



REASONS FOR ORDER

Mental Health Ordinance (Cap. 136)¹

(Section 59O)

BETWEEN

Madam W **1st Applicant²**

Madam DI **2nd Applicant³**

and

Mr C **Subject⁴**

The Director of Social Welfare⁵

Members of Guardianship Board constituted

Chairperson of the Board: Mr Charles CHIU Chung-yee

Member referred to in section 59J (3) (b): Ms Frances IP Yin-sum

Member referred to in section 59J (3) (c): Miss MA Pui-ling

Date of Reasons for Order: 1st June 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

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)(a) of Mental Health Ordinance

Background

1. The subject, Mr C, was a 68 year-old man suffering from dementia. The subject and wife used to live with son's family. In May 2009, after a family dispute over closing the business of subject and wife, the son drove the wife away. Then, the wife and subject then lived a rented village house which was near the daughter's home. Soon after, the subject was admitted to hospital and later discharged to an old age home.
2. Mr C came to Hong Kong in 1961 and married in 1969. He started his own business a few years after he came to Hong Kong. The couple gave births to two children. The subject loved the son more than the daughter. The daughter left home for several years after a quarrel between the subject and wife over her behaviour problems and they resumed contacts in 1992 when the daughter got married. The relationship between the son and daughter was poor.
3. Due to the subject's health problem, the operation of the subject's company stopped in July 2008. The business was transferred to another company under the name of wife and the factory in Mainland continued running. The wife expressed that the business was in deficit all along. The son did not involved in the business but he disliked the daughter and son-in-law of subject received \$30,000 as salary per month from the company.
4. The subject had two landed properties and the total value was about \$800,000. But the properties were mortgaged at bank for overdraft facility of \$100,000. The son wanted to sell the properties for the subject's caring and living expenses. The wife and daughter did not agree.

Circumstances leading to the present application

5. The aim of wife to apply guardianship was to mobilize the subject's savings for his daily living. In the meantime, the wife also decided to apply a Committee Order from High Court in order to manage the subject's assets including landed properties and liabilities. On the other hand, the daughter-in-law's application for Guardianship Order was for caring plan and mobilizing bank savings of subject.

Mental and health conditions

6. The subject has history of diabetes mellitus, hypertension, hyperlipidemia and gout. He was admitted to hospital in July 2008 because of acute pulmonary edema with cardiogenic shock, acute renal failure, pneumonia, acute delirium and poor diabetic control. The subject was transferred to another hospital for convalescence. He was noted to have on and off mental confusion during hospitalisation. MMSE was performed revealing a score of 9/30. The subject was assessed by clinical psychologist and was commented to be unfit to give statement. The subject was given a course of physiotherapy and occupational therapy. His diabetes mellitus was well controlled. The subject was able to walk with stick.

Summary of evidence adduced at hearing on 1 June 2011

9. **Madam W**, the 1st applicant, proposed guardian and wife of the subject, confirmed the contents of her statement dated 26 May 2011 as true. Being asked, she agreed to the contents of paragraph 19 of the latest social enquiry report dated 16 May 2011. As recorded in that paragraph, she (and her daughter Madam Y) has expressed, amongst others, that Guardianship Order was not necessary. Yet, she still liked to become the guardian of the

subject today. She then narrated how she gave daily care and escorts and provision of food to and for the subject in the past. As guardian, she would be able to continue to render care to the subject as before. She was afraid to “lose” the subject. She appeared to be very emotive. She recalled the past unhappy incident of the subject and herself being driven away by her son from the latter’s home.

10. So far, the subject has no surgery to carry out. Subject attended various medical follow-ups. Subject’s health was improving. She paid from her own money for the extra physiotherapy sessions for the subject.

11. She found the present old age home as satisfactory and the care workers provided satisfactory care to the subject. She saw many old age homes in that area and the present old age home was amongst the best she saw. The living environment was good. The average expenses per month of the subject were \$8,300. She got emotive again when talking about her son who has not supported the family financially in the past.

12. On the point of access by the son and daughter-in-law, she has already given instruction to the aged home since the time of admission not to allow other people to bring the subject out without her permission. Paying visits to the subject at the aged home were generally allowed by her.

