



**REASONS FOR ORDER**

**Mental Health Ordinance (Cap. 136)<sup>1</sup>**

**(Section 59O)**

-----

**BETWEEN**

**Mr P**

**Applicant<sup>2</sup>**

**and**

**Madam T**

**Subject<sup>3</sup>**

**The Director of Social Welfare<sup>4</sup>**

---

**Members of Guardianship Board constituted**

Chairperson of the Board: Mr Charles CHIU Chung-ye

Member referred to in section 59J (3) (b): Dr FONG Wing-chi

Member referred to in section 59J (3) (c): Mrs FURNISS LAU Mei-ying

**Date of Reasons for Order:** 24<sup>th</sup> February 2010.

---

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

<sup>2</sup> S2 of Mental Health Guardianship Board Rules

<sup>3</sup> S2 of Mental Health Guardianship Board Rules and S59N(3)(a) of Mental Health Ordinance

<sup>4</sup> S2 of Mental Health Guardianship Board Rules and S59N(3)(a) of Mental Health Ordinance

**Background**

1. The case concerns the administration of the estate of the late husband of the subject, Madam T (“the estate”).
2. The staff for and on behalf of the trustee company (“the Administrator”) is the administrator of the estate under a grant of Letters of Administration by High Court in January 2009.
3. The problem remaining unresolved relates to the property (which forms part of the estate) where the subject is residing. In the course of administration, the Administrator sees fit, on legal advice, to apply for a Guardianship Order for the subject in order that the future guardian can make decisions on whether the subject, in the words of the staff of trustee company, “wants the property (i.e. the residence) or otherwise consents to [our] taking some other action to administrate the property.”
4. In other words, pursuant to s.7 (right of surviving spouse to acquire residence) of Intestates’ Estates Ordinance Cap. 73 (“IEO”), and s.1 and s.6 of Schedule 2 (persons of unsound mind and infants) of the Ordinance, the administrator and the applicant would like the future guardian to make an election, requirement or consent over the property, so much so that the estate can be further administered.
5. In sum, the question before the Board is whether a legal guardian can make (and hence, sign for) an election, requirement and consent over the property under s.7 and Schedule 2 of IEO.

**Hearings at the Board on 12 July 2010**

6. The Board does not invite the applicant and the sons to speak because the matter now only involves a legal point on the jurisdiction of the Board, namely, the power of a guardian to sign an election involving an estate.
7. The staff of trustee company says her lawyer has not given her further advice after receipt of Board's letter dated 10 February 2010, inviting for further submission on powers of a legal guardian under s.59(R)(3)(a)-(f) Mental Health Ordinance and High Court decision in HCMP 953/2008. Their position is neutral and the final decision will rest with the Board.
8. The maker of social enquiry report, on behalf of Director of Social Welfare, says she has nothing to add.

**Reasoning of the Guardianship Board**

9. The following statutory provisions are of relevance: -

*S.7 of IEO*

*“Schedule 2 shall have effect for enabling the surviving husband or wife of an intestate to acquire the premises in which the surviving husband or wife was residing at the time of the intestate's death.”*

S.1, Schedule 2 of IEO

*“Where the residuary estate of the intestate comprises or includes an interest in premises in which the surviving husband or wife was residing at the time of the intestate's death (referred to in this Schedule as the "residence") and the surviving husband or wife so elects, the personal representatives shall appropriate that interest-*

*(a) in or towards satisfaction of any interest of the surviving husband or wife in the estate of the intestate; or*

*(b) partly in satisfaction of an interest of the surviving husband or wife in the estate of the intestate and partly in return for a payment of money by the surviving husband or wife to the personal representatives.”*

S.6, Schedule 2 of IEO

*“(1) Where the surviving husband or wife is a person of unsound mind, an election, requirement or consent under this Schedule may be made or given on his or her behalf by the guardian or committee, or where there is no guardian or committee, by the court.*

