



**REASONS FOR ORDER**

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

**(Section 59O)**

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**BETWEEN**

**Mr TM**

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

**and**

**Madam LY**

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

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

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**Members of Guardianship Board constituted**

Chairperson of the Board: Mr Charles CHIU Chung-ye

Member referred to in section 59J (3) (b): Dr WONG Chee-wing

Member referred to in section 59J (3) (c): Mr Stephen HO Kam-yu

**Date of Reasons for Order: 22<sup>nd</sup> February 2010.**

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<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 subject, Madam LY, was a 79 year-old woman suffering from Alzheimer's disease. She used to live with her husband and three surviving sons. When the sons were grown up, the two younger sons moved out, the eldest son got married in 1995 and gave a birth to a child in 2000. Her husband passed away in January 2006. Since then, the subject lived with her eldest son's family and a domestic maid in her husband's small self-own flat until October 2008. In the flat, there were 3 small bedrooms and one sitting room but large quantity of objects was filled up most of the space from top to bottom in most areas. The sofa was also used to store household items.
2. On 11 October 2008, the 4<sup>th</sup> son of subject brought the subject from her home to the home of 2<sup>nd</sup> son. In the evening, the eldest son went to the home of 2<sup>nd</sup> son and requested to bring the subject back. Finally, the 2<sup>nd</sup> son called the police and the eldest son left. The reason of the eldest son to take the subject back to his home was that the subject would have a medical appointment for her skin problem on 19 October 2008. The reason of the 4<sup>th</sup> son in taking the subject to the 2<sup>nd</sup> son's home was that the eldest son's family (especially the elder daughter-in-law) was not treating the subject well.

## **Circumstances leading to the Application**

3. The allegations of 2<sup>nd</sup> and 4<sup>th</sup> sons against the eldest son's family included the eldest daughter-in-law forbidding the subject to turn on the TV at the sitting room or to open the main door. She also required the subject to keep the curtain down the whole day. She wrote her instructions on yellow

stickers and flagged them around the flat in order to remind the subject to follow. The family did not ask the domestic maid to cook for the subject or allow the subject to take phone calls. After the death of her husband, the subject was granted the Letter of Administration without any notification to other children. The subject later sold the property of her late husband to a company, which was owned by the eldest son, at a price of HK\$600,000 which was below market value. Actually, the subject did not receive any purchase price from the eldest son. The joint-name safe deposit box of subject and the 2<sup>nd</sup> son was changed to the joint names of subject and the eldest son. The eldest son was the principal owner of the box and the subject only had the right of access to the safe deposit box.

4. The response against those allegations from the eldest son and her wife (i.e. elder daughter-in-law of subject) were that he never restricted the subject to watch TV programs. The daughter-in-law responded there was a need to remind the subject with a yellow tag to keep the curtain down so that the people could not peep into the sitting room from the glass wall of the adjacent commercial building. The 2<sup>nd</sup> and 4<sup>th</sup> son could not get in touch with subject as the stored-value SIM card of the mobile phone often ran out of cash value. The eldest son said the safe deposit box only held his personal items and some golden jewellerys of subject. The yearly rental for the safe deposit box was paid by him. Regarding the disposition of the property, the eldest son said it was the wish of his late father. Besides, the subject transferred it to him as he was the eldest son of the family and lives together with the parents for so long. His two younger brothers never made money contributions to his parents all along.

**Mental and health conditions**

5. According to the medical report of the approved doctor, the subject showed gradual memory impairment after stroke in December 2003. She was poor in learning new tasks. MMSE score (12/30) showed she was in the moderate grade of cognitive impairment.