13. Subject kept scolding people at the aged home. The home staff got used to the subject’s challenging behaviors, like cursing others and hitting objects around him.

14. Being asked, she said, according to her knowledge, the son or daughter-in-law had never attempted to bring the subject away from the aged home since the time of admission in September 2009.
15. Lastly, as the subject's money was running out, she liked to recover the \$500,000 from the son, which were paid previously as the down-payment of the flat of the daughter-in-law. She mentioned about CSSA application.

[After submission by her solicitor]

16. Finally, she says that in the long past she followed the subject everywhere all the time when the subject was operating his factories, in order to ensure that the subject would take medications on time. She even lost her fingers. She mentioned that the subject had heart valves operation in the past and needed various medications.
17. **Madam Y**, the daughter of the subject, said she was not sure why the 2nd applicant (the daughter-in-law) liked to "get back" the subject. She did not understand why the 2nd applicant told the social enquiry report maker that it was too late to have the subject returned to her (and the son's) care. [The Board noted from paragraph 18 of the latest social enquiry report dated 16 May 2011 that the 2nd applicant had expressed to the social enquiry report maker that both she and the son did not want to contest for guardianship. In fact, by a letter to the Board dated 27 May 2011, the 2nd applicant informed that she would not attend for the hearing today. Today, the 2nd applicant was absent.]

18. She suspected in the past “they” (meaning her younger brother and his wife [i.e. the 2nd applicant]) would like to take over the company of the subject and then sell it out for money illegally. She mentioned the cheating of the \$500,000 from the subject in respect of the purchase of the flat by the daughter-in-law and the son. She repeatedly referred to this so-called “nomination” incident in February 2009 as alarming. The Board noted from the papers that it meant asking the subject (and the 1st applicant) to sign in writing acknowledging that the sum of \$500,000 (money paid as deposit) was in fact the money of the daughter-in-law, i.e. the 2nd applicant.

19. She liked her mother (i.e. the 1st applicant) to become the guardian so that the subject could maintain a living in peace under the care of her mother. She was not sure what action “they” would take in future. “They” aimed at the money of the subject. She believed that once guardianship was granted, there would be no more disturbances or nuisances from them in future. She liked the 1st applicant to be appointed the guardian in order that all the affairs of the subject, including the future burial and the control of the dead body, can be taken care of by the 1st applicant with comfort and ease. [The Board noted that a Part II committee order was granted on 24 December 2009 appointing the 1st applicant, Madam Y and her husband to be the joint committee of the subject with further specific orders on management of the businesses of the subject.]

[After submission by the solicitor of the 1st applicant]

20. She also mentioned a past incident in September 2009. In the initial month of admission to the aged home and before medical certification of mentally

incapacitated person status of the subject, the son arranged the subject to be admitted to a hospital and then insisted to discharge the subject from the hospital to his care. She was against such an idea as she was alarmed by the so-called “nomination incident” happened earlier. She and her mother always think of the signing of the nomination (a written document) as an act of deception. Since social worker of Integrated Family Services Centre, upon intervention, opined that the subject should be returned to the same old age home, the subject was eventually returned to the old age home. [The social enquiry report maker said that this incident was mentioned in paragraph 4(i) of her latest report. The social worker of Integrated Family Services Centre has involved and has mediated over the dispute. The case was now under the care of medical social worker of hospital.] She did not like to have similar incident happened again.

21. She was worried that once the present application is rejected, the subject will be taken away and her mother will never see the subject again. The son has actually said it out. The son also said only the subject could live with him.

22. The solicitor of the 1st applicant went through the main points of her written submission on advantages and suitability of appointing the 1st applicant than the Director of Social Welfare as the guardian. She stressed the genuineness of the care rendered by the 1st applicant during the difficult times of the subject. The 2nd applicant has by now appeared to have given up her application. She mentioned re-application in future will be a waste of time and costs, e.g. when there was need or issue for a change of aged home. The subject was advance in age and with gradual deterioration that may need surgery in future. Difficulties have arisen due to complications

caused by the son and daughter-in-law in the guardianship application. On difficulties caused to the subject's business, there were continual disturbances caused to the staff of the Mainland factory till today. The son's family may cause difficulties or has different opinion on future surgery as well.

