



**REASONS FOR ORDER**

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

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**BETWEEN**

**Madam M**

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

**and**

**Madam F**

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

**Mr T**

**Party added<sup>4</sup>**

**The Director of Social Welfare<sup>5</sup>**

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**Members of Guardianship Board constituted**

Chairperson of the Board: Mr Charles CHIU Chung-yee

Member referred to in section 59J (3) (b): Ms NGAN Chiu-foon

Member referred to in section 59J (3) (c): Mrs Margaret WONG LEE Man-shiu

**Date of Reasons for order:** the 24<sup>th</sup> day of July 2018.

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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)(b) of Mental Health Ordinance

<sup>5</sup> 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 July 2018 concerning Madam F ("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 JULY 2018**

2. The following persons gave evidence to the Board: -
  - (a) Madam M, the applicant and proposed guardian;
  - (b) Mr T, the Party Added and 6<sup>th</sup> son of the subject;
  - (c) Madam K, 6<sup>th</sup> daughter-in-law and wife of Party Added;
  - (d) Madam H, the eldest daughter-in-law of subject;
  - (e) Madam W, the grand-daughter of subject;
  - (f) Mr C, the son-in-law of subject and husband of applicant;
  - (g) Mr K, 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 14 May 2018, was registered as received by the Board on 15 May 2018. The emergency guardianship application for the appointment of a guardian for the subject, under Part IVB of the Ordinance, dated 15 May 2018, was registered as received by the Board on 15 May 2018. The applicant is Madam M, daughter. The evidence shows that the subject is 90 years of age, woman, with mixed-type 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.

## **Summary of evidence adduced at hearing**

5. **Madam M**, the applicant, proposed guardian and daughter of the subject, says she finds it necessary to have a Guardianship Order granted today. It is necessary to promote the best interests of welfare of the subject including her treatment and choice of residential home. She disagrees to Director of Social Welfare to be appointed as the legal guardian. She prefers herself as the legal guardian. It is because she is a retired nurse and has medical, massaging and nursing knowledge, including choice of walking aids. She can afford the private medical fees and pay for any nutritional food for the subject. She prefers changing the subject to an old age home in Hong Kong Island, namely, AL Home for the Elderly. Her plan was supported by her eldest sister, her own husband, her elder-sister-in-law Madam H and 4<sup>th</sup> elder brother Mr M.
6. **Mr T**, the Party Added and 6<sup>th</sup> son of the subject, says he agrees to Guardianship Order be granted today. He agrees Director of Social Welfare as the legal guardian. He disagrees to the applicant as guardian or to change the old age home of the subject. The present aged home is close to his workplace and home. Most of the family members are living in New Territories. It is too far away to pay visits to the subject in Hong Kong Island. He cannot understand why some siblings agreed to the move. The subject has been staying at old age homes in New Territories district for around 6 years already. His objection against the applicant as guardian is also because the applicant have caused disturbance at the

former aged home “TH”, resulting in a change to the present aged home eventually.

7. **Madam K**, 6<sup>th</sup> daughter-in-law and wife of Party Added, says it was for many years that her family has been taking care of the subject. The subject was pressed to change to the present aged home due to the applicant’s disturbance to the former aged home and hence a change of attending doctor. She agrees to appoint Director of Social Welfare as the legal guardian.
8. **Madam H**, the eldest daughter-in-law of subject, says she supports a change of aged home to Hong Kong Island as the applicant, who lives in the vicinity, is knowledgeable in healthcare and very concerned of the subject.
9. **Madam W**, a grand-daughter of subject and a daughter of subject’s 3<sup>rd</sup> daughter, says due to two repeated falls of the subject that the applicant made complaint against the former aged home “TH”. It had slippery floor and was under-staff. [The applicant narrated the seriousness of injuries of the subject caused by the two falls on 27 December 2017 and 18 February 2018 respectively. At a ward meeting, Party Added did not wish to move the subject to another aged home due to financial reason, despite her willingness to supplement the expenses. It was understood at that time that there should be no hospital discharge until the family members reached a consensus of a choice of aged home. But the subject was taken away by the Party Added and his wife without notice to her.]
10. **Mr C**, the son-in-law of subject and husband of applicant, says the applicant is genuine and unselfishly loves the subject. The subject’s assets and money has disappeared over these few years. The applicant was very unhappy because of sudden loss of contact with the subject as she was not notified of the change of old age home. On changing the subject to Hong Kong Island, the applicant can pay more visits, even daily to the subject.