**Summary of evidence adduced at hearing on 21 January 2009**

6. CM, the eldest son of subject, says he wishes to apply for an adjournment today. He says he opposes to the application for Guardianship Order by his younger brothers. He feels that it was unnecessary.
7. Regarding the failure to give Ms C, the social enquiry report maker, the written information by 21 November 2008, he says he has a draft pending verifications from various sources. [Ms C says she receives a draft. But CM insists to wait for all details confirmed before finally submitting it. She explains everything to him and told him that part of unconfirmed information could be supplemented later.]
8. He says he had approached a private doctor who made an appointment to see the subject. He hands up a note from Dr L, specified an appointment on 2 February 2009. He says he would pay for the doctor's fee.
9. On the question of whether he should join as a party to these guardianship proceedings, he could not come up with an answer. The Board stands the case down to allow time for him to consider. After recess, he tells the Board that he would seek to confirm whether to join as party only after the medical report of his nominated doctor was made available to him. The

Board agrees.

10. TM, the applicant and the 4<sup>th</sup> son of subject, opposes to an adjournment as the application was well substantiated.
11. KM, the proposed guardian and the 2<sup>nd</sup> son of subject, says an adjournment is unnecessary.
12. Ms C on behalf of Director of Social Welfare says she has no comment on adjournment.

### **Order of adjournment**

13. The Board, after considering the written request from CM and the note showing a medical appointment of the subject with Dr L on 2 February 2009 and upon hearing from parties, decided to adjourn the hearing on ground of procedural fairness and the compliance with the rule of natural justice.

### **Summary of evidence adduced at hearing on 22 February 2010**

14. CM, the eldest son of subject, says he has nothing to add.
15. Mr D, Counsel for CM, says CM would not seek to join as a party to these proceedings. On behalf of CM, there is no opposition against Guardianship Order to be granted. CM would not ask to be appointed as guardian. CM would hope Director of Social Welfare to be appointed as guardian. CM would surrender the Hong Kong Identity Card and travelling documents of the subject to the Director of Social Welfare, the

future guardian.

16. As for CM, he seeks access to the subject. CM has not seen subject for over a year and each attempt for it was ended up in police intervention. Though the subject had lived in the old abode for a long time, CM would not seek for immediately restoration to his care. CM hopes one day the subject could be arranged to have alternate accommodation both at the present abode as arranged by the applicant and proposed guardian as well as at his place. These are the wishes of CM, not pre-conditions for consenting to Guardianship Order.
17. TM, the applicant and the 4<sup>th</sup> son of subject, says his brother KM, the proposed guardian, is the appropriate candidate for appointment as the legal guardian of the subject and, initially he opposes to appoint the Director of Social Welfare. On probing why he insists on KM as guardian, he says he would very much like the subject to live with family members and is afraid of appointing the Director of Social Welfare would result in restoring the subject to the care of his brother CM or institutional care. He is then invited to read the end paragraph of the Supplemental Information dated 19 February 2010 prepared by Ms Y, maker of the supplemental information. After reading it, he then says that he would not oppose too strongly against appointing the Director of Social Welfare as guardian.
18. Regarding access, he says that if CM adopts a peaceful attitude in seeing the subject, he agrees to make arrangements in future.
19. He likes to keep the address confidential until the High Court litigation regarding the property of the old abode is over. He says it is because there

is a possibility of the subject being taken away by CM and kept secretly from him. The Board does not find his reason convincing. In reviewing the case history, it was in the contrary that he and the proposed guardian KM who have hidden the subject away from CM for over a year now. Since the future guardian would have the power to decide on the residence of the subject, it follows that the future guardian would have the implied authority to decide when and to whom it would be in the best interests of the subject to disclose the address of the subject. In the instant case, visits by the subject's eldest son would be in the best interests of the subject, who also wishes to be so visited. The subject, despite being mentally incapacitated, should be enabled to enjoy fully of her fundamental human rights of liberty and freedom.

20. KM, the proposed guardian and the 2<sup>nd</sup> son of subject, says, regarding future access, he hopes CM would not adopt a threatening attitude towards the subject. He agrees to the access to be given to CM. He agrees to have present care arrangement continued. He also agrees to appoint Director of Social Welfare as the legal guardian.
21. Ms Y, medical social worker, says she has nothing to add.
22. Ms C, medical social worker and maker of social enquiry report, on behalf of Director of Social Welfare, says she has nothing to add.

