



REASONS FOR ORDER

Mental Health Ordinance (Cap. 136)¹

BETWEEN

Mr S

Applicant²

and

Madam T

Subject³

The Director of Social Welfare⁴

Members of Guardianship Board constituted

Chairperson of the Board: Mr Charles CHIU Chung-ye

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

Member referred to in section 59J (3) (c): Mr CHAN Yat-sum

Date of Order: the 27th day of January 2016.

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

THE HEARING ON 27 JANUARY 2016

1. The following persons gave evidence to the Board: -

- (a) Madam T, the subject;
- (b) Mr S, the applicant and proposed guardian (represented by Mr C, solicitor of Messrs CX Solicitors);
- (c) Madam KA, daughter of the subject;
- (d) Miss L, a public officer, on behalf of the Director of Social Welfare.

REASONING OF THE BOARD

Background

2. The application for the appointment of a guardian for the subject, under Part IVB of the Ordinance, dated 22 May 2015, was registered as received by the Board on 22 May 2015. The applicant is Mr S, step-son. The evidence shows that the subject is 88 years of age, woman, with Alzheimer's disease. The subject was unable to handle finances and was incapable of consenting to treatment.

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. **Madam T**, the subject, keeps on murmuring irrelevantly, singing and bursting laughs while she enters into (and staying at) the hearing room. She keeps on banging or knocking with her hands and fingers on the table top throughout. She keeps indulged into her thoughts and gives only brief responses on greetings. [The social enquiry report maker **Miss L** says the subject appears speaking much more today.]
5. **Mr S**, the applicant, proposed guardian and step-son of the subject, says the village house where he is residing was under his late father's name. The subject owns another village house herself. His main reason for applying for Guardianship Order is to receive the subject to his home and give care to her.
6. There is a flight of few steps leading to the present old age home and the subject's health is declining over time. He has free access to the subject now but if moved over to stay with him, access will be more convenient. He and his immediate family are willing to take care of the subject and would take her out for walking in open air. The subject could gain more sunlight then.
7. The Board points out to him that paragraphs 34, 35 and 36 under the heading "Circumstances leading to Application" of social enquiry report did not mention his wish to bring subject home as his chief reasons for applying for Guardianship Order. [Social enquiry report maker **Miss L** says that the applicant's welfare plan of moving the subject to his home was mentioned in the "Welfare Plan" section of her report, particularly from paragraphs 37 and 38.]

8. On the question of whether he paid less visits to the subject in recent months, he says the record is wrong. He finally says within these two months, he paid 6 visits.
9. As to why after the subject's stay at the old age home for 7 to 8 years now that he would like to move the subject back to him, he says he had discussed with father before, but in vain. Since his father passed away, he very much wishes to do so now.
10. On the question of which property would he like the subject to move into, he says it will be the ground floor of his abode. When probed on the current ownership of the abode and the grant of Probate in favour of Madam M, co-habitant of subject's late husband, he only replies that he prefers his lawyer to answer. He has added handrail in the toilet and painted the place and bought a single bed.
11. He would like to be the guardian. When probed as to how it is possible, given all family members are opposing to his appointment, he only says his own family and himself can shoulder up the guardian duties.
12. **Madam KA**, the elder daughter of subject, says for the year now after her father passed away, the subject's life remains stable and fees paid up. She can act as guardian. Yet, she respects the Board decision in whether to grant a Guardianship Order or to appoint her or Director of Social Welfare as guardian. She says she can stay in Hong Kong in future but now she resides at Netherlands. Even in the absence of Guardianship Order, she and her youngest sister will continue to pay for the subject's expenses in future.
13. She does not find any deficiency of the provision of service by the present aged home. The home staff has been good to the subject all through these

years. In recent years, she pays visits to the subject once a year. However, since 16 October 2015, she has not left Hong Kong. She used to visit the subject almost daily or on alternate days. She observes the aged home as clean and tidy. Subject is under satisfactory care. The staff are very nice to the subject. Her youngest sister and Madam M did not mention to her of any particular problem of the existing aged home.

14. **Mr C**, solicitor of M/S CX Solicitors for the applicant, submits that: -

- (a) The applicant would like to continue his application.
- (b) The applicant is the lawful and natural son of the late husband of the subject and there is a birth certificate (and other documents) in support.
- (c) Ownership of the properties of the applicant's late father now becomes contentious. Properties of his client's father and the subject have been transferred under suspicious circumstances.

15. Mr C refers the Board to the medical report dated 15 June 2015 by Dr D, a neurologist, in their support.

16. Mr C further submits that subject's own rental income (collected by Madam M, the "partner" of the late husband of the subject) and the expenditures during this period are not matching. Subject's income should be able to pay for her own expenses.

17. **Miss L**, medical social worker and maker of social enquiry report, on behalf of Director of Social Welfare, says the incident of the applicant having been denied of bringing the subject out to see a neurologist in June 2015 as

recorded in paragraph 10 of her Supplementary Report is the same incident as described in paragraph 35 of the earlier Social Enquiry Report.

18. In paragraph 5 of Social Enquiry Report, she has recorded that Madam M was a co-habitant of the late husband of the subject and the relationship was an intimate one.

