



REASONS FOR ORDER

Mental Health Ordinance (Cap. 136)¹

BETWEEN

Madam PC

Applicant²

and

Madam CF

Subject³

The Director of Social Welfare⁴

Mr KL

Party added⁵

Members of Guardianship Board constituted

Chairperson of the Board: Mr Charles CHIU Chung-yee

Member referred to in section 59J (3) (b): Ms Sumee CHAN Kit-bing

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

Date of Reasons for order: the 30th day of January 2019.

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)(c) of Mental Health Ordinance

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

BOARD'S ORDER

1. These Reasons for Decision are for the Board's Order made on 30 January 2019 concerning Madam CF ("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.

REASONING OF THE BOARD

Background

2. The application for the appointment of a guardian for the subject, under Part IVB of the Ordinance, dated 9 July 2018, was registered as received by the Board on 9 July 2018. The applicant is Madam PC, daughter. The evidence shows that the subject is 92 years of age, woman, with mixed-type dementia. The subject was incapable of deciding her accommodation.

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.

Summary of evidence adduced at hearing

4. Guardianship Board directed Mr KL (a son of subject) be added as a party in these guardianship proceedings.

[Private with applicant]

5. Upon discussion, the applicant agreed to disclose her letter in Chinese dated 17 July 2018 containing her psychiatric follow up details to other parties as she intended to apply to be appointed as the legal guardian today.

[After recess]

6. Upon discussion, the applicant agreed not to have her audio-recording played at the hearing today.
7. Madam CF, the subject, dozed off soon after entering the hearing room. She said she was 68 and has no bodily discomforts. She has no breakfast today and does not feel cold. She has no medication needed to take. She cannot tell with whom she lives. She cannot tell where she is living now, even prompted with hints. She cannot open her eyes even having been instructed to do so. [**Party Added** said he bought a vegetable-meat bun for subject's breakfast and the subject ate one.]
8. Throughout the conversation with the Board, the subject has kept closing her eyes, even when she was talking.

[Conversations between parties and the Board abbreviated.]

Issues and Reasoning

Reasoning for receiving the subject into guardianship

9. The subject's five children have been divided into two camps, respectively, the first camp led by the Applicant (supported by eldest daughter PL and 3rd son KW) of the one side and the second camp led by the Party Added (supported by 5th son KC). The Applicant's side strongly seeks a Guardianship Order whereas the Party Added's side clearly opposes to a grant of Guardianship Order. On carefully

considering all the documentary evidence (social enquiry reports and written statements of the parties) and the oral representations made at the hearing today, it was a clear case that mistrust between the two sides were vivid and the conflict between them were seriously affecting the welfare of the subject. Amongst the long reports and the lengthy statements (notably the one prepared by the applicant), each of the camps were seeking to take over the control of the daily care and welfare plan of the subject. The applicant's camp seek to remove the subject to the abode of PL at AMY Garden and put the subject under their personal care whereas the Party Added strongly seek to keep the status quo (i.e. to keep the subject at the present abode at YT Estate). Either side was not satisfied, for one reason or the other, with the care provided by the other side. The matter has come to a head when KW suddenly took the subject away from the YT Estate abode on 15 April 2018 and placed her under the care of PL and the applicant in AMY Garden abode. The Party Added took the subject back by force after an open family quarrel on 17 June 2018. The issue of welfare and daily care plan remained unresolved as of today. On perusing the various statements of the parties, the Board was alarmed by the fact that accusations against one another by the two camps were mounting and serious; blaming one another of poor care quality and carelessness, causing falls and slips of the subject and even abuse. The applicant's side strongly raised the issue that the routine personal cleaning works and the frequent application of medical cream involved the subject's (being a female) private parts and they should be carried out by the daughters. The applicant's side also alleged under-nutrition and insufficient clothing or improper medication administration of the subject while under the care of the Party Added. The family conflict remained severe and so intense that the subject was plainly in need of a Guardianship Order to protect her best welfare interests. The Board came to a view that a legal guardian was much needed to determine the welfare plan of the subject. Without a legal guardian, the consequence would unlikely be the one that the Board would like to see.

10. Accordingly, the Board received and adopted 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 paragraph 14 of social enquiry report and paragraph 29 of the supplementary information) and accordingly decided to receive the subject into guardianship in order to protect and promote the interests of welfare of subject.

Reasoning for choosing the Director of Social Welfare as legal guardian

11. The applicant's side proposed the applicant or KW to be appointed as the legal guardian. The Party Added opposed to a grant of Guardianship Order but indicates that if Guardianship Order were to be granted, he preferred Director of Social Welfare as the legal guardian.
12. On the choice of a candidate as guardian, the Board duly considered 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).”

13. The Board will reiterate that past efforts of a family member towards giving care to the subject do not necessarily entail his/her appointment or continual appointment as the legal guardian.
14. The Board now decided to appoint the Director of Social Welfare as the public guardian in view of the further observations as follows: -

The Board believed 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.

15. The Board accepted and adopted the view of the social enquiry report maker who recommended, as contained in the social enquiry report (particularly paragraph 14) and supplementary information (particularly paragraph 29), the Director of Social Welfare, to be appointed as the guardian of the subject in this case.

DECISION

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

- (a) That the subject, as a result of mixed-type dementia, was 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 limited 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 concluded that it is in the interests of the welfare of the subject that the subject should be received into guardianship.

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

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