11. **Mr K**, medical social worker and the maker of social enquiry report, on behalf of the Director of Social Welfare, says he has nothing to add.
12. The Board would like to thank Mr K for his assistance in this case and his reports.
13. [**Miss Y**, grand-daughter of subject and **Mr G**, grand-son of subject, attending.]

### **Issues and Reasoning**

#### Reasoning for receiving the subject into guardianship

14. Upon hearing the parties and family members at the hearing and considering all the social enquiry reports and written representations, the Board has no doubt to conclude that there are major conflicts between significant members of the family over the subject's place of accommodation and daily care, not to mention a cogent need to maintain good orders of access or visits to the subject in future. The applicant on the one side (supported by some members of the family) yearned for a change of old age home to Hong Kong Island while the side of the Party Added (and his wife) strongly wished to maintain the status quo, i.e. continuous stay at the present old age home in New Territories. Hence, the Board agrees that a Guardianship Order should be granted to safeguard the subject's interests of welfare. Parties have taken no issue with respect to a grant of Guardianship Order.
15. The Board accordingly orders that the future guardian should prepare and submit a draft welfare plan within 6 weeks from the date of receipt of the present Guardianship Order for the approval of the Chairperson of the Board.
16. The Board receives and adopts the views of the two medical doctors as contained in the two supporting medical reports as well as the social enquiry reports and the views and reasoning for recommending Guardianship Order as contained therein (particularly paragraphs 61 to 63) and accordingly decides to receive the subject into guardianship in order to protect and promote the interests of welfare of subject.

17. As Guardianship Order is granted, the Emergency Guardianship Order application is dismissed.

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

18. The Board particularly takes note that the conflicts between the two sides are deep-rooted and the mistrust is serious. As a matter of fact, subject's assets and savings have been dwindled throughout the recent years and hence there were serious accusations made by the applicant's side against the sons, inter alia, and particularly, against the Party Added in respect of the sale of the subject's farmland in 2007 and subject's flat in 2012 (see paragraphs 34-38 of social enquiry report). The grudge came to a head when the applicant suddenly found out that the subject was taken away or discharged from hospital without her knowledge in mid-March 2018. Since that time, she could not visit the subject or even know the where-about of the subject until the intervention of social enquiry report maker Mr K. Hence, the conflicts between the two sides are vivid and have been escalating.

19. On the choice of guardian, the Board carefully considered the circumstances of this case and the relevant law.

(a) Section 59O, Mental Health Ordinance, viz: -

*“(1) Subject to subsection (3), if, after conducting a hearing into any guardianship application made under section 59M(1) for the purpose of determining whether or not a mentally incapacitated person who has attained the age of 18 years should be received into guardianship and having regard to the representations (if any) of any person present at the hearing to whom a copy of the guardianship application has been sent under section 59N(3) and considering the social enquiry report referred to in section*

*59P(1) the Guardianship Board is satisfied that the mentally incapacitated person is a person in need of a guardian, it may make an order appointing a guardian in respect of that person.*

*(2) Any guardianship order made under subsection (1) shall be subject to such terms and conditions as the Guardianship Board thinks fit, including terms and conditions (if any) as to the exercise, extent and duration of any particular powers and duties of the guardian.*

*(3) 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 persons should be received into guardianship under this Part.”*

(b) Sections 59K, Mental Health Ordinance, viz: -

*“(1) The Guardianship Board shall—*

*(a) consider and determine applications for the appointment of guardians of mentally incapacitated persons who have attained the age of 18 years;*

*(b) make guardianship orders in respect of mentally incapacitated persons and taking into account their individual needs, including the making of such orders in an emergency where those persons are in danger or are being, or likely to be, maltreated or exploited;*