*(2) An election, requirement or consent made or given under this Schedule by a surviving husband or wife who is an infant shall be as valid and binding as it would be if he or she were of age.”*

*s.59R(3)(a)-(f), Mental Health Ordinance*

*(6 powers of a legal guardian)<sup>5</sup>*

*“(a) the power to require the mentally incapacitated person to reside at such place as may be specified by the guardian;*

*(b) the power to convey, or to arrange the conveyance of, the mentally incapacitated person to the place so specified by the guardian, and such reasonable force may be used as is necessary for the purpose;*

*(c) the power to require the mentally incapacitated person to attend at places and times so specified by the guardian for the purpose of treatment or special treatment (within the meaning of section 59ZA) or occupation, education or training;*

*(d) the power to consent to that treatment (other than special treatment) on behalf of the mentally incapacitated person but only to the extent that the mentally incapacitated person is*

---

<sup>5</sup> Words in brackets are supplied.

*incapable of understanding the general nature and effect of any such treatment;*

*(e) the power to require access to the mentally incapacitated person to be given, at any place where the mentally incapacitated person is residing, to any registered medical practitioner, approved social worker, or other person (if any) specified in the order;*

*(f) the power to hold, receive or pay such monthly sum (within the meaning of section 44B(8)) specified in the order on behalf of the mentally incapacitated person for the maintenance or other benefit of that person as if the guardian were a trustee of that monthly sum.”*

10. The Board is not satisfied that a guardian under Part IVB, Mental Health Ordinance (“Part IVB”) has the power to make an election / requirement / consent for the subject over the residence in question, which form part of the sizeable estate left by her late husband. The reasons being: -

- (a) Schedule 2 of which s.6(1) forms part (“S.6(1)”), Intestates’ Estates Ordinance (Cap. 73) (“IEO”) was added in 1995, at the time when s.33-35, Mental Health Ordinance (Cap. 136) (“old guardianship provisions”) were in force. Putting aside whether the old adult guardianship provisions were applicable in a situation like the present case at that time, they were in fact repealed, as early as 1997.

- (b) (i) Simple as it would seem, the staff of trustee company by her letter dated 19 October 2009 to the social enquiry report maker, further explains the situation: -

*“3. If Madam T does not exercise her right to elect to take the Property or consent to it being dealt with in some other way, we cannot carry out our administration duties as regard the Property. If there is no guardian or committee to make the decision for her, we will need to make an application to Court for such an election or consent to be made or given by the Court on her behalf.*

4. ....

*5(i).If a election is made by the guardian or committee on behalf of Madam T, our duty as administrator will according to paragraph 1(3) of the Schedule to the Ordinance, be to ascertain and fix the value of the Property by engaging a duly qualified valuer and thereafter, we will arrange for our solicitors to draw up the conveyancing document to assign the Property to Madam T. Should the value of the Property exceeds the value of Madam T’s interest in the estate, which, given the value of the assets in the Schedule annexed to the Grant, is going*

*to be the case, her committee will have to make payment from Madam T's own funds to us of the difference in value and also to sign the assignment on behalf of Madam T. Under this scenario, an appointment of guardian will not be appropriate.*

*(ii) Should the guardian or committee of Madam T consent to a sale, after obtaining the valuation, we will arrange for the Property to be sold with the valuation obtained being the minimum price for sale and instruct agents to market the Property. Madam T will however have to be placed in alternate accommodation if this option is selected.*

*(iii) Alternatively, the guardian or committee on behalf of Madam T might not make a election or consent for sale as in 5(i) or 5(ii) above, in which event, their consent on her behalf would be required for us to carry out 1(i) above ." (for paragraph 1(i), see below)*

(b)(ii) Considering the submission as a whole, the Board is not convinced that the power being sought is as simple as electing the residence alone as the scheme would and could entail substantial and extensive property rights and entitlements and, perhaps, settlements and compromises over such rights and entitlements of the subject.



