



REASONS FOR EMERGENCY GUARDIANSHIP ORDER

BETWEEN

Madam SY

Applicant

and

Madam H

Subject

The Director of Social Welfare¹

Members of Guardianship Board constituted

Chairperson of the Board: Mr Charles CHIU Chung-yee

Member referred to in section 59J (3) (b): Dr WONG Wing-yin

Member referred to in section 59J (3) (c): Ms WONG Lai-ming

Date of Reasons for Order: 26th June 2013

1. The matter of application of Emergency Guardianship Order came before the Board this afternoon, namely, Wednesday 26 June 2013.
2. The purpose of the guardianship application was clearly that of appointing a guardian to consent to forensic examination on the subject regarding the

¹ S2 of Mental Health Guardianship Board Rules and S59N(3)(c) of Mental Health Ordinance

alleged sexual assault that took place on last Thursday 20 June 2013. The forensic pathologist (and his supervisor) refused to carry out the examination on his own reasons which largely based on the inability of the subject to give consent to it. The subject's younger sister, the applicant, has never objected to the proposed forensic examination and indeed, wished that to be done as quickly as possible.

3. The difficulty that faced the Board at the start of this case was that there was virtually no information or case background found or supplied by the professionals or family members around or involved with the subject. The Board, as a legal tribunal, is not equipped with an (active) investigation role nor does its resources permit it.
4. The Board would need to set out the chronology as follows: -
 - a. "the first day": Monday 24 June 2013

The main guardianship application was received in the morning together with an Emergency Guardianship Order application (dated 22 June 2013). [The documents were earlier faxed to Guardianship Board on Saturday 22 June 2013 at 12:44 p.m. which was out of office hour.] The reasons stated in the Form 1 contains only four Chinese words: “法醫搜証” (i.e. forensic examination).

By a telephone call of the Board Secretary in that morning, a case summary was requested from the case medical social worker of the Hospital (“the Case Summary”).

- b. “the second day”: Tuesday 25 June 2013

To speed up the matter, by a letter dated the same day, the Board requested case information (i.e. witness statements) from the police officer involved in the investigation; his contacts were based on his earlier telephone enquiry to the Board only. He replied with a short letter at 14:20 on the same day, containing extremely scanty and concise case information (“the short reply from police”). Following this, the Board, with every intention to speed up the hearing, sent four letters in the same afternoon to (1) the police, for further case information, (2) hospital’s case medical officer for medical information (to which no reply was ever received), (3) the doctor-in-charge of the Forensic Pathology Service for an explanation why the Procedural Guidelines for Handling Adult Sexual Violence Cases—paragraphs 93 and 96—are not followed, thereby necessitating the present guardianship application; his contacts were based on a website search only, and (4) the medical social worker urging for the Case Summary.

Despite only with the four Chinese words “法醫搜証” and the short reply from police on hand, the Board decided to fix the hearing on today i.e. “the third day” 26 June 2013 in order to expedite the matter as far as possible.

5. The Board would like to remind all professionals involved in this type of case to take lesson from the present case and to collate all essential information upon filing an application i.e. the first day. It was pointless to ask a lay family member to file an application form without any useful information supplied at all. How could a tribunal proceed to hear a case without sufficient prima facie evidence properly filed? At some stage, the Board was not given proper assistance even in identifying the names of the

professionals involved in this case, particularly the names of the forensic doctors or the branch to which they belong.

