



REASONS FOR ORDER

Mental Health Ordinance (Cap. 136)¹

BETWEEN

Madam T

Applicant²

and

Mr H

Subject³

Mr P

Party added⁴

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 Maria CHUI Yeuk-ping

Member referred to in section 59J (3) (c): Mr CHAN Yat-sum

Date of Reasons for order: the 24th day of January 2018.

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)(b) of Mental Health Ordinance

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

BOARD'S ORDER

1. These Reasons for Decision are for the Board's Order made on 24 January 2018 concerning Mr H ("the subject"). The Board appointed the Director of Social Welfare as the guardian of the subject, for a period of one year, with powers to make decisions on the subject's behalf, as set out in the Board's Order, and subject to the conditions referred to therein.

THE HEARING ON 24 JANUARY 2018

2. The following persons gave evidence to the Board: -
 - (a) Madam T, the applicant and proposed guardian (represented by Solicitor Mr A of Messrs WHC Solicitors);
 - (b) Mr P, the son of the subject and Party Added (represented by Counsel Mr R and Ms S, instructed by Messrs KS Solicitors);
 - (c) Miss L, a public officer, on behalf of the Director of Social Welfare.

REASONING OF THE BOARD

Background

3. The application for the appointment of a guardian for the subject, under Part IVB of the Ordinance, dated 18 April 2017, was registered as received by the Board on 19 April 2017. The emergency guardianship application for the appointment of a guardian for the subject, under Part IVB of the Ordinance, dated 24 July 2017, was registered as received by the Board on 24 July 2017. The applicant is Madam T, cohabitee. The evidence shows that the subject is 94 years of age, man, with vascular dementia. The subject was unable to handle finances and was incapable of consenting to treatment.

The Law

4. Section 59O (3) of the Ordinance provides that, in considering whether or not to make a guardianship order, the Guardianship Board must be satisfied that the person, the subject of the application, is in fact a mentally incapacitated person in need of a guardian, having considered the merits of the application and observed the principles and criteria set out in sections 59K (2) and 59O (3) (a) to (d) of the Ordinance respectively.

Issues and Reasoning

Reasoning for receiving the subject into guardianship and appointing the Director of Social Welfare as legal guardian of subject

5. The Board directs that subject's son Mr P be added as a Party to these proceedings ("Party Added"). The Party Added is a son born to the subject and his late wife. Party Added is represented by counsel Mr R and Ms S, on the instructions of Messrs KS, Solicitors. Party Added's stance is that Guardianship Order is not necessary. In other words, he opposes to the application.
6. The Board also directs the Emergency Guardianship Order application be heard together with the normal Guardianship Order application.
7. The applicant, a long-time cohabitee of the subject, is represented by Mr A of Messrs WHC, Solicitors. The applicant's stance is that she strongly wishes to have a Guardianship Order granted over the subject and seeks to be appointed as the private guardian. However, she is amenable to the appointment of a public guardian.
8. The subject, aged 94, a successful and wealthy businessman, has been staying in HK Hospital (a private hospital) since mid-November 2015 till present. There was

no dispute over the subject's state of vulnerable medical conditions and the fact that he has been suffering from multiple chronic life-threatening illnesses.

9. The applicant made the present application for guardianship order on 18 April 2017 and later an emergency application (on 24 July 2017) mainly because of her concerns over the alleged disruptive actions taken by the Party Added in respect of the subject's healthcare matters. In addition, due to serious financial disputes between the two sides (see paragraphs 8.4, 8.5 of the social enquiry report and paragraphs 21 to 24 of the applicant's "statement in support" accompanying Form 1), the applicant has earlier started an application in High Court for a committee order on 6 February 2017. The matter leading to these Court proceedings might very well be also resulted from the arguments between the two sides over the payments of the medical and hospitalization expenses of the subject. Committee order was finally granted to an independent professional committee on 26 May 2017. The conflictual situation was neatly captured in paragraph 11 "circumstances leading to the application" of the social enquiry report.
10. As the committee order was granted and the issue of the sudden proposal of right leg amputation (one of the alleged disruptive actions – see paragraph 22 of applicant's Skeleton Argument) was agreed to be withdrawn by the Party Added, and coupled with the formulation of a plan of comfort care by the new attending doctor, both the Party Added and the social enquiry report maker submitted that there was no impending need for a grant of Guardianship Order.
11. For the following reasons, the Board disagreed with such a simplistic analysis and would address squarely on the "particular need" of the subject hereunder: -
 - (a) No issue has been taken regarding the fact that the subject has been mentally incapable to make his own medical and welfare decisions. In harmonious families, it would have been correct that no Guardianship Order would, in general, be necessary. However, the deep underlying mistrust between the two sides over the financial interests has no sign of regression ever since the time the financial disputes arose. This caused a grave concern.

