



**REASONS FOR ORDER**

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

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**BETWEEN**

**Mr KY**

**1<sup>st</sup> Applicant<sup>2</sup>**

**Madam YF**

**2<sup>nd</sup> Applicant<sup>3</sup>**

**and**

**Madam MY**

**Subject<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-ye

Member referred to in section 59J (3) (b): Dr SO Ho-pui

Member referred to in section 59J (3) (c): Ms Lily CHAN

**Date of Reasons for order:** the 16<sup>th</sup> day of May 2017.

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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

<sup>4</sup> S2 of Mental Health Guardianship Board Rules and S59N(3)(a) of Mental Health Ordinance

<sup>5</sup> S2 of Mental Health Guardianship Board Rules and S59N(3)(c) of Mental Health Ordinance

## **Background**

1. The 1<sup>st</sup> application for the appointment of a guardian for the subject, under Part IVB of the Ordinance, dated 16 August 2016, was registered as received by the Board on 16 August 2016. The 2<sup>nd</sup> application for the appointment of a guardian for the subject, under Part IVB of the Ordinance, dated 15 December 2016, was registered as received by the Board on 15 December 2016. The 1<sup>st</sup> applicant was Mr KY, nephew (lived apart and had no contacts for many years) and 2<sup>nd</sup> applicant was Madam YF, niece, living with the subject. The evidence shows that the subject is 84 years of age, woman, with cerebral vascular accident. The subject was unable to handle finances and was incapable of consenting to treatment. The subject was a widow with no children, of considerable wealth and allegedly still operating a shop with the assistance of the 2<sup>nd</sup> applicant.
2. The Board first set the hearing on 22 December 2016.

## **The Law**

3. 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.

**Order and Reasons for adjournment on 22 December 2016 (Parties were represented)**

4. Due to absence of written submission of the counsel for the 1st applicant and last minute filing of a bundle by his solicitor without covering letter or pagination, as well as very late filing of a written submission by the counsel for the 2nd Applicant, the Board orders that the hearing today be adjourned sine die with notice to parties.
5. TAKE NOTICE that the hearing on 22 December 2016 be adjourned sine die to a date and time to be fixed and notified to the parties. Also, the Board would like the following directions: -
  - i. since the emergency guardianship application filed by the 1<sup>st</sup> applicant (A1) and two guardianship applications respectively filed by the 1<sup>st</sup> applicant and the 2<sup>nd</sup> applicant (A2) herein are made for the same subject, the applications shall be consolidated and to be heard together.
  - ii. Director of Social Welfare shall file an update report 14 days before the next hearing.
  - iii. Parties shall file and exchange documents (if any) 7 days before the next hearing.
  - iv. Parties shall file and exchange written submissions 7 days before the next hearing.
  - v. Absence of written submissions by legal representatives of parties may lead to further adjournment.

**Summary of evidence adduced at hearing proper on 16 May 2017 (An independent Committee was already appointed by High Court on 24 February 2017)**

6. Counsel for A1, instructed by MRC Solicitors, submitted that by now A1 and A2 have agreed to Director of Social Welfare as guardian of the subject. Due to a recent fall and stroke, the subject is evidently mentally incapable to give care to herself and became dependent. There still remains different views on the daily care regime and the choice of care facility between the two applicants today. A1 wishes the money be spent for the subject in receiving the best care. A1 would like to employ more trained carers to give daily care to the subject, to which proposal A2 may not agree. A1 has searched and found Home for Elderly. Also, A1 has not been disclosed of the medical conditions of the subject by A2. [A2 says it is the subject's confidential information.]
7. **Mr KY**, A1, proposed guardian and nephew of the subject, indicates he prefers subject be changed to the aged home suggested by him.
8. [Solicitor of MRC Solicitors, attending.]
9. **Madam YF**, A2, proposed guardian and niece of the subject, says the subject received traditional Chinese medicine in recent few days and has showed some improvement of her ability to speak. She notices that the home has tight security over visitors as seen or encountered during her frequent visits. She is satisfied with the service of the present care facility. She believes that emotional support to the subject is more important. The care home suggested by A1 is too inconvenient for paying visits. Currently, many relatives have visited the subject and found the present care facility good and convenient to visit. Subject has adjusted to the new environment

and getting to improve in her overall condition. There is a resident doctor at the care facility, attending up to 6 p.m. daily. [Ms S, Committee of estate of subject, confirms.]

10. She agrees to Director of Social Welfare as legal guardian of the subject. A public guardian can make decisions readily especially on urgent situation without the trouble of ongoing arguments.
11. She is the first contact person on the record of the present care home.
12. **Mr W**, the maker of 1<sup>st</sup> supplementary information, on behalf of the Director of Social Welfare, says he agrees to some typos found in the Supplementary Information submitted by him.
13. **Miss T**, the maker of 2<sup>nd</sup> supplementary information, on behalf of the Director of Social Welfare, says she has nothing to add.

## **Issues and Reasoning**

### Reasoning for receiving the subject into guardianship

14. Upon hearing from the parties and counsel and reading the reports and documents filed, the Board agrees that both applicants still have vital disagreement over the future care, i.e. welfare arrangement, of the subject, particularly the choice of care home for subject's long-term placement. Before this important issue is well settled, the Board comes to a view that Guardianship Order is needed.
15. On this issue, the Board directs that the guardian should file a draft welfare plan of the subject in Chinese **within** three months from today for the

approval of the Chairperson on behalf of the Board, such draft welfare plan shall also be circulated to both applicants upon filing with the Board. The Board allows written submissions by the applicants within 7 days thereafter.

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 report and the views and reasoning for recommending Guardianship Order as contained therein and accordingly decides to receive the subject into guardianship in order to protect and promote the interests of welfare of subject.

17. Accordingly, the application of Emergency Guardianship Order is dismissed.

18. The Board is mindful to clarify that the granting of Guardianship Order today should not be taken as an expression of a negative view on the adequacy of the previous care rendered by the 2<sup>nd</sup> Applicant to the subject.

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

19. 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**

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

- (a) That the subject, as a result of cerebral vascular accident, 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 or accommodation;

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.

21. 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