



REASONS FOR ORDER

Mental Health Ordinance (Cap. 136)¹

(Section 59O)

BETWEEN

Mr X

Applicant²

and

Mr Y

Subject³

Madam Z

Party added⁴

The Director of Social Welfare⁵ (represented by Miss C)

Members of Guardianship Board constituted

Chairperson of the Board: Mr Charles CHIU Chung-yee

Member referred to in section 59J (3) (b): Ms YUNG Lai

Member referred to in section 59J (3) (c): Mr HO Wing-shing

Date of Reasons for Order: 20th November 2015.

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

1. The subject Mr Y did not attend the hearing and was interviewed in advance by the Chairperson on 13 November 2015.

Background

2. The application for the appointment of a guardian for the subject, under Part IVB of the Ordinance, dated 11 March 2015, was registered as received by the Board on 11 March 2015. The emergency guardianship application dated 17 April 2015, was registered as received by the Board on 17 April 2015. The applicant is Mr X, younger brother. The evidence shows that the subject is 69 years of age, man, with vascular dementia. The subject was unable to handle finances and was incapable of consenting to treatment. He first suffered from ischaemic stroke on 25 April 2012 and was discharged home in June 2012. He was subsequently admitted to the present care and attention home by the applicant on 29 January 2015.

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.
4. At the start of the hearing, the **Guardianship Board** orders that: -
 - (a) the normal guardianship Order application and emergency guardianship order be consolidated and heard together;
 - (b) the wife of the subject, Madam Z, be added as a party (“Party Added”).

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

5. Upon carefully considering all the medical reports, social enquiry reports and supplementary reports, the written representations and statements by parties and the chronology of account by the Party Added, and upon hearing from the parties and the solicitor representing the Party Added, the Board decides to receive the subject into guardianship and appointing the Director of Social Welfare as the legal guardian.

6. The Board's decision is guided by the following rulings and observations: -

6.1. It is important to set out the major facts of this case, as follows: -

(1) On 25 April 2012, the subject was diagnosed to suffer from ischaemic stroke and mental incapacity

(a) In consequence of his stroke, he has undergone various CT brain and MRI brain proving that critical areas of his brain were suffering from lacunar infarcts and cerebral atrophy plus small vessel diseases. His MMSE score was 21-22 and was noted to have deterioration in memory and self-care ability with poor hygiene and bad temper. He was treated as for vascular dementia. A Clinical Psychology report dated 29 May 2012 of TW Hospital (Appendix 11 of social enquiry report) further confirmed subject's deficits of impaired memory and verbal learning, characterized by retrieval deficits and intrusion of other information during recall. The subject was also noted to have specific cognitive deficits involving executive dysfunctions and problem

solving and visual-spatial executive planning. The subject was further noted to lack awareness of his cognitive problems. Due to dementia, he was started on Donepezil since 3 April 2013.

- (b) His dementia symptoms were noted to be worsening since and resulted in his hospitalizations, namely, in 27 April 2013 (due to loss of consciousness), 14 April 2014 (due to hypertensive urgency secondary to non-compliance of medications), 14 September 2014 (due to generalised malaise and elevated blood pressure etc). On 26 January 2015 at medical follow up, subject was again found to have elevated blood pressure, due to medication non-compliance. (Source: medical report dated 12 March 2015 - Appendix 8 of social enquiry report.)
 - (i) Indeed, the subject's mental incapacity due to vascular or mixed dementia was now further supported by the two medical reports both dated 9 March 2015 (respectively by Dr H and Dr DS) and accompanying these applications.
 - (ii) In sum, the Board concludes that the subject did suffer from mental incapacity since his stroke in April 2012 and he was on a downward trend ever since.
- (2) On 28 June 2012, the subject made the first will in favour of the applicant, Mr X.