*(c) review guardianship orders;*

*(d) give directions to guardians as to the nature and extent of guardianship orders made under section 59O appointing those guardians, including directions as to the exercise, extent and duration of any particular powers and duties of those guardians contained in such terms and conditions (if any) that those guardianship orders may be subject under subsection (2) of that section;*



*(e) perform such other functions as are imposed on it under this Ordinance or any other enactment,*

*and in so doing shall observe and apply the matters or principles referred to in subsection (2).*

*(2) The matters or principles that the Board shall observe and apply in the performance of its functions or the exercise of its powers are as follows, namely—*

*(a) that the interests of the mentally incapacitated person the subject of the proceedings are promoted, including overriding the views and wishes of that person where the Board considers such action is in the interests of that person;*

*(b) despite paragraph (a), that the views and wishes of the mentally incapacitated person are, in so far as they may be ascertained, respected.”*

and,

(c) Section 59S, Mental Health Ordinance, viz: -

*“(1) A person (other than the Director of Social Welfare) shall not be appointed by the Guardianship Board as a guardian of a mentally incapacitated person received into guardianship under this Part unless the Board is satisfied that-*

*(a) the proposed guardian has attained the age of 18 years;*

*(b) the proposed guardian is willing and able to act as a guardian;*

*(c) the proposed guardian is capable of taking care of the mentally incapacitated person;*

*(d) the personality of the proposed guardian is generally compatible with the mentally incapacitated person;*

*(e) there is no undue conflict of interest, especially of a financial nature, between the proposed guardian and the mentally incapacitated person;*

*(f) the interests of the mentally incapacitated person will be promoted by the proposed guardian, including overriding the views and wishes of that person where the proposed guardian (once appointed) considers such action is in the interests of that person;*

*(g) despite paragraph (f), the views and wishes of the mentally incapacitated person are, in so far as they may be ascertained, respected;*

*(h) the proposed guardian has consented in writing to the appointment as a guardian.*

*(2) Where it appears to the Guardianship Board that there is no appropriate person available to be appointed the guardian of a mentally incapacitated person the subject of a guardianship application, the Guardianship Board shall make a guardianship order appointing the Director of Social Welfare as the guardian of the mentally incapacitated person.*

*(3) In the performance of any functions or the exercise of any powers under this Ordinance the guardian shall ensure-*

*(a) that the interests of the mentally incapacitated person the subject of the guardianship order are promoted, including overriding the views and wishes of that person where the guardian considers that such action is in the interests of that person;*

*(b) despite paragraph (a), that the views and wishes of the mentally incapacitated person are, in so far as they may be ascertained, respected,*

*and shall comply with directions (if any) given by the Guardianship Board in respect of that guardian and any regulation made under section 72(1)(g) or (h).”*

20. The Board will reiterate that past efforts of a family member or friend towards giving care to the subject do not necessarily entail his/her appointment or continual appointment as the legal guardian. Equally, in this case, the Board has no doubt on genuineness and skills of the applicant in giving good care to the subject.
21. The Board now decided to appoint the Director of Social Welfare as the public guardian in view of the further observations as follows: -
22. The Board believes in family conflict case of this kind, the best and sure way to ensure adequate and timely decisions to be made for the subject will be appointing the public guardian. As well,
- (a) appointing a private guardian in this peculiar situation will, in the assessment of Board, result in more complications as the private guardian's decision will be very likely challenged by the other side.
  - (b) Also, a complaint by the other side against the private guardian will unlikely be perceived to be fairly, openly and properly investigated or dealt with. The

situation will likely be that the conflicts between the parties will further escalate in result and end up in further jeopardy of the interests of the subject. In a nutshell, a private guardian will be difficult to act in his roles and duties timely and efficiently, due to conflicting relationships, for the best interests of the subject.

23. Accordingly, the Board accepts and adopts the view of the social enquiry report maker who recommended, as contained in the report, the Director of Social Welfare to be appointed as the guardian of the subject in this case.

## **DECISION**

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

- (a) That the subject, as a result of mixed-type 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, her own welfare plan and treatment plan, which has caused conflict between family members in making decisions for subject's 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 concludes that it is in the interests of the welfare of the subject that the subject should be received into guardianship.

25. 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-yee)  
Chairperson of Guardianship Board