6. The main crux of this matter arose from the forensic pathologist Dr S who refused to carry out the much needed forensic examination on the subject at the very night of the incident, i.e. 20 June 2013. The doctor insisted a guardian to be appointed and to give consent on behalf of the subject. The acting in-charge Dr B, a Consultant Forensic Pathologist, had given his written views against using Part IVC, Mental Health Ordinance in his letter dated 26 June 2013 to the Board. To such views, Dr S had confirmed in writing that he has no further comment. That means both doctors stood by the same front.
7. In gist, the two doctors took the point that Part IVC, Mental Health Ordinance (which provided authority for the doctor to proceed with medical treatment directly if it is necessary and in the best interests of the patient) was not applicable to forensic examination which was altogether different in nature and purpose from day-to-day medical treatment for physical illness or the like.
8. For completeness, Section 59ZF (When treatment may be carried out without consent) and Section 59ZA (definition of “in the best interests”), Part IVC, Mental Health Ordinance were reproduced as follows: -

s.59ZF

“(1) Treatment by a registered medical practitioner or registered dentist may be carried out in respect of a mentally incapacitated person to whom this Part applies without consent under section 59ZD(1) or (2) if that registered medical practitioner or registered

dentist intending to carry out or supervise the treatment considers that as a matter of urgency that treatment is necessary and is in the best interests of the mentally incapacitated person.

(2) *Subject to subsection (3), treatment by a registered medical practitioner or registered dentist may be carried out in respect of a mentally incapacitated person to whom this Part applies without consent under section 59ZD(1) if-*

(a) *after all reasonably practicable steps have been taken by that practitioner or that dentist to ascertain whether or not a guardian has been appointed under Part IIIA or IVB responsible for that person, there is, or appears to be, no guardian so appointed; or*

(b) *the guardian appointed under Part IIIA or IVB has not been conferred the power to consent in a guardianship order under section 44B(1)(d) or 59R(3)(d).*

(3) *Where a registered medical practitioner or registered dentist intending to carry out or supervise the treatment under subsection (2) considers that that treatment is necessary and is in the best interests of the mentally incapacitated person, then he may carry out that treatment without the consent of the mentally incapacitated person or that person's guardian (if any) accordingly.”*

s.59ZA

“in the best interests (符合最佳利益), in relation to the carrying out of treatment or special treatment, as the case may be, in respect of a mentally incapacitated person, means in the best interests of that person in order to-

- (a) save the life of the mentally incapacitated person;*
- (b) prevent damage or deterioration to the physical or mental health and well-being of that person; or*
- (c) bring about an improvement in the physical or mental health and well-being of that person;”*

9. The Board found it essential to set out a summary of oral evidence taken at today’s hearing so that those reading this important decision could grasp a full picture of what had been canvassed.

9.1 **Madam SY**, the younger sister, applicant and proposed guardian, said she will consent to the forensic examination on the subject if appointed as guardian today. She was notified of the incident in the evening of Thursday 20 June 2013 at around 8:00 p.m. and then she attended the aged home. She saw the policemen there and then the subject was sent to the hospital. She recalled that later that night she was informed by a police officer and a doctor (identified as Dr S) that she needed to apply for Guardianship Order as the subject could not consent to forensic examination and she could not stand for the subject to give consent.

9.2 **The medical social worker** of the Hospital and maker of case summary, said she met the applicant the next morning Friday 21 June 2013 and then she contacted the police. She then enquired with

the Board's Secretariat. She had discussions with the Inspector L and another woman police officer on the use of Part IVC, Mental Health Ordinance. She was later informed that there was a need to apply for guardianship.

9.3 **Dr B** said while agreeing Part IVC in giving power of doctor to treat illness, he held the view that forensic examination was by nature not treating illness, despite some legal views that it still could arguably be said to be within the definition of medical treatment as defined in the law. He was therefore of the view that Part IVC did not apply to forensic examination which was primarily a referral from police for criminal investigation. Forensic evidence obtained without consent will also subject to legal challenge in court. Forensic examination was not within Part IVC in term of definitions of treatment and best interests. This was not the first time he had refused forensic examination. (Yet, the Board did not find any similar case since February 2006). He further said treatment for injuries should have priority over forensic examination. In summing up, he agreed that he did not find Procedural Guidelines for Handling Adult Sexual Violence Cases (revised 2007) regarding forensic examination for mentally incapacitated victims correct and will not follow. The Board reminded him of his position as a public servant and the Guidelines were promulgated as a joint effort of all relating government departments and most important of all, the Department of Justice, being the government legal counsel, had given proper advice and inputted to bring about the said Guidelines.