23. The social enquiry report maker, on behalf of Director of Social Welfare, said, regarding her first report, it should be the right hand fingers of the 1st applicant that have been lost. She maintained her latest recommendation for no Guardianship Order be granted today.
24. At the invitation of the Board to submit on section 59O(3), Mental Health Ordinance, the solicitor of the 1st applicant, said, regarding the point of particular need of the subject, the subject is 68 and a mentally incapacitated person and prone to injuries due to disturbing behaviors (e.g. banging of walls) and thus there was likelihood of future unforeseen physical deteriorations or changes. On the principle of last resort, the solicitor stressed that she could only agree there was no need for guardianship if there was absence of conflicts or issues from the son and daughter-in-law, given there is already a Part II order. However, the 2nd applicant is still proceeding for guardianship and has not (technically) withdrawn. She emphasized on the strong likelihood of actions taken or disputes instigated soon by the son and daughter-in-law because of the likely deteriorations of the subject's physical conditions. There were burning issues like the future control of the dead body. Raised by the Board that the powers of guardian did not include the aspect of a dead body, the solicitor said that it will be a matter of the split second between the respective moments of life and death.

There have been many incidents, liked the nomination incident and the dispute on hospital discharge in September 2009 as mentioned by the daughter.

25. Finally and in response to the Board, the solicitor repeatedly submitted there were many incidents (e.g. the nomination incident) occurred and there was likelihood of dispute that the son and the daughter-in-law (i.e. the 2nd applicant) would transfer the subject to other places to live. This will likely happen once the news of refusing guardianship application comes out after today, if that is the case. There was indeed a burning issue in this case. Lastly, she submitted that there was one more possible document that can be arranged to be signed by the subject. The 1st applicant (and her daughter) was worried of the signing of a will by the subject, or similar documents, as arranged by the son in future. Those signed documents could be dated with a different or earlier date. If that happened, there will be need for court proceedings.
26. The sister-in-law of the subject said she supported the application in favor of the 1st applicant as guardian. She liked to see the 1st applicant to continue to give care to the subject. The couple had gone through a lot in the past. The 1st applicant liked to continue to run the factory. The son was bad and aimed at money. Yet, the 1st applicant was still not angry at the son.
27. The younger sister of the subject said she supported the 1st applicant to become the guardian as they were husband and wife.

28. The son-in-law of the subject said nothing.

29. Another younger sister of the subject said nothing.

Reasoning of the Guardianship Board

30. The two applications, respectively lodged by the wife Madam W (“1st applicant”) and the daughter-in-law Madam DI (“2nd applicant”), were consolidated to be heard together by an earlier order of the Board dated 23 February 2011.

31. The 2nd applicant did not turn up at the hearing today.

32. When deciding whether to grant a guardianship order, the Board was required to consider the legal criteria as set out under s.59O(3) (a), (b), (c) and (d) of the Mental Health Ordinance. All criteria must be satisfied before the Board can grant a guardianship order.

33. S.59O(3), Mental Health Ordinance provided the following:-

“In considering the merits of a guardianship application to determine whether or not to make a guardianship order under subsection (1) in respect of a mentally incapacitated person, the Guardianship Board shall observe and apply the matters or principles referred to in section 59K(2) and, in addition, shall apply the following criteria, namely that it is satisfied-

- (a) (i) *that a mentally incapacitated person who is mentally disordered, is suffering from mental disorder of a nature or degree which warrants his reception into guardianship;*
or
- (ii) *that a mentally incapacitated person who is mentally handicapped, has a mental handicap of a nature or degree which warrants his reception into guardianship;*
- (b) *that the mental disorder or mental handicap, as the case may be, limits the mentally incapacitated person in making reasonable decisions in respect of all or a substantial proportion of the matters which relate to his personal circumstances;*
- (c) *that the particular needs of the mentally incapacitated person may only be met or attended to by his being received into guardianship under this Part and that no other less restrictive or intrusive means are available in the circumstances; and (Amended 19 of 2000 s. 3)*
- (d) *that in the interests of the welfare of the mentally incapacitated person or for the protection of other persons that the mentally incapacitated person should be received into guardianship under this Part.”*

