



REASONS FOR ORDER

Mental Health Ordinance (Cap. 136)¹

BETWEEN

The Director of Social Welfare

Applicant²

and

Madam AK

Subject³

Mr KM

Party added⁴

Members of Guardianship Board constituted

Chairperson of the Board: Mr Charles CHIU Chung-yee

Member referred to in section 59J (3) (b): Ms CHAK Tung-ching

Member referred to in section 59J (3) (c): Mr HA Siu-pang

Date of Reasons for order: the 10th day of May 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)(b) of Mental Health Ordinance

BOARD'S ORDER

1. These Reasons for Decision are for the Board's Order made on 10 May 2019 concerning Madam AK ("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 20 July 2017, was registered as received by the Board on 20 July 2017. The applicant is social worker of Integrated Family Services Centre. The evidence shows that the subject is 68 years of age, woman, with schizophrenia and Alzheimer's disease. The subject was unable to handle finances and was incapable of consenting to treatment.
3. The Board adjourned the hearing on 12 January 2018. Originally, the new hearing date was scheduled to take place on 30 November 2018. The solicitor for the Party Added has requested to cancelled it.

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.

Issues and Reasoning

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

5. The Board has earlier consolidated this present case to be heard together with the guardianship application of the subject's twin elder sister Madam MK [MK's case]. [The subject and MK are hereinafter collectively referred to as "the twin sisters".]
6. In the present case, as in MK's case, there was no issue taken as to whether Guardianship Order should be granted. The Board hence accepted that the subject remained a mentally incapacitated person incapable to manage substantial proportion of her personal affairs, including welfare, medical and finance. As her old age home fees remained in serious arrears, the Board found that there was a cogent need to grant a Guardianship Order. The Board so ordered.
7. In both cases, the Party Added has applied to be appointed as the legal guardian. He earlier sought an adjournment in this case and has instructed counsel to represent him. In MK's case, the Board has held, for the reasons therein stated, that the Party Added was not an appropriate person to be so appointed.
8. In considering the candidature of a guardian, the Board duly took the interests of the subject as paramount. The Board has carefully considered: -

(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 person 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).”

9. The Board will reiterate that past efforts of a family member and friend towards giving care to a subject do not necessarily entail his/her appointment or continual appointment as the legal guardian.
10. In the present case, the Board has duly considered all evidence, including oral representations, all reports and statements filed as well as the submission made by the counsel for the Party Added. The Board came to a view that the Party Added was not an appropriate person to be appointed as the legal guardian of the subject.
11. The Board’s decision was guided by the following observations, views and rulings.
 - (a) Party Added was not a relative of the subject at all.
 - (b) All three cousins preferred the impartial public guardian to be appointed but not the Party Added. Indeed, all cousins, particularly Madam GM, even put doubts on the Party Added’s motive or intention of having involved into the affairs of the twin sisters. All cousins were surprised by the fact that the old age home fees were not paid up. Madam GM even claimed that she did not

know the Party Added; whereas the Party Added claimed, in addition to his being the younger god-brother of the twin sisters, he has been like a close relative to them as well as to her late mother for 40 years.

- (c) The Board cannot be convinced that the Party Added has diligently pursued to resolve the financial problem of the subject after having obtained the first two medical reports in support of guardianship application respectively back in March and April 2015. Indeed, the arrears of old age home fees have accumulated ever since March 2016. It was noted that the present application was only filed by the applicant, a government social worker, as late as 20 July 2017. At the same time, the old age home has shown strong discontent of the long overdue accumulated arrears since March 2016, such discontent has fueled these guardianship applications. As of today, the said arrears have accumulated to \$91,668.80.

- (d) In connection to the above, the Board accepted, despite the denial of the Party Added, as a fact that in around April 2015, Party Added was given sufficient notice and information by both medical social worker of hospital and case social worker of integrated family services centre of the need to apply for guardianship order and the purpose thereof, due to mental incapacity of the subject.

- (e) The subject was assessed unfit by doctor on 15 April 2015, meaning that she was incapable even to spend or manage her money in amount(s) as small as normal disability allowance of \$1,580. Fully realizing the subject's mental incapacity and unfitness since March 2015 (denied by the Party Added) (the month in which was assessed as a mentally incapacitated person by a medical report in support of guardianship) and being at the material time the appointee of subject's welfare money, the Party Added has arranged the following suspicious transactions entered into by the subject: -

- i. execution of a will on 12 January 2016, naming the Party Added as the sole beneficiary of the estate,
- ii. setting up of auto-pay arrangement at the joint bank account in mid-2016,
- iii. changing the beneficiary of the insurance policy in favor of the Party Added himself on 28 June 2017.