9.4 For clarification, the Board pointed out that the Guidelines only suggest application for guardianship in special circumstances. That was why the Board asked him if there was special concern. Up to

the discussion so far, there was none found. The applicant, being subject's younger sister, had apparently never opposed to the proposed forensic examination.

- 9.5 If Guardianship Order was not granted today, Dr B said he will not proceed with the forensic examination at all. On the reminder of all forms of consequential pressure on him (or the case forensic doctor) in result thereof, he said he and his seniors and subordinates had thoroughly discussed this issue and all of them adopted the same stance i.e. they would not follow (that part of) the Guidelines. He had offered no useful answer when the Board probed on a scenario that when internal injuries were detected during and in course of forensic examination, would he not inform the treating doctor so that treatment could be made timely. The Board, by this, raised the issue of benefits of forensic examination (not to mention the possibility of finding infectious diseases). Dr B simply said such a scenario was based on a presumption of internal injuries present. The Board did not find that answer helpful or constructive but to avoid the main issue.
- 9.6 Finally, the Board asked Dr B would there be occasions where a victim at hospital being suspected of gynecological injury being forensically examined in the presence of a gynecologist doctor. He said yes. He said evidence might not necessarily be produced or done in the framework of forensic examination, i.e. it could be achieved by other course like in the course of treatment or medical examination. Forensic examination was purpose-specific and should be distinct. The Board reminded him that there was no distinction between Part IVB (guardianship) and Part IVC so far as the definition of medical treatment is concerned.

- 9.7 **Dr S**, forensic pathologist, said he had nothing to say.
- 9.8 The medical social worker a Psychiatric Hospital and the maker of social enquiry report, on behalf of the Director of Social Welfare, said she had nothing to add.
10. The Board provided his main reasoning in the ensuing paragraphs. For clarity and to avoid any war of words, whenever the word “Guidelines” was referred to above or hereinafter, it will mean, unless otherwise stated, Chapter VI “Handling of mentally incapacitated adult sexual violence victims in need of forensic examination” of the document.
11. For completeness, paragraphs 93 and 96 of the Guidelines were reproduced hereunder:-

“93. A victim who is an MIP may have global incapacity or may retain the capacity to make certain decision. If the victim has the capacity to give consent to medical examination / treatment, she should make the decision for herself in relation to the matter. On the basis that forensic examination by a forensic pathologist who is a doctor is carried out to determine the extent of physical injuries, whether the victim has been infected with sexually transmitted disease and to provide advice / referral for subsequent treatment, arguably it may be regarded as medical treatment. If the victim is unable to give a valid consent, the examination may still be conducted without the victim’s consent by invoking section 59ZF under Part IVC of the Mental Health Ordinance (MHO), Cap 136 if the responsible social

worker / police officer in consultation with the forensic pathologist concerned:

(a) Considers that as a matter of urgency that the examination is necessary and is in the best interests of the MIP; and

(b) Has taken all reasonably practicable steps to ascertain whether a legal guardian has been appointed, and there is, or appears to be, no guardian appointed, or the appointed guardian has not been conferred the legal right to give such consent.

96. *There is **no need to apply for guardianship** under Part IVB of the MHO in normal situation. **Only under special circumstances** that if the registered medical practitioner, e.g. forensic pathologist, considered that the circumstances would not be appropriate to invoke section 59ZF of the MHO and when a guardian is not available or the guardian is not conferred with the power, an application for the MIP victim's guardianship under Part IVB of MHO should be considered."*

