



REASONS FOR ORDER

Mental Health Ordinance (Cap. 136)¹

(Section 59O)

BETWEEN

Mr YK

Guardian²

and

Mr LH

Subject³

Madam WC

Applicant⁴

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): Dr Calais CHAN Kin-yuen

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

Date of Reasons for Order: 27th May 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 and S59U(4)(b) of Mental Health Ordinance

³ S2 of Mental Health Guardianship Board Rules and S59U(4)(a) of Mental Health Ordinance

⁴ S2 of Mental Health Guardianship Board Rules and S59U(2)(a) of Mental Health Ordinance

⁵ S2 of Mental Health Guardianship Board Rules and S59U(4)(c) of Mental Health Ordinance

Background

1. The subject, Madam LH, was a 86 year-old widow without child suffering from a stroke causing cognitive deficits since February 2010. The subject was a farmer and rehoused to a public housing unit. Before the subject suffered from stroke, she used to live with a niece Madam WC's family in public housing unit. Starting from 1986, the subject offered assistance to another niece (i.e. mother of the applicant) to take care of her children and household matters. Since 1993, the subject even stayed with the applicant's family and only returned to her own home occasionally. Madam WC's family moved away from the housing unit in 2006 but the legal tenant of the unit remained under the name of Madam WC.
2. The grandnephew, Mr YK filed a guardianship application for the subject in March 2010 in order to mobilize her bank savings and restore the subject home from hospital.
3. The social enquiry revealed that the niece Madam WC employed a foreign domestic helper to take care of the subject at home. She has withdrawn \$73,440 from subject's bank account (the subject added her name as an authorised person years ago) within a few days of subject's admission to hospital. She used part of the savings around \$32,000 to pay for subject's hospital fees, expenses of employing the helper, electric appliances and other miscellaneous expenses. Yet, she insisted to keep around \$16,200 for subject's future use and was only willing to give \$25,000 to Mr YK for depositing back to subject's bank account.
4. In May 2010, the Board appointed Mr YK to be guardian for a year with all powers.

5. In April 2011, near the time of annual review of the Guardianship Order, the niece Madam WC filed an application for review and proposed herself to be the new guardian of subject. She complained that the current guardian, Mr YK, did not perform his duties well. She further complained that the guardian did not give proper care to the subject especially regarding the subject's daily meals, finance management and maid service.
6. According to the progress social enquiry report, the case social worker stated the subject had a good appetite and indeed gained body weight. No record of hospitalisation was found. The guardian all along paid regular visits to the subject for at least once a week. He was also responsible to purchase necessities for the subject and avoided the maid to go to supermarket with the subject. He also escorted the subject to his home for dinner and for overnight stays. The guardian asked his siblings to take care of the subject when the maid was on leave and he was not free to do so.
7. The niece Madam WC and guardian Mr YK once held different views on the arrangement of the maid's rest day. After the case social worker's intervention, the maid would enjoy her rest day on every Sunday. The maid was confused to whom she should seek advice and approval on subject's daily care. Regarding the employment of the maid, the Board's main concern was that apparently the employer i.e. Madam WC did not live with the subject at the flat which was the address appearing in the standard employment contract, i.e. whether the employment contract and existing maid's arrangement contravene current foreign domestic helper (FDH) policy and law of the Immigration Department. In other words, the employer is not residing at the contracted address and the subject is not a member of the Madam WC's household at the contracted address.

8. Regarding the financial management, in February 2011, Madam WC was asked to use the subject's savings held by her for paying the expenses of the subject. The guardian, in the initial 6 months of the present Guardianship Order, found it difficult to submit financial records monthly as Madam WC failed to forward receipts to him even after reminders given. After the intervention of the case social worker, the niece promised to submit the receipts to guardian by 15th of every month. The case social worker checked the monthly records and receipts collected or obtained by the guardian and found them in order.

9. Both Mr YK and Madam WC filed their statements with detailed explanations over their arguments and they proposed themselves to be the guardian of subject respectively.

Mental and health conditions

10. The subject had a regular daily routine. She was under several medications and had medical follow-ups at Medical-Geriatric Clinic of a hospital regularly. She could recognize and recalled the names of relatives. She was still disorientated about time, date and place. She could walk independently without any assistance at home and used wheelchair for outings. The subject was capable to manage toileting and bathing with little assistance of maid.

Recommendation of the Director of Social Welfare

11. The case social worker and progress report maker on behalf of the Director of Social Welfare, commented that the guardian was considered to be a trustworthy person who has performed his duties properly during the guardianship period under review. The officer recommended the

Guardianship Order be extended for 3 years and the existing guardian Mr YK to continue with all powers.