- (3) On 18 October 2012, the subject got married with the Party Added.
- (4) On 1 August 2013, the subject acted on the following three matters: -
 - (a) Making a new will in favour of Madam Z, with an unusual memorandum stating that the will should not be altered without her consent, failing which full indemnity should be paid by the subject.
 - (b) Making a general powers of attorney with Madam Z as attorney.
- (5) On 1 August 2013, the subject executed a mortgage in favour of H Bank (“the first mortgage”). The Party Added has admitted in her written statement that the loan amount was \$4 million.
- (6) On 15 May 2014, the subject executed a second mortgage in favour of Y Credit. The loan amount was \$5 million (“the first 2nd mortgage”).
- (7) On 24 December 2014, the subject executed a second legal charge in favour of F Finance, together with a rental assignment. The loan amount was \$6.6 million (“the second 2nd mortgage”).

6.2. Due to the mental incapacity of the subject since 25 April 2012, the Board has serious doubts and reservation on the validity of all the above listed (2) to (7) transactions. In other words, there is a strong case, to say the least, that the subject has entered into all these

transactions under undue influence of the Party Added. Today, the subject could hardly remember these mortgages or transactions at all except that he still remembers that he has a wife or girlfriend.

6.3. Financial abuse: the evidence

(1) On examining the evidence, the Board accepts that some part of the loan amounts of the two second mortgages were used to pay for finance charges, penalty and legal fees. Indeed, major part of the second 2nd mortgage, \$5,252,609 was paid towards the discharge of the first 2nd mortgage. However, the Board believes that Madam Z, i.e. the Party Added, has, subject to (2) below, broadly embezzled and deprived of the subject the following monies: -

- (a) The entire loan amount of the first mortgage at \$4 million.
- (b) The entire loan amount of the first 2nd mortgage \$5 million.
- (c) The net loan amount of the second 2nd mortgage netting of the repayment amount towards satisfaction of the outstanding indebtedness of the first 2nd mortgage at \$1,347,931 (i.e. \$6,600,000 - \$5,252,069 = \$1,347,931).

In sum, (a) + (b) + (c) = \$10,347,931.

(2) To be fair to the Party Added, up to November 2015, she has repaid monthly instalments, assuming those were true, to various financial institutions in the following sums: -

- (a) to H Bank \$1,038,100.
- (b) to the first 2nd mortgagee at \$525,000.

(c) to the second 2nd mortgagee at \$1,117,831.

In sum, (a) + (b) + (c) = \$2,680,931.

A caveat to registered here is that according to paragraph 18 of the social enquiry report, there has been debt collectors sending letters to the subject in February and March 2015.

(3) Therefore, based on the **acceptable** and **available** evidence, the Board has reasons to believe that the Party Added has financially abused the subject in the amount at the region of \$7,667,000 (i.e. \$4,000,000 + \$5,000,000 + \$1,347,931 - \$1,038,100 - \$525,000 - \$1,117,831 = \$7,667,000).

6.4. Further financial abuse on pension

In addition to the above, the Board has also come to view that the Party Added has also abused the subject's monthly pensions all along since April 2012. However, for all fairness, the Board would only take into account of the start of the period as admitted by the Party Added in her chronology of account (filed on 18 November 2015) of having used the subject's said pension, i.e. since August 2013. In that chronology, the Party Added made a calculation up to January 2015 (the very month that subject was admitted to the care and attention home). However, upon the latest confirmation by S Bank, the credit balance up to 12 November 2015 of the subject's account (used to receive pensions) stood at only HKD399.52. Thus, the Board takes into account of a total of 27 months, i.e. August 2013 to November 2015, as the period during which the Party Added has abused the subject's monthly pension. Adopting a median sum of

\$28,122 as the monthly pension received by the subject during this period, the total sum abused is \$759,294 (\$28,122 x 27).

Therefore, during this period, the net sum misappropriated by the Party Added was at the region of \$8,426,294 (\$7,667,000 + \$759,294).

6.5. Finance abuse: the Party Added's explanation

The Party Added has filed the aforesaid chronology of account on 18 November 2015 with an aim to justify how she has spent the total loan amounts of three mortgages in question and the subject's pension from August 2013 to November 2015.