34. Upon considering all the reports, statements and submissions filed in this case and upon hearing from the 1st applicant, her witnesses, her solicitor and the Director of Social Welfare represented by the social enquiry report maker, the Board has come to a conclusion that all the main domains of affairs of the subject were well settled and there was no outstanding particular need that could only be met by a Guardianship Order. The reasons were due to the following observations and findings.
- a. The 1st applicant (the wife) and Madam Y (the daughter) were on one side and the 2nd applicant (the daughter-in-law) and the son were on the other side. The two sides were on acute conflict sometime since February 2009. Both sides accused the other as taking financial advantages of the subject who used to run factories of plastic pigments and own some properties. The mistrust between them has been serious.
 - b. After filing of the two guardianship applications respectively in August and September 2009, a committee order was granted by High Court on the application by the wife's side. The committee order was made on 24 December 2009 appointing the wife, daughter and her husband as joint committee over the estate of the subject with detail provisions on the management of subject's businesses.
 - c. The 1st applicant by reasons of already having a committee order granted, once filed a Request to withdraw her guardianship application, such a Request was filed on 4 February 2010, but was later withdrawn by a letter dated 24 February 2010 of her solicitor.

- d. In spite of the tense relationship between the two sides, the Board observed that since October 2009 up till the present day, i.e. a relatively long period of say 20 months, the subject was well settled at the present aged home. The wife has shown satisfaction to the existing welfare arrangement and there was no plan of changing the subject to another old age home. It was confirmed by the wife at the hearing that during the lapse of the 20 months, the son and the 2nd applicant has not taken any actions or attempts to remove the subject from the aged home. Apparent from the all the evidence so far submitted, the subject was enjoying his present stay in peace. Thus, there was no outstanding issue that can be ascertained at this moment or the foreseeable future over the question of welfare and accommodation. According to paragraph 18 of the latest social enquiry report dated 16 May 2011, the 2nd applicant and the son have, for various reasons, given up the plan of restoring the subject to the son's home for care.
- e. The wife has also confirmed that the subject has stable health and has some improvements throughout this period. There was no surgical operation under plan for the subject. Thus, there was no outstanding issue over treatment decisions today.
- f. Regarding finances and subject's assets, they were now well protected by and under proper management of the committee appointed by the High Court. There was no concrete evidence to show that there was any major challenge put up by the son or the 2nd applicant against the management or decisions of the committee since the appointment on 24 December 2009. In any case, dealing with such matters should be the responsibility of a committee who should take directions from the High Court.

- g. The daughter (Madam Y), the wife (1st applicant) and her solicitor have strongly advocated for a guardianship order and even ventured to submit that the matter was imminent and there are burning issues. By the analysis above, the Board can hardly agree. The nomination incident has happened long time ago, i.e. around February 2009 and should be regarded as an isolated incident. Further, the likelihood of the son in stealing the subject out to sign legal instruments (e.g. a will) was, in the view of the Board, little as the wife and daughter have already given, as early as since the time of admission, instructions to the aged home to disallow the subject from being taken out by the son and the 2nd applicant. Considering the positive development in the last 20 months, the Board did not agree to the far-fetched speculations of risks as submitted by the daughter (e.g. the subject will become a captive of the son) and the solicitor for the wife as they were mere amplified worries over the endless scenarios that human mind could imagine of. In other words, those worries were more fanciful than real. In any event, a guardian's statutory powers, as scrutinized under the decision in HCMP No. 953/2008, were limited in scope and certainly cannot be extended to restrict or regulate the access by the son or the 2nd applicant.
- h. It must also be made clear that, taking into the account of all the four legal criteria into consideration, a guardianship order was never meant to be used for a long-term stand-by purpose. A guardianship order may only be granted to meet a specific need and for the shortest time possible. This accorded with human rights recognized in international human rights conventions. In this case, the Board felt that the wife and the daughter were seeking a guardianship order just for a stand-by purpose which was entirely erroneous and misconceived.

35. The Guardianship Board can only exercise its powers under section 59O to make an order if it was satisfied on certain criteria. The Board was NOT satisfied that the subject's particular needs may only be met or attended to by guardianship, and no other less restrictive or intrusive means were available

36. Accordingly, the present two applications were dismissed.

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