



REASONS FOR ORDER

Mental Health Ordinance (Cap. 136)¹

(Section 59O)

BETWEEN

Miss KA

Applicant²

and

Madam L

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 Cindy CHAN

Member referred to in section 59J (3) (c): Ms WONG Mee-ling

Date of Reasons for Order: 22nd August 2011.

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, aged 61, was divorced and lived alone in a rented flat paying \$8,500 per month. Due to her health and mental deteriorations, she was discharged to a private residence care home for the elderly since 18 June 2011. The subject was born in China and ranked first in her maiden family, having a younger sister and younger brother, Mr KAM who were all married and lived in Mainland. The subject maintained close contact with them even after she migrated to Hong Kong in 1980's.
2. In 2006, the subject stopped working due to the poor marital relation and onset of breast cancer. The subject received cancer treatment in hospital and was referred to psychiatric centre for treatment of depression. In 2009, the subject was further diagnosed spreading of breast cancer to the bones. Her marriage was finally dissolved in 2010 and, by Court Order, she received from her ex-husband around \$1 million as her share of 3 joint properties.
3. During the Chinese New Year in 2011, the subject returned to Mainland. She had acute brain problem which caused unconsciousness. She was sent to hospital in China and was diagnosed of suffering from stroke. In late February 2011, she was arranged to return to Hong Kong and admitted to hospital.
4. Since June 2011, the subject was transferred for palliative care. On medical advice to discharge, the younger brother planned to discharge the subject to private old age home. Due to the need of the subject, the younger brother was advised to file a guardianship application for mobilizing the subject's savings at bank for future maintenance. The younger brother, after repeated explanations, refused to be the applicant but

proposed himself to be guardian. He also refused to disclose the financial information of the subject to the medical social worker. Finally, the medical social worker filed a guardianship application for the subject in mid June 2011.

5. Under the investigation by Director of Social Welfare for preparing the social enquiry report, the younger brother finally produced the bank passbooks to the report maker. The saving balance of subject in the banks was around \$488,000. The bank passbooks showed that there was a total of \$178,000 withdrawn from subject's bank accounts in May and June 2011. The younger brother explained that it was under the instruction of subject, during her hospitalisation in February 2011 in Hong Kong, to withdraw money by her ATM card for paying rents, old age home fees, hospital fees, etc. He also said the sum was used to repay him the money for buying Chinese medicine and herbs and paying hospital fees in Mainland.

Mental and health conditions

6. The subject was diagnosed to have of breast with brain metastasis. Her prognosis was poor with life expectancy in terms of months, from six months to one year. Observed by the reporting officer, she was poor in reasoning and had a confused mind. She lay on the bed and looked pale, tired and weak. She gave simple answers in response and could not recall most of the things in the conversation. She once complained of frequent pain attacks and depended on medicine injection to relief pain at night.

Summary of evidence adduced at hearing on 22 August 2011

7. The younger brother of the subject said the subject arrived Mainland on or about 28 January 2011. In the morning of onset, namely 30 January 2011,

subject was found to have confused speech. Subject was sent to a local hospital. The relevant receipt showing the admission was on 31 January 2011 because the subject was kept for one day at the outpatient department for medical conference.

8. Regarding the younger brother's claim for reimbursement, the Board explained to him that the clarity of subject's finances remained obscure, to viz: -

(a) There was no clear evidence to support the usage of the huge amount of monies withdrawn from subject's 1st bank account between November 2010 and June 2011, i.e. \$530,000.

(b) The whereabouts of \$272,000 out of the said \$530,000 was unknown. This sum was withdrawn between 10 November 2010 and January 2011 (i.e. before the subject left for Mainland).

(c) Absence of a clear account of the use of another \$248,000 out of the said \$530,000. This sum was withdrawn by the younger brother since the subject's hospitalization in Mainland on 30 January 2011 and up till June 2011. The alleged expenses were doubtful because, even according to the younger brother, the monthly expenses of the subject were around \$20,000 a month only. Most of the receipts submitted (total value \$121,643.40 only) were related to expenses in the long past, e.g. 2009 and 2010.