The Board does not find the justification reasonable or acceptable at all, for the following reasons: -

- (1) The expenses as claim did not accord with the usual living style and pattern of spending of the subject. On this point, the Board accepts the applicant's explanation of subject's simple living style as true and correct. The spending as recorded was unusually lavish as if the subject was a multi-millionaire and that the loan amounts need no repayment.
- (2) There was not a single piece of receipt or documentary proof of a single item of expenditure annexed to the chronology of account at all, given that the Board has already requested for all documentary support in writing to the Party Added's solicitors on 13 November 2015. At the hearing, the party Added simply said she could not find any. Nor did the solicitor prepare a skeleton

submission to explain all these central issues despite the request by the Board on 29 October 2015.

- (3) All figures and dates were rounded up and non-specific.
- (4) Given a retired civil servant with a monthly pension of \$28,122 on average, it is unbelievable that the monthly spending with the Party Added, as alleged, was \$45,000. It is equally incredible that there was no plan at all to make sustainable mortgage repayment by the monthly instalments. Currently, the respective monthly instalment repayable to H Bank, the first mortgagee, is \$37,075 and to second 2nd mortgagee is \$101,621. The unpaid indebtedness of these two existing mortgages respectively is \$3,173,763.51 (as at 16 November 2015) and \$6,551,909 (as at 27 March 2015), totalled at \$9,725,672.51. It is startling that as at the hearing, the Party Added tells this Board that no more money at all is left.
- (5) There was no convincing explanation as to why there was a need for the first mortgage and then the two 2nd mortgages.
- (6) The quick successions of all the mortgages within short periods demonstrated only one trend, i.e. to deplete the net equity of the subject's property as soon as possible. This is one of the classic ways to swindle the subject's assets. Of course, there are many other methods of abuse, but the Board would make it clear to the Party Added's solicitor that an abuser chose a particular method of abuse but not the others does not exonerate the Party Added from the guilt of her unmerciful, ruthless and premeditated scheme of depriving the subject of his substantial assets.

(7) Both at the hearing and according to her chronology of account, the Party Added stayed vehement that all monies have now been spent. It is unbelievable that within a short span of 27 months, a total sum as huge as \$8,426,294 has been spent.

(8) The Party Added is observed to be an untruthful witness. Even more, the Board is doubtful on the genuineness or truthfulness of the so-called marriage between her and the subject. It is because she admits that she has never lived together with the subject at subject's place at all since the marriage was registered on 18 October 2012.

6.6. On the allegation of neglect of care, having considered the evidence of Mr X, the applicant at the hearing, the Board accepts his version that the subject was not properly cared for by the Party Added at all. As mentioned above, as shown in medical report, the subject's repeated hospital admissions points to only one thing, that is, his medication compliance has not been satisfactory since his discharge back home in June 2012. Plainly, on proper medical record, the repeated hospitalizations were due to uncontrolled blood pressure secondary to poor medication compliance. Further, despite the denial of the Party Added, the Board accepts the applicant's description that the bedding and pillows, the toilet and kitchen of the subject's flat remained very dirty during that time. Equally, the Board accepts the applicant's case that the subject was not provided with proper meals and drinks.

6.7. The Board also observes that there have been major disputes over the future accommodation and care of the subject. The applicant prefers the subject to continue to reside at the present care and

attention home. The Party Added opposes it. It was, inter alia, evidenced by the two attempts of the Party Added to take the subject away from the care and attention home respectively on 3rd and 4th February 2015, followed by a warning letter from her solicitors. That being case, the need for Guardianship Order is unavoidable in order to safeguard, inter alia, the subject's welfare interests.