Summary of evidence adduced at hearing on 27 May 2011

Evidence of Mr YK

12. Regarding why the guardian has not arranged auto-transfers of the monthly sum from subject's bank account to the guardian account, Mr YK explained that after he opened the guardian account at BC Bank, Mr YK followed the Guardianship Order by starting to use the money in subject's HC Bank account. Due to its own involvement with another bank, the HC Bank refused to arrange auto-transfer as requested. The bank said that he needed further proof of that power. Upon hearing that the Board's specific written authority would be given in the renewed order, the guardian says that, if re-appointed, he will try again to set up auto-transfer instructions next year.

13. He has only withdrawn four monthly sums from subject's bank account during the entire period under review. Each time, he paid all money so withdrawn into the guardian account first before using. He further mentioned that the staff of BC Bank (with which the guardian account was opened) even posed some questions to him regarding withdrawals of money from his own guardian account. Such a situation was smoothed out after explanations given. He clarified with the Board that it was not due to his busyness that he has only withdrawn four times of the monthly sums. He explained that he just wanted to streamline the financial management (i.e. allowing time for the cash held over by Madam WC at the time of the last Guardianship Order to be used up) and not to arouse suspicion of any kind by continually withdrawing money from subject's bank account.

14. He is willing to continue as guardian.

15. The reasons for failure to compile the first six months' account of expenses were, Mr YK continues to explain, due to the difficulties to collect all expenses details from Madam WC plus he needed the proofs of whether the aforesaid cash held over by her has been used up. He could only choose to have as little withdrawals from the subject's bank as possible. He paid up the expenses of the subject first by using his own money and then he tried to keep the accounts on reimbursement basis. He supplemented that he did not start to use the money of the subject until he was certain that the cash held by Madam WC has been utilized. The subject still owed him \$17,785.40 as 31 March 2011. (This is confirmed by the case social worker Miss MM.)

16. He repeated that he was confident to continue to act the subject's guardian. There had been difficulties and the situation was eased out after the intervention of the case social worker.

17. He said that the subject used to lead a frugal life.

18. He had initial difficulties in the working with the maid to whom he was not the employer. The matter was settled as the maid has later resolutely preferred to take holiday than cash in lieu. Madam WC did not assist him to persuade the maid to change leave days or to accept payment in lieu. He thought it would be good for him to act as the direct employer of the maid in future.

Evidence of Madam WC

19. Madam WC, the niece of the subject and the applicant for review, said the contract of employment of the Indonesia maid will be expired by 4 May 2012. She was the named employer on the contract and the contracted address was the same address of the subject which she was still the legal tenant. On being asked if she has already moved out with her family since 2005, she said she still has occasional overnight stays at the unit for about 20 times a year. She returned to visit the subject regularly too.

20. She added that she had sufficient time to take care of the subject and underwent a personal care worker course herself. She knew well in making soup and preparing dishes that the subject liked. She was familiar with the neighbours whom she got along well before. She understood the subject better. The maid was very good and she liked the maid to continue. [The guardian also said that the maid was good.]

21. She said that subject has indicated to her, after she moved out from the housing unit, that she liked to live with her. That was before subject's onset.

22. On being asked by the Board regarding her allegation against the guardian regarding provision of "poor" meals to the subject, she said there was not much food left in the fridge. It was almost empty except some food for the maid. She knew a sum of \$600 per month was given to the maid for her own food. She saw, for a few occasions, that the subject was given the same fish for a few consecutive meals.

23. On being further probed as to whether she has raised this matter of concern with the guardian, she said that she just enquired with the case social worker Miss MM. [Miss MM says that in December 2010, Madam WC did talk to her about this matter. She then saw Madam WC in the following January. She then enquired with the maid about this matter during home visits. The maid told her that the subject was used to have meat and vegetables for every meal. The subject was able to give similar version. During visits, Miss MM notes that the subject looks healthy and “fat”. She did also mention the concern of Madam WC to the guardian.]
24. Madam WC went on to complain that the food was poor in quality, although it might not necessarily starve the subject. [The guardian said that there was a detail record of food provided to the subject written up by the maid. It might appear that there seemed too little meat for the subject. But the subject had an average appetite and ate little and thus she might eat the same fish for a few meals. Yet, it might not be the case every time. He used to bring chicken meat to the subject without making an entry in the food record. In the past, he did throw away some rotten food. On average, roughly \$1,000-\$2,000 a month was set aside for the food of the subject. He also invited the subject to his home for dinners every week. He had no suspicion on the record of expenses on food as kept by the maid.]
25. Madam WC said that the guardian kept records of chicken meat brought to the subject at the beginning but not afterwards. She was not sure if chicken meat was still being sent to the subject.
26. For today’s hearing, Madam WC said her daughter was taking care of the subject at home.

