



REASONS FOR ORDER

Mental Health Ordinance (Cap. 136)¹

(Section 59O)

BETWEEN

Mr S

Applicant²

and

Mr H

Subject³

The Director of Social Welfare⁴

Madam W

Party added⁵

Members of Guardianship Board constituted

Chairperson of the Board: Mr Charles CHIU Chung-yee

Member referred to in section 59J (3) (b): Dr David DAI Lok-kwan

Member referred to in section 59J (3) (c): Mrs Almond WONG LEE Sze-mun

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

⁵ S2 of Mental Health Guardianship Board Rules and S59N(3)(b) of Mental Health Ordinance

Date of Reasons for Order: 24th September 2008.

Background

1. The case involved a multi-millionaire subject-person in terminal brain tumor and a bitter family feud between the second wife (in process of divorce) and the eldest son of the first wife. The case was predominantly medical in nature and complicated by the signing of, inter alia, a health care advance directive in the United States of American.
2. On 28 April 2008, the applicant filed an emergency guardianship application. Hearing for the application was held on 26 June 2008 and emergency guardianship order was made with the Director of Social Welfare appointed as the guardian for three months.
3. The hearing for the application proper is held today, 24 September 2008. Both the applicant and the subject's second wife are legally represented by solicitors and counsel.

Mental and health conditions

4. The evidence shows that the subject is 65 years of age, man, with delirium due to brain tumour; and latest medical information reveals that the patient is in a condition compatible with vegetative state.

Issues and Reasoning

Reasoning for receiving the subject into guardianship

5. The present case is viewed by the Board as a bitter family conflict case necessitated for a legal guardian to be appointed in order to safeguard the subject's best interests particularly regarding his medical decisions. There is no issue taken by any party in these proceeding regarding whether there should be a Guardianship Order. Upon reading all bundles of documents, medical reports, social enquiry reports and all papers submitted and upon hearing the parties and witnesses at today's hearing as well as at the hearing of the emergency application held on 26 June 2008 and upon considering all legal submissions, the Board has decided to receive and adopt the two medical reports respectively dated 24 April 2008 and 25 April 2008 of Dr B and Dr G submitted in support of the application and the two social enquiry reports respectively dated 20 June 2008 and 5 September 2008 of Ms F. Accordingly, the Board decided to receive the subject into guardianship for a period of twelve months.

Reasoning for choosing the Director of Social Welfare as the legal guardian

6. To start, the Board does not think it serve any useful purpose to recite here the full background of the subject and his family and the status of various court proceedings between the parties and the subject as it was clearly and concisely set out from paragraph 1 to 29 of the Decision of the learned Deputy High Court Judge L. CHAN dated 22 July 2008 in HCMH 16/2008 ("the High Court Judgment").

7. The Board has carefully assessed all evidence before it and comes to a decision that instead of appointing the applicant, the Director of Social Welfare should be appointed as the legal guardian of the subject. The Board's decision is made on basis of the following observation, findings and rulings.

(a) The applicant ("applicant") Mr S has largely remained in a stance similar to the last hearing at the Board. In a nutshell, he still would like to be appointed as the legal guardian of the subject and in case Director of Social Welfare is appointed at the end of the day, then he sought a direction from the Board to exclude entirely the party-added Madam W ("the wife") from involving or participating in the medical decisions of the subject. In other words, he would like to see the wife be completely excluded in any event, except giving routine daily care to the subject. The inference from his stance is clear to the Board that the bitterness between these two closest family members of the subject had never showed any sign of remission, not to mention reconciliation, during the recent three months, i.e. the period since the grant of the emergency guardianship order on 26 June 2008.

(b) The recent evidence since the time of the emergency guardianship order has showed that the serious conflicts, suspicions, mistrust and even hatred between the applicant and the wife have continued. To recount, the first social enquiry report clearly showed, which are not disputed, that the conflict between these two persons

started as early as the beginning of 2007 while the couple still lived in the United States of America. The conflict between them then intensified resulting from the wife's perception of losing her significance in the eyes of the subject, her knowledge of the contents of the first will of the subject, her separation from the subject later that year and her filing of the divorce petition in the United States and the subsequent divorce and other matrimonial and ancillary proceedings in Hong Kong in October of the same year. The family conflict was and still is further complicated due to the emergence of the two half-sisters of the subject, E and K, who involved themselves into the daily care of the subject in 2007 and later in Hong Kong and held, among other things, various allegations against the applicant's integrity. In fact, all four close family members of the subject were and are still in constant conflicts, though less between the wife and the half-sisters. They do hold on to different viewpoints from others and agreements between them were quite impossible irrespective of minor or major matters over the daily care, nutrition and treatments of the subject. As correctly pointed out by Ms F in paragraph 21 of her (second) social enquiry report:

“21. However, divergent views, precipitated by strong distrust, continuously exist among the family members. It is difficult to draw them nearer to each other's view even on lesser medical issues such as administering antibiotics in treating infection, not to mention matters

of greater importance like resuming the anti-tumor medication. In some occasions, decisions were made as a matter of natural progress of the physical/medical conditions of the MIP....”