- 6.8. In addition, the subject Mr Y is now facing the imminent risks to have his monthly pension further abused. It is clearly seen that S Bank has not stopped Madam Z, the Party Added, being an authorized signatory, from withdrawing the money/pension in the subject's account, despite the bank being notified of the medical certifications as mentally incapacitated person of the subject as early as 23 March 2015. He would need therefore a legal guardian to manage his financial affairs including considering to apply for an urgent Committee order to protect the net equity of his flat, which is imminently exposed to the risks of a foreclosure or forced sale by the mortgagees.
7. Regarding the choice of candidates of guardian, the Party Added has been opposing to Guardianship Order but later asking to be appointed. But today, at the hearing, she agrees to the Director of Social Welfare be appointed as the legal guardian. Due to the ruling of the Board that she has been abusing the subject's substantial assets, she is obvious to have conflicts of interests of a financial nature with the subject. She is therefore not fit to be appointed anyway apart from the Board's ruling that she has all along been neglecting the subject's daily care and supervision of medications.
8. On the other hand, the applicant threatens to appeal against the Board if he were not appointed as guardian. The Board would make it clear that the

assessment of a suitable guardian depends on many factors. Equally, the Board is mindful of the making of the 1st will of the subject in favour of applicant after losing of his mental capacity. This has casted doubts on motive of the applicant as to whether he has ulterior material motive over the subject's assets. Further, in this case, the social enquiry report maker Miss C has pointed out correctly in paragraph 45 of her social enquiry report dated 28 April 2015 and paragraph 24 of her supplementary report dated 18 November 2015 as follows: -

“45. For the appointment of guardian, it is with no doubt that if Madam Z or Mr X is to be appointed as the guardian, his/her role of the legal guardian will not be fully supported or even be challenged by the other side basing on their different views on MIP's care plan and disharmonious relationship. Without mutual trust and understanding, there will be arguments and disagreement between the two sides and the guardian will possibly be queried on his/her fairness and openness when decisions have to be made for the MIP. He/She will have much difficulty to implement proposed welfare plans for MIP. In view of the above, it is foreseeable that the guardian from either side will have difficulty to function efficiently as the legal guardian. For the best interest of the MIP and to ensure timely and quality decisions for the MIP in future, the investigating officer recommends that the DSW who is considered the neutral and impartial public officer be appointed as the legal guardian of Mr Y, MIP, under the Mental Health Ordinance, Cap. 136 with all powers under section 59R(3)(a)-(f).”

“24. Being certified as a mentally incapacitated person, Mr Y is in need of a guardian to take care of his welfare and financial matters under the provisions of Guardianship Order. For the appointment of guardian, without mutual trust and understanding, it is foreseeable that the guardian either from Madam Z or Mr X will have difficulty to function efficiently as the legal guardian. For the best interest of the MIP and to ensure timely and quality decisions for the MIP in future, the investigating officer remains recommending the DSW who is considered the neutral and impartial public officer be appointed as the legal guardian of Mr Y with all six powers granted under the Mental Health Ordinance, Cap. 136.”

9. On considerations of the entire facts of this case and the Board is convinced that appointing the neutral public officer Director of Social Welfare as the legal guardian is appropriate given the disputes and conflicts between the applicant and the Party Added, especially where the first will of subject is now apparently revoked by the second will. The Board entirely agrees with the reasoning and observation of Miss C in recommending Director of Social Welfare as the legal guardian.

10. Therefore, 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 supplementary information 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 and to appoint the Director of Social Welfare as the guardian of the subject in this case.

11. As Guardianship Order is granted today, the application for emergency guardianship order is technically dismissed.

12. [**Post note:** At the hearing today, Madam Z, the Party Added finally signed an undertaking by which she acknowledged the subject's ownership of the credit balance of the joint H Bank account at \$40,920.35 and agreeing not to withdraw any money from this account plus agreeing the future guardian to use the money for subject's maintenance and use. It is to the great surprise of the Board that according to H Bank's reply (dated 20 November 2015) received by the Board on 24 November 2015, the account only holds \$3,725.38.]

13. In view of continuous abuse, the Board has exceptionally issued immediate written notices to H Bank and S Bank on the granting of Guardianship Order on 20 November 2015.

DECISION

14. 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, treatment plan and finances, which has caused the subject being abused financially;

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, future treatment plan and finance;

(d) The Board concludes that it is in the interests of the welfare of the subject that the subject should be received into guardianship.

15. 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