19. Now the subject is followed up by a CPGT of Hospital as recorded in paragraph 13 of Social Enquiry Report.

Reasoning of the Guardianship Board

20. The Board has carefully considered all evidence presented in this case and found that there is serious conflict of financial nature between the applicant of one side and the Madam M, the eldest daughter KA and the youngest daughter Madam MA of the other side. However, as to whether a Guardianship Order should be granted, there is only one focus, that is, the interests of the subject. The Board has duly considered the legal criteria set out in Section 59O, Mental Health Ordinance, Cap. 136, which provides: -

“(1)

(2)

(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.”

21. On examining the evidence, the only conclusion that the Board can draw is that there is no particular need of the subject that cannot be satisfied without a Guardianship Order. Nor does the Board find that it is in the interests of the subject that a Guardianship Order should be granted. The Board observes that the subject has well settled at the present old age home, which participated in the Enhanced Bought Place Scheme of Social Welfare

Department, since as early as 2008 under the arrangement of her late husband. Secondly, her fees and expenses were paid all along and even after the death of her husband in 2014. Madam M has informally been managing the rental collected from the subject's properties to defray her charges ever since. As to the future and further safeguards, KA and Madam MA have undertaken to pay for future expenses. As well, there have been no issue on medical treatments and access. Regarding the latter, the applicant confirms at the hearing that he has free access to the subject now.

22. On considering the applicant's claim that he would like to take the subject to his care. The Board finds it doubtful. The Board has observed the following:-

- (a) Considering Section K "Circumstances leading to the Application" of the social enquiry report, it is clear that the applicant's main focus is on validity of the will of his late father (and hence the estate distribution of his late father) and the two property transactions of the subject back in 2012. He thought, as he claimed as advised, by becoming the guardian, he would stand a better chance to become the committee of the subject and starting the law suits on subject's behalf.

"34. The current guardianship application was lodged by Applicant. He said that late Mr G had signed on a letter terminating his previous will and changing the terms in favour of Madam M as the sole beneficiary (Annex 23). He was very concerned about the validity of the will and considered Madam M might have taken advantage of late Mr G during the period when he was in ill health. Applicant claimed that he had reported his suspicion over the matter to police in October 2014 but it

was not accepted for investigation as the matter was over a deceased. Hence, when he further found the joint ownership of Subject and later Mr G over their two shops in Yuen Long had been changed to Subject's 1st daughter, youngest daughter and Madam M in 2012 during the time when Subject had been shown in a medical report from Hospital to have become disoriented for her suffering from dementia (Annex 7), Applicant opined that the above-mentioned three persons might have assumed control over Subject by taking advantage of her mental deterioration and obtained the properties illegally. He furthered that there was no information on whether Subject had received her share of the sales prices as stated in the Land Registry record (Annex 15 and 16). Applicant showed worries over Subject's interest being jeopardized and considered Subject were at high risk of being coaxed due to her cognitive impairment. He earnestly wished the Guardianship Board (GB) would help report the case to police if suspicion of financial abuse be substantiated.

35. *Furthermore, Applicant thought that Subject was not in reasonable care given her immense wealth. He considered that she deserved better quality of daily care as well as medical care. Besides, as instructed by the 1st daughter, Subject was barred from leaving with Applicant from the RCHE. Thus, when he was not allowed to bring Subject out to see the neurologist as arranged by him on 2.6.2015, he had called police for intervention. He*

opined that Subject lost her rights to be accessed by persons of her circle and for reasonable treatment.

36. Applicant alleged that he was given the advice by his hired lawyer that if he was successfully appointed by GB as the private guardian of Subject, he would have greater chance to be further nominated as the authorized person to commence legal action for and on behalf of Subject when he applied to the Court of First Instance under Part II of the Mental Health Ordinance (MHO). Applicant therefore filed the present GO application for Subject with no prior discussion with any of Subject's daughters."

- (b) Since 2008 to present, the applicant has never taken an actual or active step to live with the subject or take care of her. There is no evidence suggesting the applicant was actively managing the subject's welfare or acting as the main carer throughout the family history (see paragraphs 6, 30 and 31 of the social enquiry report). Then why now? Also, his plan was to move the subject to the ground floor of the village house where he and his family were living but yet the property was part of his late father's estate, which was being administered by Madam M with the authority of a Probate granted on 20 April 2015. Such a property, under the relevant will, would be inherited by Madam M. The Board has grave doubt, therefore, on the genuineness of the applicant's motive in proposing to move the subject over to that property which does not belong to him and which will very likely become the subject matter of a future litigation. Particularly, as disclosed in paragraph 73 of the social enquiry report, the applicant has planned to initiate lawsuit against Madam M, KA and MA regarding properties of the subject and his late

husband.

- (c) In sum, the Board is not convinced at all that there is a real issue over accommodation of the subject that necessitated a grant of Guardianship Order. Indeed, the view of the Board is that the continuation of the stay at the present old age home is in the best interests of the subject.

23. Accordingly, the Board dismisses the present guardianship application.

24. Lastly, the Board would like to thank Miss L, representative of Director of Social Welfare, for her reports.

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