- (b) The applicant's relationship as the long-time co-habiting girlfriend has given her an innate imbalanced position in making clean-cut decisions over the medical and health care of the subject since various disputes rippled off in early 2017. The Board had no evidence to disprove the genuineness of the relationship between the applicant and the subject. To an extent, rather, the Board tended to accept that the Party Added has had a much looser contact with the subject and participation in the latter's daily healthcare decisions, until perhaps all the financial disputes surfaced early last year. Actually, perceived at the hearing today, there was clear communication blockage between the two sides, due to emotive issues, costs or legal concerns over which the Board had yet to know exactly. The disputes between the two sides over the medical care regime, despite palliative care being destined, were still vivid. The rather quick and major reshuffles (including changing of attending doctor – i.e. the in-charge doctor) of specialists of the medical team in past months since June 2017 was quite alarming in all the circumstances. These proved only one thing, namely, the intensification of the already deteriorated relationship between the two sides. That adverse situation remained till today and hence the Board had grave worry that the best medical interests of the subject would be jeopardized. It cannot be emphasised enough that the last thing the Board wants to see is the subject's medical interests being victimised by the fights between the two sides.
- (c) Much has been said about comfort care and conservative treatment would be the plan for the subject for his remaining days. Regarding that, the Board would take no issue. However, the Board was concerned that, given the plan was in place, there would be no better way to secure the subject's best medical interests for a good life till the very end without a guardian appointed to manage the conflict between the sides, as the subject would definitely and ultimately be benefitted by a quick and clean medical decision by a legal guardian for him.

- (d) One of the live issues taking place as of today was clearly over the necessity of a cardiac specialist for the subject. The applicant's side has made a clear demand since 12 July 2017 by letter for reinstating the cardiac specialist Dr TT but was met with no avail nor response. This would shed light to everyone here today that a palliative plan did not mean there would be no medical or medical-related decisions to make. It was obvious that the side of Party Added has played too highhandedly (amongst others) in this regard in the recent few months that had escalated the whole situation. The Board suspected that it could very well be a show of power or acts of revenge by the Party Added as a reaction out of the financial disputes between him and the applicant. In the conflictual relationship web such as the present one, the Board took the view that it would be a secured way to appoint a public guardian, being a neutral public officer, to oversee the medical and welfare affairs of the subject. As a final word, both sides would still have a long way to go before they can get over their financial disputes and hence the Board needs to safeguard that this entanglement would have no adverse impacts on the medical care of the subject at any time in future.
12. Regarding the choice of the guardian, the Board has duly considered sections 59K, 59O and 59S, Mental Health Ordinance, before exercising his discretion in this matter. In the judgment of the Board, the best way to endeavour to maintain a better equilibrium of the challenging family dynamics is to appoint the public guardian. Hence, the applicant's application to be appointed as private guardian is not approved by the Board.
13. The Board so orders.
14. As a committee has been appointed by High Court, the Board decides not to grant financial power in this case.
15. Technically, the Board dismisses the emergency Guardianship Order application.

DECISION

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

- (a) That the subject, as a result of vascular dementia, 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, his own welfare plan and treatment plan, which has caused conflict between family members in making decisions for subject's welfare or treatment;

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 concludes that it is in the interests of the welfare of the subject that the subject should be received into guardianship.

17. The Guardianship Board applies the criteria in section 59S of the Ordinance and is satisfied that the Director of Social Welfare is the only appropriate person to be appointed as guardian of the subject.

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