



REASONS FOR ORDER

Mental Health Ordinance (Cap. 136)¹

BETWEEN

Madam X

Applicant²

and

Mrs Y

Subject³

Madam Z

Party added⁴

The Director of Social Welfare⁵

Members of Guardianship Board constituted

Chairperson of the Board: Mr Charles CHIU Chung-yee

Member referred to in section 59J (3) (b): Ms CHOW Tsui

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

Date of Reasons for order: the 13th day of April 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)(b) of Mental Health Ordinance

Background

1. The application for the appointment of a guardian for the subject, under Part IVB of the Ordinance, dated 10 September 2015, was registered as received by the Board on 10 September 2015. The applicant is Madam X, granddaughter. The evidence shows that the subject is 98 years of age, woman, with cerebral vascular accident. The subject was unable to handle finances and was incapable of consenting to treatment.

The Law

2. 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

3. The Board directs that Madam Z (“Party Added” or “Z”) be added as a party to these proceedings. [She consented.]
4. Guardianship Board asks Z if she is physically able and ready to proceed to hearing today. She replies yes.
5. **Madam X**, the applicant, proposed guardian and granddaughter of the subject, says there are still existing problems with the subject’s care as long as Z is present in Hong Kong because it is difficult to anticipate what her

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

attitude or reaction would be. She uses to deal with this situation by arranging her helper or relatives to divert Z's attention by bringing her out for breakfast so that daily care can be run smoothly e.g. the changing of urine bags can then be done.

6. Regarding doctor's choice, she retained a geriatrician Dr F whom was introduced to her by her friend. She is convinced that the doctor is well experienced. [The Board notes that the applicant addressed Z as Miss Z. When asked why she addressed her natural mother so differently, she says it was because Z did not address her as her daughter.] She uses to arrange a time to avoid the presence of Z during home visits by Dr F. She did allow one visit by the doctor recommended by Z. She was present at the visit. Z uses not to allow her to be present when the subject was attended to by healthcare professionals brought by Z. She was not allowed to be present during a visit by an occupational therapist appointed by Z.
7. Further, she is worried of delays in making medical decision for the subject in future. It is because Z has misled the subject to refuse medication. Z even took subject out to skip the medications or stopped the maid from giving medications to the subject. She mentions the incident of stroke in May 2015 when Z refused to take subject to hospital. Z has the tendency, even with regard to her own medical conditions, in refusing medical advice and treatment e.g. for her own diabetic mellitus, or surgical advice for her cataract. Z's recent refusal to take antibiotics eventually ended her up in having one of her kidneys excised.
8. When probed on the absence of significant incident for past eleven months since onset and pending hearing, the applicant basically agreed. But the applicant supplements that there has been a lot of work pressure on her care works and hindrance from Z e.g. verbal criticisms kept continuing. She

needed to work 24 hours a day and planned up everything. She points out one unreasonable insistence of Z upon the delivery worker to leave all diapers at the lobby of the building. The applicant says how can she ask the deliverer to leave the diapers at lobby without paying first.

9. On the practical help of guardianship, she says she is willing to serve the subject. For now, she is more concerned of future medical decisions of the subject. There was one admission of the subject to Accident & Emergency Department for the purpose of inserting feeding tube due to the interruption of Z. There was another situation for re-insertion of the feeding tube by the nurse at home, which was eventually done after much delays of meal time and arguments with Z. Z's words of accusation and allegations were hurting, intolerable and harsh.
10. Besides, as guardian, she would have an option to move the subject to another place of living.
11. She confirms not one cents of the money withdrawn (out of \$436,000) from subject's Citibank account was spent on her own (i.e. the applicant's) use or purpose.
12. Director of Social Welfare as public guardian is not preferred by her.
13. **Ms Z**, the daughter of subject and Party Added (accompanied by her husband), says for the past 11 months, while without a Guardianship Order, the subject lived well and was under family care. She believes participation in the care of the subject by more family members would be better. She accepts participation by other family members too. Subject was old and suffered from stroke. She questions why this matter is brought before the

court. For 9 years since she came back from United States, she took care of the subject personally.

14. At hospital in May 2015 (subject's onset of stroke), subject held her hands tight while others all left. Doctors asked her to stay behind. Subject now has 4 nurses, the last bill was \$100,000. Subject was frugal in her life. The doctor at hospital told her there was no need for nurses but experienced personal worker would be sufficient.

