



REASONS FOR ORDER

**Mental Health Ordinance (Cap. 136)¹
 (Section 59O)**

BETWEEN

Madam W	Applicant²
and	
Miss P	Subject³
The Director of Social Welfare⁴	

Members of Guardianship Board constituted

Chairperson of the Board: Mr Charles CHIU Chung-ye
 Member referred to in section 59J (3) (b): Dr CHOI Wing-kit
 Member referred to in section 59J (3) (c): Ms CHAU Sook-haan

Date of Reasons for Order: 11th January 2012.

¹ Sections cited in this Order shall, unless otherwise stated, be under Mental Health Ordinance (Cap. 136) Laws of Hong Kong.

² S2 of Mental Health Guardianship Board Rules

³ S2 of Mental Health Guardianship Board Rules and S59N(3)(a) of Mental Health Ordinance

⁴ S2 of Mental Health Guardianship Board Rules and S59N(3)(a) of Mental Health Ordinance

Background

1. The subject, P, was a 50 year-old woman with mental handicap since birth. She used to live with her family in a public housing unit before. Her parents passed away in 2008 and 2009 respectively. Her elder brother lived in USA with his family. The subject was admitted into a day care centre cum hostel since mid-1996. Her paternal aunt, W, acted as her CSSA appointee. Madam W had arranged auto-payments to settle the hostel fees of the subject and maintained regular contacts with hostel staff.

Circumstances leading to the present application

2. The (adopted) social enquiry report stated that:

“9.1. The subject had experienced bleeding haemorrhoid at times and received follow-up at surgical out-patient clinic of hospital. Dr WONG [this name is supplied] explained to W that the subject needed to undergo a sigmoidoscopy to confirm if hemorrhoidectomy, i.e. surgical removal of piles, was necessary. W then signed on the consent form for the subject to receive sigmoidoscopy but she was later informed that the consent form was invalid. She was sent to see a medical social worker who provided her the medical certifications to file an application to the Guardianship Board for guardianship over the subject.

9.2 Dr WONG informed that he knew Part IVC of Mental Health Ordinance [“MHO”] provided that a doctor might give urgent or non-urgent treatment to a mentally incapacitated person who lacked capacity to consent, when the treatment was necessary in his/her best interests. In this case, Dr WONG considered application for guardianship as the proper way to obtain consent for the subject to receive the medical

examination and subsequent treatment. Dr WONG added that it was the decision of the Surgical Team of hospital.”

Mental and health conditions

3. The subject, apart from mental handicap, she was found to suffering from deafness since young. She has not learnt to speak. Due to her left eye glaucoma, she had poor vision since admission to hostel in mid-1996. In recent years, the subject also suffered from heart disease, high level of cholesterol and hemorrhoid. The subject was attending medical follow-ups at different health centres and hospital.

Views of Director of Social Welfare

4. The report maker did not recommend the Guardianship Order and stated in the (adopted) supplementary report:

“The subject continues to enjoy the holistic care rendered to her by hostel. In the phone contacts made in last week with the hostel social worker, it is learnt that the subject’s PR bleeding remains more or less the same and is not serious as to warrant immediate medical attention. During a follow-up at Surgical out-patient Department of hospital on 25 November 2011, despite request made by the hostel nurse who brought the subject to hospital, the medical officer did not book sigmoidoscopy for the subject and scheduled the next follow-up to 20 April 2012. The investigating officer recommends no Guardianship Order not because there is not a practical need. It is because the surgeon Dr WONG clearly stated that he knew Part IVC of the MHO provided that a doctor might give treatment to a MIP who lacked capacity to consent, when the treatment was necessary and in his/her best interests. The investigating officer regards that as the proper way to

deal with this case, rather than asking GB to appoint a legal guardian to give consent for the subject to take the medical examination/treatment. Upon good advice, the investigation officer called Dr WONG on 5 January 2012 to find that Dr WONG had left the hospital. His successor, Dr YU [this name is supplied] said he would report to the surgical team to see what should be done if GO was declined. He refused to tell if medical examination/treatment would be given to the subject using Part IVC of the MHO, not to say to confirm it in writing.”

5. Before receiving the supplementary information from the social enquiry report maker, the Board sent a letter to the consultant-in-charge in order to clarify the stance of hospital. A reply from Senior Medical Officer of hospital dated 11 January 2012 was received and stated:

“For the procedure of flexible sigmoidoscopy in this patient, this is a non-urgent operation. She needs general anaesthesia and there is risk of colon perforation and subsequent operation.

Legal guardian is necessary.”

Summary of evidence adduced at hearing on 11 January 2012

6. The applicant, W, says she is willing to act as the guardian of the subject and consent to the sigmoidoscopy examination. The PR bleeding of the subject is still persistent.
7. The maker of social enquiry report, on behalf of the Director of Social Welfare, says he agrees to a grant of Guardianship Order today.

Issues and Reasoning

Reasoning for receiving the subject into guardianship

8. The Board is rather reluctant to grant the Guardianship Order today as the surgeons of hospital should rely on Part IVC, Mental Health Ordinance to carry out the sigmoidoscopy for the subject. The said procedure is apparently delayed twice, namely, in the medical follow ups respectively in April and November 2011. Despite the efforts of the Board and the social enquiry report maker, the hospital kept her stance and required a guardian to be appointed without a valid reason (an elective or non-urgent procedure per se is not a valid reason), even when the Board's letter dated 3 January 2012 pointed out to the consultant-in-charge that no relatives are objecting and attached therewith the Board's leaflet no. 13. The situation is rather unfortunate, as it comes to the stage today, and the Board, with a view to pragmatically resolve this impasse in order to bring about an early diagnosis of the subject's PR bleeding problem, finally decides, or somehow forced to decide that a Guardianship Order with medical powers should be granted due to the treating surgeons' unreasonable insistence. On passing, the Board queries why the present diagnostic examination is not urgent, as quoted by Senior Medical Officer of hospital, in his letter dated 11 January 2012.

Reasoning for choosing the legal guardian

9. The Board accepts and adopts the view of the social enquiry report maker who recommended, as contained in the report, the applicant and proposed guardian, to be appointed as the guardian of the subject in this case.

DECISION

10. The Guardianship Board is satisfied on the evidence and accordingly finds:-

- (a) That the subject has a mental handicap within the meaning of section 2 of the Ordinance which warrants the subject's reception into guardianship;
- (b) The mental handicap limits the subject's capacity to make reasonable decisions in respect of a substantial proportion of the matters which relate to the subject's personal circumstances;
- (c) The subject's particular needs may only be met or attended to by guardianship, and no other less restrictive or intrusive means are available as the subject lacks capacity to make decisions on her own welfare plan and treatment plan;

In this case, the predominant need of the subject remained to be satisfied is, namely, consent to sigmoidoscopy of her illness;

- (d) The Board concludes that it is in the interests of the welfare of the subject that the subject should be received into guardianship.

11. The Guardianship Board applies the criteria in section 59S of the Ordinance and is satisfied that the applicant and proposed guardian is the only appropriate person to be appointed as guardian of the subject.

12. After the hearing, the Board sent a letter to the Senior Medical Officer of hospital and copied to the Hospital Chief Executive. In the letter, the Board extracted the reasoning of the order for their reference and pointed out that this present application should have been well avoided because Part IVC of Mental Health Ordinance should be relied upon instead.

(Mr Charles CHIU Chung-ye)
Chairperson of Guardianship Board