Paragraph 1(i) and 2(i) of the staff of trustee company's said letter stated: -

*“1(i) Since the deceased died intestate, his residuary estate will be distributed amongst his beneficiaries according to section 4(3) of the Intestate Estates Ordinance (“the Ordinance”). Specifically in respect of the Property which Madam T is residing, our proposed administration action is to assent the legal ownership of the Property as to 50% to Madam T and the remaining 50% as to 10% to each of the deceased's 5 children.”*

*“2(i) The legal purpose of this right of election by the surviving spouse is to ensure that Madam T as the surviving wife gets to keep the property which she has been living in at the time of her husband's death. The legal implication is that if Madam T elects to take the property, the property will not be available either for sale or for distribution to the deceased's children.”*

(b)(iii) Regarding the new adult guardianship scheme, Part IVB of Cap. 136 clearly set out 6 essential powers which are limited in scope and application (see HCMP 953/2008). These 6 essential powers do not cover the situation of the present case, viz, powers of guardian to

make election / requirement / consent or appropriation or sale of the residence which is a real estate property. The financial ramifications of the election etc is a complex financial matter in its very nature and as such, should be dealt with by a committee. In sum, the matters asked to be dealt with by a legal guardian appointed under Part IVB of Cap. 136 is beyond the ambits of the residence power under s.59R(3)(a) and financial power under s.59R(3)(f), which are far narrower in scope and extent.

- (c) Reading IEO and particularly its Schedule 2, there contains no specific reference on the term “the guardian” as to whether it is a guardian appointed under Part IVB or other parts of Mental Health Ordinance or other Ordinances of Hong Kong. Being the case, it could very well be the proper interpretation that the term “the guardian” provided in s.6(1) only refers to a guardian of a surviving **infant** spouse who is at the same time mentally unsound to give or make his/her election or consent etc under s.6(2) of Schedule 2, IEO.
- (d) The preceding proposition considered is supported by the mirror provision under UK law as s.6(1)&(2), Second Schedule of Intestates’ Estate Act (UK) read as follows: -

*“6(1)Where the surviving husband or wife is a person of unsound mind or a defective, a requirement or consent under this Schedule may be made or given on his or her behalf by the committee or receiver, if any, or, where there is no*

*committee or receiver, by the court.*

*(2)A requirement or consent made or given under this Schedule by a surviving husband or wife who is an infant shall be as valid and binding as it would be if he or she were of age; and, as respects an appropriation in pursuance of paragraph 1 of this Schedule, the provisions of section forty-one of the principal Act as to obtaining the consent of the infant's parent or guardian, or of the court on behalf of the infant, shall not apply.”*

- (e) As it would seem, 6(1) of UK Act does not provide for a guardian to function whilst 6(2) specifically mentions some functions of the “**infant's parent or guardian**”.

11. Accordingly, the application herein is dismissed.

## **DECISION**

12. The Guardianship Board observed and applied the principles contained in section 59K (2) and applied the criteria set out in section 59O (3) of the Mental Health Ordinance. The Guardianship Board was satisfied: -

- (a) The subject is a mentally incapacitated person suffering from vascular dementia, amounting to a mental disorder, within the meaning of section 2 of the Mental Health Ordinance;

- (b) the mental disorder limits the subject in making reasonable decisions in respect of all or a substantial proportion of the matters which relate to the subject's personal circumstances.
13. The Guardianship Board cannot exercise its jurisdiction to make a guardianship order as insufficient evidence has been furnished to satisfy the criteria in section 59O (3) (c) and (d) of the Mental Health Ordinance (Cap 136) namely: -
- (a) that the particular needs of the subject, may only be met or attended to by guardianship and that no other less restrictive or intrusive means are available in the circumstances particularly the power of a guardian being sought is outside the jurisdiction of the Board; and
- (b) that it is in the interests of the welfare of the subject that the subject should be so received.
14. The Guardianship Board, for the reasons set out in its Reasons for Order, **DISMISSES** the application for guardianship and **REFUSES** to order that the subject be received into guardianship.

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