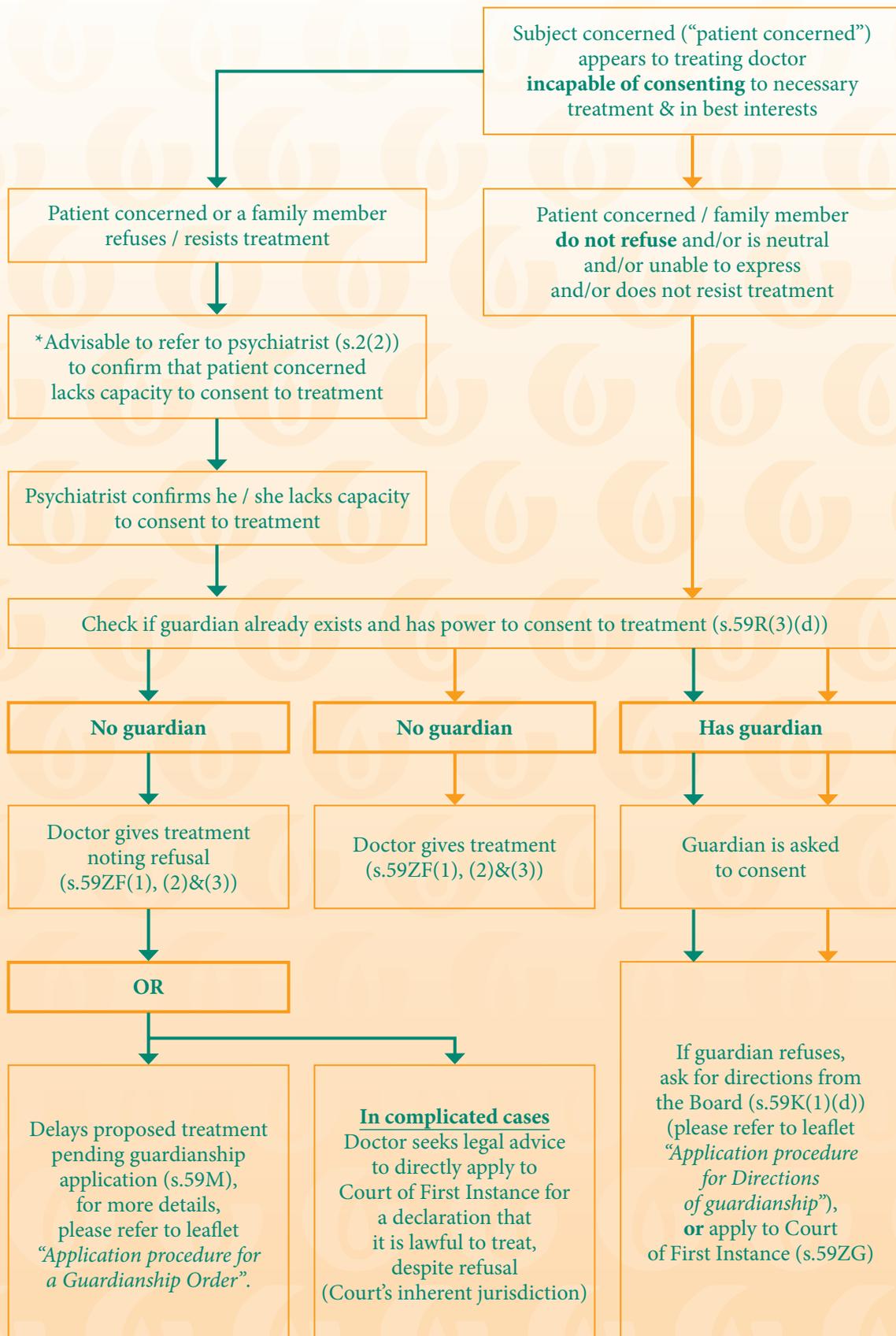
Webstie : www.adultguardianship.org.hk

Important notes : The information in this leaflet is for general guidance only and does not purport to be legal advice given by the Guardianship Board.

Copyright notice of the Guardianship Board

© Copyright of the Hong Kong Guardianship Board 2006. Reproduction of any part is allowed only with written permission from the Guardianship Board.

Consent to medical / dental treatment of mentally incapacitated person, Part IVC of Mental Health Ordinance (Cap. 136)



* This is not a legal requirement under Part IVC.