9. The Board therefore declined to authorize the claim of reimbursement by the younger brother in the sum of \$42,661.40.

10. He disagreed with the appointment of Director of Social Welfare as the legal guardian. He liked to become the guardian of subject. He preferred not to talk about money and repeated that he did pay out a lot for the subject. He and his other elder sister take care of the subject in hospital every day from February to June this year on alternative basis as he and the other elder sister can only stay in Hong Kong for 7 days under the travelling permits. He knew the subject has short life expectancy. He liked to give the best care and concern to the subject during her remaining days due to sibling bondage.
11. The maker of social enquiry report, on behalf of the Director of Social Welfare, said he has discussed with the younger brother on his suitability to act as the guardian of the subject. He explained that in the best interests of the subject, public guardian should be the right choice. With the appointment of public guardian, the siblings could still continue to give care and concern to the subject. His reasons were set out in his first report.

Issues and Reasoning

Reasoning for receiving the subject into guardianship

12. The Board received and adopted the views of the two medical doctors as contained in the two supporting medical reports as well as the social enquiry report and the views and reasoning for recommending Guardianship Order as contained therein and accordingly decided to receive the subject into guardianship in order to protect and promote the interests of welfare of subject.

Reasoning for choosing the legal guardian

13. The Board accepted and adopted the view of the social enquiry report maker who recommended, as contained in the report, the proposed guardian the Director of Social Welfare to be appointed as the guardian of the subject in this case. In this case, the subject suffered from mental incapacity secondary to breast cancer which metastasised to the bone and then to the brain. She has only a short life expectancy which was counting by months. According to the evidence, the subject's mental capacity had a significant lapse on 30 January 2011 during her stay in Mainland and as a result of which she was sent to a local hospital in Mainland. Although there was no evidence of mental problem before that day, it was sufficiently clear that the subject cannot regain her mental capacity since that day. The Board entirely agreed with the reasons as set out in the social enquiry report in finding that the Director of Social Welfare was the better candidate for appointment as the legal guardian. The Board would add that it was rather impractical to appoint someone who was not an ordinary resident of Hong Kong to be a guardian, such as the present case. The simple reasons were that it was difficult to monitor and supervise such a guardian by local social worker and it was also hopeless to recover from the guardian should there be inappropriate management of finances, not to mention decisions to be made on urgent medical or other situations. In general terms, it was plain and obvious that a local resident has far better knowledge of the Hong Kong culture, public and other community resources to help improving the subject's welfare. In promoting the best interests of the subject, a professional social worker under the Director of Social Welfare will have so many advantages over the younger brother to become the guardian of the subject. Lastly but most importantly, the use of sizeable sums withdrawn from the subject's account as canvassed at the hearing remained mysterious. The Board has unresolved doubts as to whether the younger brother had

taken any advantage of the subject's money. The younger brother was unable to give a clear explanation or show clear record on the use of the sums so withdrawn. The Board was rather disturbed by his submission of a large number of old receipts in support of his alleged expenses for the subject. He even wished to claim further reimbursements. Overall, the Board tended to believe there existed an undue conflict of interests of a financial nature between the younger brother and the subject. Therefore, after considering s.59S of Mental Health Ordinance, the Board decided to appoint the Director of Social Welfare as the legal guardian of the subject in this case.

DECISION

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

- (a) That the subject, as a result of brain metastasis of breast cancer, was suffering from a mental disorder within the meaning of section 2 of the Ordinance which warrants the subject's reception into guardianship;
- (b) The mental disorder limited 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 needed may only be met or attended to by guardianship, and no other less restrictive or intrusive means were available as the subject lacks capacity to make decisions on accommodation, her own welfare plan, treatment plan and finances, which had resulted the subject being abused financially;

In this case, the predominant need of the subject remained to be satisfied was, namely, decision to be made on finance;

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

15. The Guardianship Board applies the criteria in section 59S of the Ordinance and was satisfied that the Director of Social Welfare was the only appropriate person to be appointed as guardian of the subject.

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