- (c) In the course of evidence today, the Board noted that K was identified as the one who objected to the use of antibiotics on 15 July 2008 to treat an infection episode of the subject and the infection later subsided by itself. The Board also noted that there was delay of consent from the wife over the use of the drug known as avastin, the targeted therapy recommended by Dr P, the treating doctor, at the time of the lodging of the guardianship application in April 2008. In his very concise letter dated 16 June 2008, Dr P summarized how the disputes between the family members had cause various delays of treatments, from simple to anti-tumor therapy including the use of avastin. When getting closer to the hearing of the emergency application, the wife, K and the applicant held different views over the proposed surgery of ventricular-peritoneal shunting to treat subject’s hydrocephalus developed as a result of the subject’s brain tumor progression. In one word, the Board is gravely concerned by the detrimental and adverse effects of the family disputes and conflicts on the well being and medical interests of the subject.
- (d) It is clear to the Board that all these differences of opinions over the medical decisions of the subject are stemmed from the inherent

conflicts and hatred between these four close family members of the subject and the resultant serious mistrust and suspicion over one another's motive and intention in opting for or against the treatments. As an example, in the evidence, the request for medical reports for seeking a second medical opinion by the wife was seen by the applicant as gaining advantages for the impending divorce proceedings. Further, the aspect of serious suspicions between the applicant towards the other family members is clearly seen from his very act of secretly installing a DVD tapping device at the hospital room of the subject as a surveillance mechanism. Of all these four family members, the wife and the applicant are the key and active players in the family feud. As such, none of them is suitable to be appointed as the legal guardian.

- (e) In the circumstances of this case, the subject's interests of welfare and particularly his medical interests must be protected, namely, that medical decisions and treatment should not be delayed simply due to the conflicts between his family members. One of the alarming incidents to the Board during the past three months was the disengagement of Dr C from the medical team. In the course of evidence today, being pressed, the applicant denied time and again that it was him who suggested to terminate the service of Dr C, the neurosurgeon who used to advise on the hydrocephalus of the subject, in late August this year. The applicant stated that it was Dr P who suggested it to him and that such a suggestion was sounded to him as a usual routine matter as shunting was no

longer needed. However, it was clarified from Dr P, who was recalled in the afternoon, that it was a family member who initiated the idea and request to disengage Dr C on the ground that shunting was no longer needed. On balance, the Board holds the view that it was the applicant who in fact initiated the idea of disengaging Dr C which, in the view of the Board, was something that he should not do; firstly because hydrocephalus was a continuous symptom and secondly it should be the role of the public guardian to disengage a treating doctor and the public guardian was not even informed on Dr C's disengagement afterwards.

- (f) Dr C was a key witness at the last emergency hearing and the Board took full account of his report and evidence given by him in which he plainly told the Board that the subject was in his terminal conditions. According to the evidence of Dr P today, the subject cannot breathe spontaneously, his brain stem function was further declining and his natural responses are diminishing, if not absent, such that he needed no sedation. As already expressed in reason numbered (5) in Page 3 of the Board's reasoning in the Emergency Guardianship Order, the Board would express here again that it remains the Board's worry that the aggressive manner of taking on treatment options of the applicant would or might affect the quality of life of the subject.

- (g) In conclusion, in view of the fact that the applicant is a key figure in the family conflicts, the Board doubted his impartiality and neutrality in acting as the legal guardian. Also, time and again, he refused to sit together with other family members to discuss the medical conditions together with the doctors and the legal guardian, on one reason or the other, had demonstrated clearly that he is unable to fulfill the role of a legal guardian as a legal guardian needs to communicate well with other family members in order to come to a balanced view on making decisions. On the contrary, those rare meetings attended by all family members only ended up in verbal exchanges and failure of arriving consensus. The Board does not have the slightest faith that the applicant, if appointed as the legal guardian, would have the support from the rest of the family members, thus rendering him impossible to function well as the legal guardian. In fact, at the hearing today both the wife and K clearly opposed to his appointment as guardian. The Board would reiterate that the paramount concern is to safeguard the best interests of the subject and thus in the instant case, the Board believes that the appointment of the Director of Social Welfare, being a neutral and impartial third party, should be the best choice in protecting the interests of the subject. The Board agrees with the view of the social enquiry report maker Ms F that the public guardian also served as a platform for communication between the family members. Likewise, the Board must state that the public guardian worked extremely well in this difficult case during the past three months.

- (h) For the record, Ms R, counsel for the wife sought an adjournment for the wife's application for a direction in obtaining a second medical opinion for the subject.
- (i) Regarding the applicant's application for a direction to exclude the participation of the wife in the future medical decisions of the subject, the Board declined to make such a direction after considering the written and oral submissions of Mr J, counsel for the applicant.
- (j) The Board was not impressed by the six stated reasons as contained in Mr S's written submission. On a contrary, such reasons might only be relevant if the wife is seeking for appointment as the legal guardian.
- (k) In coming to this particular decision, the Board agreed with the views as expressed by two social workers, Ms F (the social enquiry report maker) and Ms Y (the delegated public guardian) at the hearing in that it is in the interests of the subject to have full participation from all his close family members at his last days and that the wife was observed by them as very caring towards the subject and attentive to minute details of his daily care and was able to make discerning observations, like the absence of Dr C from daily ward rounds in late August 2008 and the loss of body weight of the subject due to low calorie intake in the months of July and August 2008. She in fact worked well with the public

guardian to a great extent.