## **Issues and Reasoning**

Despite the overall consensus, the Board nevertheless feels important to summarize hereunder the reasons behind granting a Guardianship Order and selecting a guardian in this particular case.

### **23. Mental capacity of the subject**

- (a) This application is supported by two medical reports, respectively dated 23 August 2008 by Dr CHAN and 9 October 2008 by Dr CHIU, both are approved doctors.
  
- (b) Apparently from Dr CHAN's report, an MMSE, with a low score of 12/30, was done on 25 July 2008, the same day on which Dr CHAN saw the subject. Dr CHAN included, deliberately as one can see, the MMSE score in January 2004 was 16/30 (see paragraph 10 of Dr CHAN's report). It therefore speaks as basis in support of the doctor's comment on prognosis (paragraph 13 of the same report) that the subject has a deteriorating course of illness. The doctor further specified that the subject is limited in her capacity to make decisions on treatment because of "problem for understanding health issues" (see paragraph 14(a)) and on managing finances because the subject "can't remember her decisions or actions, can't appreciate the consequences" (see paragraph 14(b)). The doctor cited one example of the poor memory of the subject, namely, that the subject "can't recall husband's death in June '06".



- (c) Dr CHIU saw the subject later on 9 October 2008. According to Dr CHIU's report, subject's score of MMSE done on that day remains 12/30. Despite different expressions, both doctors come to the same view that the subject suffers cognitive impairment ranging from profound (according to Dr CHAN) to moderate (according to Dr CHIU) degrees. Both doctors come to the same diagnosis, namely, Alzheimer's disease and vascular dementia with a progressively deteriorating course.
  
- (d) Dr CHIU came to same conclusion with Dr CHAN in that, apart from self-care, the subject is limited in capacity to make decision on treatment or managing finance. In respect of finance, Dr CHIU made it very clear that the subject "does not understand her current financial situation and unable to manage it".
  
- (e) After the adjournment of hearing on 21 January 2009, the subject was brought by the applicant, as directed by this Board, to the clinic of Dr L for assessment on 12 February 2009. Dr L is also an approved doctor, but he is paid and nominated by CM.
  
- (f) The Board duly considered Dr L's report dated 14 February 2009 and his letter dated 5 March 2009 together with the reports of Dr CHAN and Dr CHIU. The Board decides that the subject is a mentally incapacitated person within the meaning of Mental Health Ordinance on the following grounds: -

- (i) All three doctors basically give a common diagnosis that the subject suffers from a form of dementia.
- (ii) Dr CHIU and Dr L both came to a view that the dementia is of moderate degree. On this basis, the Board accepts the cognitive impairment of the subject is of a moderate severity. To the Board, such an assessment result shows a sufficiently serious degree of cognitive impairment of the subject.
- (iii) The serious level of cognitive impairment is beyond arguments as it is well supported a history of acute stroke back in 2003 and (according to paragraph 51 of Dr L's report) by a CT scan as early as in December 2003 and MRI brain scan in February 2004 showing multiple areas of infarct of the brain of subject. Further, the MMSE scores of the subject remain low (by Dr CHAN at 12/30, Dr CHIU at 12/30 and Dr L at 14/30).
- (iv) Reading paragraphs 9, 13, 14, 27, 31, 42, 43 and 49 of Dr L's report, there are sufficient evidence for the Board to hold that, echoing with Dr CHAN and Dr CHIU, the subject suffers from poor memory and disorientations resulting in dysfunctions to make reasonable decisions.
- (v) It is plain that the subject totally forgot the departure of her ownership over the flat left to her by her late husband. Although Dr L has recorded this aspect in paragraphs 42, 43 and 62 of his

report, as well as paragraph 4.2 of his letter dated 5 March 2009 to the Board, it appears to the Board that the doctor has not attached any or any sufficient significance from this important observation in or towards his assessment of the severity of the subject's lacking financial capacity. Equally, noting from subject's failure to do serial 7 subtractions (see paragraph 31 of Dr L's report), how could this Board reasonably hold that the subject has sufficient financial capacity? On passing, Dr L repeatedly asked the Board, in his report and letter, to determine whether the subject is a mentally incapacitated person. The Board would state that Dr L should supply clinical data and a definitive clinical opinion in his capacity of a medical expert.

