



**ORDER FOR RENEWAL AND VARIATION
OF GUARDIANSHIP ORDER**

Mental Health Ordinance (Cap. 136)¹

(Section 59U)

BETWEEN

Mr LEN

Guardian²

and

Madam TUN

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): Ms YEUNG Mee-ling

Member referred to in section 59J (3) (c): Ms MA Yuk-kum

Date of Reasons for Order: 23rd April 2008.

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 and S59U(4)(b) of Mental Health Ordinance

³ S2 of Mental Health Guardianship Board Rules and S59U(4)(a) of Mental Health Ordinance

⁴ S2 of Mental Health Guardianship Board Rules and S59U(4)(c) of Mental Health Ordinance

Background

1. The subject, Madam TUN, was a 70 year-old woman suffering from advance stage of Alzheimer's disease. She has two sons and husband. The subject authorised her husband by general powers of attorney to manage her savings (about \$2 millions) in the bank accounts in 2004. The subject was arranged to live in care and attention home since November 2006. By the end of 2006, the husband and elder son had withdrawn about \$1.6 millions from the subject's accounts. On 6 January 2007, the husband of subject passed away due to lung cancer. The elder son claimed that the sums withdrawn were used up for maintenance of subject, purchased machineries for his business and kept repaying the mortgage loan of his younger brother. Due to one of the time deposit account (around US\$67,000) could not be withdrawn timely before the death of the subject's husband, the elder son applied guardianship for the subject. The aim of his application was to withdraw the remaining savings (around \$550,000) in subject's accounts to support her living.
2. The Board's view was explained to the elder son on the lapse of the general powers of attorney by the subject in favour of his late father upon the psychiatrist's certification on 12 November 2006 and as such, all withdrawals of money made in November 2006 were unauthorised. The elder son explained that it was not for money that he rendered care to the subject who was his mother, irrespective of the result of the guardianship application. It would be more financially flexible to his family if the Guardianship Order were granted and he wanted to fulfil the wish of his late father to continue to pay for the mortgage loan of his younger brother. On balancing all factors, the Board still appointed the elder son to be the guardian on 27 April 2007.

3. Unfortunately, the guardian passed away in a traffic accident in Mainland China on 2 October 2007. After 4 months from the death, on 12 February 2008, the Director of Social Welfare applied for review and suggested to change the guardian. The younger son was willing to be the new guardian of subject. After the death of guardian, the payment of HDA was stopped from depositing to the elder son's account and the younger son settled all the expenses of subject e.g. home fees, medical expenses, diaper charges, the maid's salaries, daily transportation expenses and miscellaneous expenses at a total over \$60,000.
4. According to the progress social enquiry report, the subject moved to a subvented care and attention home since October 2007 with the assistance from the younger son of subject. An Indonesian maid employed for taking care the subject at care and attention home from 8:00 a.m. to 7:00 a.m. daily. The maid will help the subject to walk in the park, brought her fruits and snacks, etc.
5. In March 2008, the wife of elder son informed the younger son that she was eligible for the application for Employee's Compensation for the Death under the Employees' Compensation Ordinance. Meanwhile, the subject was entitled for 10% apportionment of compensation if the application was successful.

Mental and health conditions

6. Physically, the subject could walk slowly and she required assistance in feeding. She could eat if the food was put in her hand. The subject would need supervision and assistance in her daily activities e.g. bathing, changing clothes and diapers. Mentally, the subject was suffering from advance stage

of Alzheimer's disease. Her score of MMSE is zero. She was unable to follow any verbal command.

Hearings at the Board on 23 April 2008

7. The newly proposed guardian, i.e. younger son of the subject, said he agreed to comply with guardian duties as explained.
8. Regarding the issue of the employment contract of the Indonesian maid, he said he did explain to the agent on the scope of work before the contract was prepared. The Board took the younger son through the problematic clauses in the employment contract. The Board explained to him the need to immediately rectify the contract by means of a written authorization of the Board. The Board clearly explained to him the potential legal problem and criminal liability that might involve. The Board wished to make clear that in future the wages and expenses of the maid could not be claimed as part of the expenses of the subject until the Immigration Department approved the rectification, as the present scheme is clearly contrary to public policy and immigration law of Hong Kong.
9. Progress Social Enquiry Report maker Ms O said due to nocturnal restlessness, subject was given anti-psychotics for better sleep. The home nurse would keep in view of the progress and would decide on whether there was a need for psychiatric referrals.
10. The Board was rather dissatisfied with the lapse of almost four months after the death of the former guardian before a review application was filed. Ms O said the reason for the delay was due to the waiting time spent for a review medical report, but the Board pointed out to her that the subject

suffered from Alzheimer's disease and as such there was no need to call for the report. Neither was it a requirement set out in the last Guardianship Order. The Board found the maker's explanation totally unacceptable. The Board felt unsatisfactory also because there was a debt unnecessarily incurred to a sum of over \$60,000 to date.