- (l) The Board duly noted one of the grounds relied upon by the applicant in this issue was the subject's signing of the advance health care directive dated 8 November 2007 in USA. However, the Board is equally mindful of the subject's wish to see the wife in March 2008 and his stated wish, as the Board so finds, to continue to see the wife after her first visit to the hospital on 13 March 2008. In this regard, the Board noted in the medical report of Dr B in support of the guardianship application, the doctor certified that subject's MMSE score was 11/30 on 13 March 2008 despite the doctor's remark of subject's significant impairment of memory. Also, in the report, the doctor only certified the subject had disorientation only in time and place but not person (see answer to question 10 in the medical report).
- (m) On the point of the advance health care directive, the Board would make it clear on three points. First, the Board had not the opportunity to examine the original document, which was untraceable. Secondly, the law of Hong Kong Special Administrative Region has no place for such a directive as there is not a single local legislation giving effect to this type of directive which is in fact a health care proxy appointment. Thirdly, there was no direct evidence on the execution of the document including testimony of the attesting witness. In any event, the Board is bound to approach the all questions on the best interests principle,

including whether to limit a family member's participation in the subject person's affairs. In approaching the particular question of choosing a guardian, the Board would need to consider all the relevant circumstances pursuant to Section 59S of the Mental Health Ordinance, Chapter 136, in order to arrive at a decision on suitability. On basis of the above, the Board equally finds that the HIPAA/CMIA Authorization signed by the subject in USA is of little assistance to the Board.

- (n) Returning to the point of excluding the wife from participation in the medical affairs of the subject, the Board has taken particular reference from the reasoning as set out from paragraphs 111 to 115 of the High Court Judgment choosing the Official Solicitor as the committee instead of the applicant. For convenience of reference, the same is reproduced hereunder.

“111. The relationship between W and H (i.e. the subject) has also lasted for 18 years. The breaking up appears to be caused by the bequeaths in the 1st will and the joining of the household by S (i.e. applicant) in late 2006 or early 2007. There did not appear to be any other cause which would have destroyed their care and affection for each other.

112. Though I am not going to verify any allegation, I do not think I can completely write off the evidence of

K that H had all along wanted to meet with W and the evidence of W that H persuaded her to return home through mutual friends and how H behaved and reacted when she visited him in the hospital since 13 March.

113. For E and K, their bonds with H are still there. Though they did not have the same father, the father of E and K passed away when they were young and they grew up under the guidance of H. S also said that K used to dine with H a few times every month. After the diagnosis of the tumour, K also took a month's vacation to take care of H. After W had left home, E also went from Shanghai to Los Angeles to look after H. After H's return to Hong Kong, he had taken E and K to his bank and authorized them to deal with his bank on queries over his big cheques. This demonstrates his trust in E and K as well. After he was hospitalized on 8 March, E and K visited him daily. All these show that there are strong bonds between E and K on the one hand and H on the other. They still have a close relationship.

114. S no doubt is very close to H and enjoys his trust and reliance. However, if I should appoint S as the committee, it is likely that E, K and W will have

difficulty in seeing to H. There are already accusations against S for his attempts to secure exclusivity to the medical information of H. He has prohibited the night-time helper from disclosing her name or her employer's identity to E and K. The bitterness and hatred between them is tremendous. My worry of difficulty of access is also strengthened by the submissions of counsel for S. Counsel argued against access by W to H to protect H's financial interest in the divorce proceedings. Counsel also argued that there was collusion between W and K.

115. I do not want to exclude E, K or W from access to H. I think they should continue to rally around him and support and take care of him. I think H would also wish to continue to have their support and care. It would be against his wish and feeling to cut them off from him. Though I have been told that H is already in a coma, it has also been suggested by reference to medical opinion that he may wake up again.”

- (o) Regarding the worries of the applicant on ground of conflict of interests arising from hostile litigation, the Board would state that the final medical decision is rested with the public guardian and the wife's participation will only be limited to giving her views. As such, the Board did not find the continuous participation in the

medical affairs in this manner would pose any real risk on the health of the subject. Instead, the Board is very mindful not to be deployed as a weapon in the family conflict.

- (p) Lastly, it remains for the Board to thank the counsel for both side and the Director of Social Welfare for their assistance at the hearing.

DECISION

8. The Guardianship Board is satisfied on the evidence and accordingly finds: -
- (a) That the subject, as a result of delirium due to brain tumour, 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 his own treatment and welfare and there also exists serious conflict between family members in making decisions for subject's treatment;

In this case, the predominant need of the subject remains to be satisfied is, namely, decision to be made on future treatment;

- (d) The Board concluded that it is in the interests of the welfare of the subject that the subject should be received into guardianship.
9. 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