Other witnesses

27. Mr L, the clansman, said he was the son of a cousin of the subject's husband. He did see that the subject's food quality was poor at a visit in the winter of 2010. When asked about the details, he said that the subject had the same fresh water fish without vegetables at lunch and dinner that day.
28. He had confidence that niece had the necessary integrity and caring and dutiful attitude to become the guardian as he knew her well since young.
29. The younger brother Mr MS of the subject said he liked his younger sister Madam CS to speak up for him as his throat was not very well. He liked the guardian Mr YK to continue his role.
30. The younger sister of the subject Madam CS said the subject liked fresh water fish. The subject liked to keep the fish for two consecutive meals. The guardian brought the subject with chicken meat too. Sometimes, there was no soup prepared for the subject because when going to the guardian's place the next day, she would then have soup. The subject was looked healthy overall, despite leg pains. The subject brought up Madam WC and loves her though. The younger brother of subject also visited the subject frequently in the past. But now all were busy and paid less visits to the subject. She preferred Mr YK to continue as guardian because he was able to keep clear records and was performing well.
31. Ms P, the maid of subject, said she had regular leaves now and there was no more problem. She was not sure if she liked to renew the contract when it expired. She was given enough money to go to market. The guardian has asked her not to buy so much food as the subject ate little. She thought

it was right.

32. Miss MM, the maker of Progress Social Enquiry Report, on behalf of the Director of Social Welfare, says she has nothing further to add.

Issues and Reasoning

Reasoning for continuing to receive the subject into guardianship

33. The Board received and adopted the views of Dr M as contained in the medical report dated 15 April 2011 as well as the progress social enquiry report and the views and reasoning for recommending Guardianship Order as contained therein and accordingly decides to continue to receive the subject into guardianship in order to protect and promote the interests of welfare of subject.

Reasoning for continuing to appoint the legal guardian

34. The Board accepted and adopted the view of the progress social enquiry report maker who recommended Mr YK, grandnephew, to continue to be appointed as the guardian of the subject in this case.
35. In fact, the Board noted that the two younger siblings of the subject attending the hearing today gave their full support to the existing guardian to be continually appointed. According to the progress social enquiry report, the subject superficially expressed that she wished the guardian to continue. Further, the case social worker Miss MM, on behalf of the Director of Social Welfare, has high regards for the past performance of the guardian and recommended for his continual appointment.

36. The Board, upon perusing all the reports filed and hearing the witnesses and parties herein, also found that the guardian performed satisfactorily during the last year, though not without difficulties. On this point, the guardian performed well because he was able to set his plan and goals in meeting up with the difficulties. Those difficulties were, as found by the Board, largely due to late submission of the receipts by the applicant Madam WC and also the mishandling or lack of accurate understanding by the bank staff concerned. He knew well to seek the assistance of the case social worker Miss MM to clarify the issue of the cash held over by the applicant Madam WC and to build a more effective channel of submission of expenses records by Madam WC later. On the issue of the maid over holidays, the same is by now resolved and the guardian has mobilized his siblings to help out. The Board was impressed by Mr YK as an able and calm young man with adequate problem solving skills.
37. On hearing the oral evidence at the hearing, the Board did not find the accusation of poor food quality, raised by the applicant Madam WC, as proven.
38. In conclusion, the Board did not find there was existed any cogent reason to replace the existing guardian Mr YK. On ground of his past satisfactory performance, the Board decided that he has satisfied the Board on the criteria as set out in Section 59S and accordingly the Board appointed him to be the guardian of the subject for the next three years. The Board likewise ruled that the application by Madam WC for appointment as guardian be refused.
39. Finally, on the question of whether the contract arrangement of the Indonesian maid is proper and legal under the prevailing policy and law of the Immigration Department on Foreign Domestic Helpers, the Board, upon

hearing the parties and noting the contents of paragraph 7 of the supplementary report dated 23 May 2011, hereby strongly requested the future guardian to take steps to clarify the matter and, if thought fit, to rectify the slip within the coming 12 months. In addition, it would be beneficial from the standpoint of case and household management if the guardian would eventually become the direct employer of the maid. The steps suggested are as below: -

- (a) Obtaining the consent *ex post facto* from the Immigration Department;
- (b) Where applicable, obtaining special approval when submitting a fresh application for a maid. The attention of the guardian was drawn to FAQ, Question 22, of the official website of the Immigration Department; or
- (c) Applying to court for appointment of a Committee under Part II of the Mental Health Ordinance.

DECISION

40. The Board is satisfied and accordingly found that the subject remained a mentally incapacitated person for whom a guardian should be appointed as the order has resulted in maintenance of the subject's welfare and health. The subject still needed a guardian to make substitute decisions, as the subject lacked capacity to make reasonable decisions on personal and welfare matters including decision on financial matters. For the same reasons as stated in the original Guardianship Order, the Board was satisfied that there remained no less restrictive or intrusive alternative to

guardianship. The Board concluded that it was in the interests of the welfare of the subject to continue to be under guardianship and that the original guardianship order should be renewed.

41. The Guardianship Board applied the criteria in section 59S of the Mental Health Ordinance and was satisfied that Mr YK is the most appropriate person to continue to be appointed the guardian of the subject.

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