- (g) Further, paragraphs 8 to 44 and 47 to 51 of Dr L's report lend support to the findings of Dr CHAN and Dr CHIU and in particular, as the Board infers, that the subject's mental impairment has not only limited her capacity to make decision on treatment and finance but also on choice of accommodation. Although Dr CHAN, in paragraph 14(c) of the doctor's report, only stated that the subject is "satisfactory in self care", the doctor has made it quite clear in paragraph 11 of his report that guardianship will assist (inter-alia) decision making of the subject for accommodation. The inference so drawn by the Board is well supported by paragraphs 11 and 14(c) of Dr CHIU's report which state clearly that the subject lacked capacity to make decision for accommodation. With the confusion of even the current address (see paragraphs 9, 46 and 49.1 of Dr L's report), the subject could, in the

view of the Board, hardly be regarded as a person with full mental capacity to decide on her choice of residence.

- (h) In view of the above analysis, the Board decides that the subject suffers from a mental disorder of a nature and degree that warrants her reception into guardianship (s.59O(3)(a)(i), Mental Health Ordinance). Also, the subject's mental disorder has limited the subject's ability in making decision for a substantial proportion of matters which relates to her personal circumstances (s.59O(3)(b), Mental Health Ordinance).

#### 24. Granting Guardianship Order

- (a) The Board is gravely concerned with the adequacy and quality of care rendered by CM before 11 October 2008. Taking into account of the assertions by the parties and particularly the matters narrated in paragraphs 6, 7, 8 (respectively the crowdedness of the previous abode and sleeping arrangement) and 14, 15, 16 (respectively on poor in-law relationship and suspicious using of yellow tags) of the social enquiry report, the Board does not find, on balance, the previous care rendered by CM as satisfactory.
- (b) The more alarming matter to the Board is the intense family conflict and mistrust between the three sons of the subject that triggered off this guardianship application. The applicant (TM) and the proposed guardian (KM) is of the one camp as against CM of the other camp. The degree of severe conflicts can readily be seen from the cross

accusations exchanged throughout the numerous statements filed by the two camps before the hearing. It is plain and obvious that the applicant's original purpose of this application is to appoint a guardian, first and foremost, to take legal action in canceling the conveyance of assignment by which the property of the subject's late husband was transferred to CM (see statement of reasons accompanied with Form 1 – the application form). The Board, however, does not choose to examine the merits of this application from this perspective as firstly, the transaction in question took place as early as 4 August 2006, and secondly, a legal guardian, even appointed, does not have legal power to commence legal action for and behalf of the subject in his/her capacity as a legal guardian.

- (c) In respect of the acute family conflict, the Board is rather concerned with the sudden taking away of the subject from her old abode on 11 October 2008 and has since 12 October 2008 been kept secretly away from the CM. TM and KM both by themselves and through the social enquiry report maker via letters respectively on 11 November 2008, 9 September 2009 and 21 November 2009 requested to keep confidential (inter alia) the current address of the subject. While reasons for concealing address were stated in those letters, the Board does not find them sustainable after granting of a Guardianship Order today. A legal guardian, granted with residence power, should have an implied authority to disclose the address of the subject by applying the best interests principle. In the present case, the Board would not eliminate the possibility of materialistic motive behind this application plus the

applications for concealment of address until the property litigation is over. These moves, added with the sudden taking away of the subject from the usual abode, could well be employed by TM and KM, among other considerations, to add pressure on CM over the property issue. The Board also notes that CM cannot virtually gain any access to the subject since October 2008.