The Board has serious doubts on the validity and appropriateness of such transactions for want of mental capacity, and hence doubts on the motive, genuineness and intention of the Party Added as a whole. The Board noted, inter alia, that in respect of potential beneficiaries of her will, the subject still has MK as her elder sister, another sister in Canada and three cousins, being her close relatives.

- (f) At an interview with the applicant in early April 2017, the Party Added was found out to have not paid for part of the total arrears of old age home fees (accumulated to around \$49,814.90 in March 2017) despite holding \$14,914.40 in the appointee account at the material time. The Party Added's explanation of his dissatisfaction against the old age home regarding fee-charging is doubtful. At any rate, the Party Added's handling and management of subject's disability allowance is viewed as improper and ineffective.

Strangely, instead of diligently pursuing a long-term solution for the subject's financial problem since April 2015 (i.e. the time when the first two medical reports were obtained), he has embarked on the preparation for an execution of the subject's will in his entire favor on 12 January 2016.

- (g) The Board found it unconvincing of the Party Added's allegation at the time of the last adjournment (12 January 2018) that his wish to be appointed was not made known and as if he has never been given to know that Director of

Social Welfare was proposed by the social workers (including the then social enquiry report maker) as the legal guardian of the subject, and as if the whole thing has caught him unprepared. The Board dismissed this claim as a nuisance. Conversely, the Board accepted as a fact that in early April 2017 the applicant, a government social worker of integrated family services centre, has explained the impending guardianship application, its purpose and the intending appointment of the public guardian. To all these matters, the Party Added has raised no objection, neither did he show any objection to the social enquiry report maker.

- (h) By virtue of the transactions set out in (e)(i) and (iii) and the unwanted keeping of subject's cash set out in (f) above, there has been and still was a conflict of interests of a financial nature between the Party Added and the subject. The Board intended to recommend the public guardian to seek a committee order from the High Court (inter alia) to execute a statutory will, to revert the auto-pay arrangement at bank and revert the beneficiary of the insurance policy.
- (i) In all, the above analysis proved one important conclusion, that was, the claimed genuineness of the Party Added in his involvement into the affairs of the twin sisters was in serious doubt. In coming into this conclusion, the Board particularly and fully realized that the Party Added has good education and worked in accounting field. He was not a man in ordinary walk of life with little education or exposure.
- (j) The statement filed by the Party Added and his assertion at hearing contained nothing but a bare denial of knowledge of significant progression of the subject e.g. he said he has never known of subject's incapacity until late hours, he only had the necessary understanding of guardianship order until late hours, the signing of the will was requested by the subject regarding her post-mortem matters, the will was only in standard template, the change of

beneficiary of subject's insurance brought him no benefit etc. He has also subtly laid unfair criticism against social workers involved by stating, in sum, he has not been told or explained of the mental problem of the subject and the relating important actions that were needed to be taken and was kept all along in a passive role in the past till the time closer to guardianship application. The Board found these allegations or explanations unconvincing. Had he allowed himself to be kept in the dark of the significant stages so long, he should have been plainly assessed as lacking the ability to act as a guardian. Equally true, rather, is that he was observed to be lacking the ability to communicate or communicate well, if at all, with the key stakeholders of the subject's welfare, e.g. the old age home staff, the social workers and the three cousins.

12. 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 report and supplementary information and the views and reasoning for recommending Guardianship Order and the Director of Social Welfare to be appointed as the guardian of the subject as contained therein (particularly paragraphs 38 and 39 of social enquiry report and paragraph 3 of supplementary information dated 29 April 2019) and accordingly decides to receive the subject into guardianship and appoints the Director of Social Welfare as legal guardian in order to protect and promote the interests of welfare of subject.

13. On the request of reimbursement of legal costs at \$230,559 by the Party Added, the Board found it absurd. It was for his own contention to vigorously contest for an appointment as guardian that the Party Added has instructed his own team of legal representatives. It was nothing to do directly with the welfare interests of the subject. Further, it was just another way to seek a cost order from the Board which plainly does not have power to do so. Even the Board did have the power, it will not do so as it was plainly unjust to make an order to pay the huge amount of legal costs out of the small estate of the twin sisters, particularly given the Party Added's application herein has failed. On hindsight, supposing there was a total

absence of the doubtful transactions, had the Party Added instead spent the said \$230,559 for the purpose of paying up subject's old age home fees and welfare needs in the past without arrears, the picture today might have been totally different.

DECISION

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

- (a) That the subject, as a result of schizophrenia and Alzheimer's disease, was suffering from a mental disorder within the meaning of section 2 of the Ordinance which warranted 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, treatment plan and finances, which has resulted in the subject's bank accounts being frozen;

In this case, the predominant needs of the subject remained to be satisfied were, namely, decision to be made on future welfare plan, future accommodation, future treatment plan and finance;

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

15. The Guardianship Board applied the criteria in section 59S of the Ordinance and was 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