12. In considering the evidence and relevant legal provisions in Part IVB and Part IVC, Mental Health Ordinance, the Board disagreed with the view of the two forensic doctors. Indeed, the legal views from Department of Justice had been well canvassed which resulted in the revision in 2007 of the Procedural Guidelines for Handling Adult Sexual Violence Cases. Particularly, in paragraph 33 of the document, if the alleged assault

occurred within 72 hours prior to report, forensic examination should be conducted as soon as possible. As common knowledge in the public domain, forensic examination should be carried out as soon as possible. However, the two doctors' incorrect view had resulted in the undue delay of such an important examination. It was, in the view of the Board, highly suspicious of neglect or omission of public duty, particularly in view of seriousness of the suspected crime involved. The Guidelines permitted an application for guardianship only when there were special circumstances justifying it. In the letter dated 26 June 2013 of Dr B and in the course of examination at the hearing, the Board did not find (as agreed by him) there was any or any professed special circumstances justifying or warranting an application for Guardianship Order. The Guidelines set out clearly that in normal case, there was no need to apply for guardianship. Indeed, the present case was a simple and normal case plainly in need of immediate forensic examination which was long overdue since the very night of the Thursday 20 June 2013.

13. The doctors' view, when simply put, was that they disagreed with the rationale and procedures set out in the Guidelines and nothing more. However, as public officers in charge of this very essential function in the area of criminal justice administration, the Board wondered why the doctors did not abide by the Guidelines and instead chose to embark on their own interpretation, which was simply not open to them. The interpretation role was not open to the doctors because first, they were guidelines which were promulgated, to name the least, by all government departments and public bodies involved and included particularly the Hong Kong Police and certainly the forensic service of it. Secondly, the government legal adviser, the Department of Justice had given its advices and views to the Guidelines already. Thirdly, as public officers, the forensic doctors were mandatory to follow the Guidelines in discharging

public duties.

14. During the course of examination and as well as in his letter dated 26 June 2013, Dr B mentioned about possible legal challenge on the forensic evidence collected without consent. However, he was unable to recall from his long experience or memory there was ever a single case so challenged at court.
15. Of Dr B's view that the term "medical treatment" in Part IVC did not apply to forensic examination which was different from normal meaning of treatment, i.e. treatment of illnesses. The Board found that this view as entirely misconceived. Part IVB and Part IVC, Mental Health Ordinance were, in the judgment of the Board, share the same set of statutory definitions, including, of course, the definition of "medical treatment". It was intended to be wide and all catch. If Dr B was correct, then it simply entailed that a legal guardian appointed had no power to consent to forensic examination for (according to Dr B) it was a distinct type of examination. It was the firm belief of the Board that Part IVB and Part IVC, Mental Health Ordinance, in relation to medical treatment provisions, stood and fell together and could not be separated. The only exception to the definition was "Special Treatment" expressly saved therein. The law had never put forensic examination, like special treatment, as an exception. It had been a long held legal view that Part IVC, Mental Health Ordinance did apply to forensic examination and in normal case, such as the present one, there was no need to apply for guardianship.
16. For clarity, the definition of medical treatment was set out hereunder:-

s.59ZA

"medical treatment (醫療) includes any medical or surgical

procedure, operation or examination carried out by, or under the supervision of, a registered medical practitioner and any care associated therewith;”

17. This classic and all embracing definition had its root of international reference.
18. Finally, on the point of “in the best interests”, it was the firm view of the Board that the definition must be given an open, encompassing and wide meaning i.e. bringing about an improvement, benefit or possible or perceived benefit (e.g. early diagnosis) will deem sufficient. Even, removing a doubt or suspicion of injuries or illness should be regarded as an improvement. The Board shall not bother to repeat here paragraph 9.5 above. Suffice to say that the traumatic assault on the subject on Thursday 20 June 2013 was a sufficient trigger to call in play of this legal provision.
19. In line of the above reasoning, the Board initially considered not to grant the Emergency Guardianship Order. However, in order to ensure or salvage the opportunity to have the forensic examination conducted and to contribute to social justice, the Board decided to treat this case as an extremely exceptional case and grant the Emergency Guardianship Order as sought. Lastly, the Board stressed that this case should never be regarded as a precedent case. If similar case should ever be filed again with this Board, let all those involved be forewarned that the Board shall act decisively in the ways as it deems fit and necessary.

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