- (d) The Board finds that the family conflict, developed to the present stage, has already gravely affected the well-being and welfare of the subject. Despite the overall satisfaction of present care given to the subject as felt upon by the social enquiry report maker (see paragraph 12 of the Supplementary Information dated 9 September 2009), the Board holds the view that a legal guardian is still needed to be appointed to safeguard the subject's interests and to make decisions on the subject's future residence and daily care. In fact, the more adamant the wish of CM to have the subject returned to his care and to oppose the present application has become, the more the need to appoint a guardian in this case would arise, naturally. The Board notes that, quite distinct from his strong stance as expressed in all his statements filed, CM through his counsel conceded at the hearing that he only looks, at the most, for an arrangement that the subject could live at the current abode and his place during alternative periods of time.
- (e) Accordingly, the Board accepts and adopts the reports filed the Director of Social Welfare and hereby orders the subject to be received into guardianship.

Reasoning for appointing Director of Social Welfare as guardian

25. In coming to a decision on the choice of candidates for appointment as the legal guardian of the subject, the Board has considered the appropriateness test set out in s.59S of Mental Health Ordinance.
26. In the instant case, both KM (the proposed guardian) and CM are strongly seeking to be appointed as the legal guardian. At the hearing, CM (through his counsel) and KM concede to the appointment of Director of Social Welfare as guardian, while TM still wishes KM to be appointed. TM's stance is subsequently softened up after various promptings by the Board.
27. As detailed in the above reasoning in receiving the subject into guardianship, KM and CM are key players in the family conflict and as such neither of them is capable or able to carry out properly the function of a legal guardian. As an example, in case one of them is appointed and the other files a complaint against the guardian's decision over access or choice of residence, then, how would it be reasonably expected that the complaint is fairly, impartially and openly investigated by the guardian himself and a fair remedial actions taken? On the contrary, the conflict between the parties would further intensified if one side is so appointed. The Board's paramount concern is clearly on the interests of welfare of the subject and thus it is prudent and essential to appoint the Director of Social Welfare, being an impartial party and a public officer, as the legal guardian of the subject.

28. In any case, CM must be disqualified from the appointment for the following reasons: -

- (a) Litigation against CM over the ownership of the subject's property is imminent and there is potential undue conflict of interests of a financial nature between him and the subject, at least until the litigation is adjudicated upon or settled.
- (b) The Board does not find, as mentioned earlier, that the previous care rendered by CM is satisfactory. Nor does his future welfare plan as expressed in his statements for the subject or as advanced at hearing find agreement by this Board.
- (c) Above all, CM maintained all along (see all his statements filed) that the subject is not a mentally incapacitated person and he opposes strongly to a grant of Guardianship Order. He holds this attitude until the hearing today.

29. Also and in any case, KM is not a desirable candidate for the following reasons: -

- (a) Despite knowledge of dissatisfactory care, KM has taken no concrete action at all even after the death of subject's husband in January 2006. It is clearly that (despite knowing as early as mid-2007 of the clandestine transfer of the property) it was only after the negotiation over the property rights (including those properties in Mainland) failed



in early 2008 that TM and KM started to plan for various actions. The Board draws reference from paragraph 16.1 of the joint statement dated 28 April 2009 of KM and TM and paragraphs 19 and 20 of social enquiry report dated 11 November 2008.

- (b) The Board cannot eliminate the possibility that KM (and TM) have materialistic motive behind all these actions, including and not limited to the filing of the present guardianship application. The Board has reservation on the genuineness of KM's averred willingness to act as subject's guardian.

30. Accordingly, the Board agrees and adopts the latest recommendations on appointing Director of Social Welfare as guardian in the Supplementary Information dated 19 February 2010 of the social enquiry report maker.

## **DECISION**

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

- (a) That the subject, as a result of Alzheimer's disease, is 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 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 accommodation, her own welfare plan and treatment plan, which has ended up in conflicts between family members in making decisions for subject's accommodation and welfare;

In this case, the predominant needs of the subject remained to be satisfied are, namely, decision to be made on future welfare plan, future accommodation and future treatment plan;

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

32. The Guardianship Board applied 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-ye)  
Chairperson of Guardianship Board