11. Ms O said it was the secretary of the deceased guardian who prepared the monthly accounts of expenses. The Indonesian maid stayed at the former quarters of the subject and therefore there was need to pay for the management fees and rates.
12. Ms O said the nurse of aged home told her that the subject's mobility was maintained well by the daily walking exercises provided by the maid.
13. Ms O raised that lately the deceased guardian was entitled to an employee's compensation. She said the Labour Department was shown a copy of last Guardianship Order, but was of the view that a legal guardian could not represent the subject to obtain the compensation. [The younger son said the 10% entitlements of the subject would be around \$100,000, but if this was not dealt with then the entire compensation claim would be held up.] In this respect, the Board could not find a single paper from Labour Department being enclosed in the report showing the claim amount, the type of claim and the status of claim and the basis on which subject was so entitled. Later, the Board was helped to understand that the claim was not even filed yet. The Board was asked if the new guardian could be authorized to institute an application to Labour Department on the subject's behalf and represent the subject in processing the claim including signing of a receipt. To the Board, all such steps might entail the power to negotiate or advocate for the final amount of the compensation. Obviously, all those

powers being asked for are not within the scope of the statutory scheme of guardianship, which the representative of the Director of Social Welfare should have known.

14. At the most, the future guardian could only be recommended to receive a cheque(s) drawn in favour of the subject in a fixed amount representing the subject's entitlement to the former guardian's employee compensation or interim compensation as determined from time to time by Commissioner for Labour or the relevant authority, on the condition that such cheque(s) must be paid into the subject's sole name account.

15. Finally, as seen from this case, Ms O and the officer supervising her were extremely inexperienced in handling guardianship case and lack the necessary knowledge and understanding of guardianship practice and law, not to mention what to include and write down in her report (e.g. she even quoted that she informed the Board "verbally at once" on knowing the death of the former guardian last October, but exactly when? And to whom? And what was the advice she got? And what did she do afterwards? And why informed verbally? And why quote the Board in an official and neutral report, supposedly to be submitted to the Board? Why no correspondence with Labour Department was exchanged showing what was the exact need?)

Reasoning for continuing to receive the subject into guardianship

16. The Board accepts and adopts the views of doctor as contained in the medical report dated 18 December 2007 as well as the progress social enquiry report and the views and recommendations as contained therein and accordingly decided to continue to receive the subject into guardianship in

order to protect and promote the interests of welfare of subject.

Reasoning for changing the legal guardian

17. The change of guardian was obviously needed in this case due to the sudden death of the former guardian. The Board accepts and adopts the view of the progress social enquiry report maker who recommended the younger son of subject, to be appointed as the new guardian of the subject in this case.

DECISION

18. The Board is satisfied and accordingly finds that the subject remains a mentally incapacitated person for whom a guardian should be appointed as the order had resulted in maintenance of the subject's welfare and health. The subject still needed a guardian to make substitute decisions, as the subject lacked capacity to make reasonable decisions on personal and welfare matters including decision on financial matters. For the same reasons as stated in the original Guardianship Order, the Board was satisfied that there remained no less restrictive or intrusive alternative to guardianship. The Board concluded that it is in the interests of the welfare of the subject to continue to be under guardianship and that the original guardianship order should be renewed.

19. The Guardianship Board applied the criteria in section 59S of the Mental Health Ordinance and was satisfied that the younger son is the most appropriate person to be appointed the guardian of the subject.

Recommendation of the Board

20. The guardian is recommended to receive a cheque(s) drawn in favour of the subject in a fixed amount representing the subject's entitlement to the former guardian's employee compensation or interim compensation as determined from time to time by Commissioner for Labour or the relevant authority, on the condition that such cheque(s) must be paid into the subject's sole name account.

Authorizations of the Board

21. The guardian be authorised, in the exercise of the financial power granted under the present Guardianship Order, to apply to Immigration Department in his capacity as the legal guardian for approval in employing a foreign domestic helper to serve the daily needs of the subject.
22. The case social worker is required to submit an interim report on the progress of this matter within 6 months from today.
23. The case social worker must pay attention to the paragraph 8 of above.

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