15. The Board points out to her of paragraph 20 of supplementary report dated 11 April 2016 containing her response to the applicant's five main facts (regarding her unreasonable behaviour) relying on which this application was filed. She replies that all those matters as raised by the applicant were incorrect. The Board then attempts to clarify with her as follows: -

(1) She would like the subject to have good care, not only from her but any family member. She will be happy to employ any needed personnel to give care to the subject. She did employ an occupational therapist, a professor at university. She has never objected to the doctor suggested by the applicant's side whilst she brought another of her choice. Regarding the suggestion of buying a hoist for the subject, she questions why it is not possible to employ a male nurse instead. She did not aim at bringing in any conflict. She lives on 8th floor of the same building. She would not object to appoint a guardian. Mr W, her brother, cut off her call last night. In an occasion before Easter (March 2016), the applicant even called social worker and threatened her to leave subject's place. She came today for the subject's sake and not for herself.

(2) She does not disbelieve doctors but her personality was prone to very much love her family members. Allegations as provided by the applicant were untrue. She thinks it may be the report-maker felt of her as unco-operative at enquiry stage and as such, she (the report-maker) refused to update and clarify her report further despite her requests made (last night).

16. [Case stood down for the Party Added to consolidate her final response.]

17. After recess, the Party Added says she has no supplements to make further. She only wants to say that all allegations stated by the applicant were not true. She believes there is no need for appointing a guardian for the subject. She will continue to support the subject's living and care and will make money for that purpose.

18. Confronted by the Board, she admits since February 2016, she has stopped payment for the expenses for the subject. It was because her companies have paid to the applicant few millions into the latter's own bank account and \$60 million into Mr W's bank account. Initially, they asked the subject to sign company cheques for those sums but the company bank account did not have enough money and the matter came up to her. (On clarifications) She says this matter happened in around 2012, i.e. at the time of passing away of her father (the husband of the subject). These are company's monies and must be returned. Since she knew the applicant can withdraw from subject's bank account which holds \$5 million, she stopped further payments. She informed the applicant before she left for United States on 25 January 2016. [The applicant says the subject also gave money to Z from time to time. She also confirms that the passing of monies to her and Mr W mentioned by Z did not happen after the stroke of the subject in May 2015.]

19. **Ms L**, medical social worker and the maker of social enquiry report, on behalf of the Director of Social Welfare, says Z called her many times and in one conversation at about 4:45 p.m. yesterday, she was then able to grasp what Z would like to say to her. But those information collected was rather irrelevant for the purpose of this application.

20. The Board would like to thank Ms L for her reports.

21. [**Mr B**, the grandson of subject, attending.]

Issues and Reasoning

Reasoning for receiving the subject into guardianship

22. Upon hearing from the parties and perusing the social enquiry reports filed, the Board comes to a conclusion that the Party Added has behaved in such a way that the daily care of the subject has been interrupted substantially. The Board finds that the main facts relied upon by the Applicant in starting this present guardianship application did happen and were serious in nature. These include:-

- (1) Substantial delay in admitting the subject to hospital with apparent signs of stroke on 5 May 2015. It was with great efforts by other relatives, staff and friends that the subject was finally hospitalized. It was apparently an unnecessary and tortuous course forced upon by the Party Added's queer attitude.
- (2) Substantial obstruction against routine change of urinary bag.

- (3) Objection to deliveries of healthcare supplies (diapers and feeding tubes) to the home of subject.
- (4) Challenges against choice of specialist, including difference of opinions over the initial attendance of allied health professionals, e.g. occupational therapist and physiotherapist.
- (5) Challenges against employment of nurses and personal care workers, resulting in unsatisfactory mix of the team.

23. Out of the above, the Board observes that the main problem lies with the unique personality of the Party Added. The Party Added holds fixed beliefs of her own and does not appear to be easy to be engaged and collaborated. One of the observations in support was her seriously unco-operative attitude held towards Ms L, the social enquiry report maker. Considering the contents of the lengthy paragraph 35 of the social enquiry report dated 4 November 2015 (containing full information substantiating the applicant's allegations) as well as the Party Added's response collected by the social enquiry report maker as contained in paragraph 20 of the supplementary report dated 11 April 2016, coupling with the flat denial advanced by the Party Added at the hearing, the Board finds that, on the balance of probability, the applicant has established her case for guardianship.

24. Further, as raised by the applicant at the hearing, equally at the heart of the Board, the medical interests of the subject in future is called in doubt. Worst still, the Party Added has stopped paying subject's expenses since February 2016.

25. 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 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 the subject.

26. Lastly, the Board would grant financial power in this case and would require the applicant to refrain from further withdrawing from the subject's bank accounts immediately. To tie with the huge monthly financial need of the subject in the long run, the Board would recommend the future guardian to immediately apply for a committee order from High Court to manage the subject's very varied asset types, including her sizeable savings at bank and company interests.

Reasoning for choosing the Director of Social Welfare as legal guardian

27. The Board has considered the statutory criteria on suitability of guardian set out in 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).....”

28. However, due to conflicts between the two parties (i.e. between the applicant and the Party Added) and the entangled relationship between them (being mother and daughter) together the rather complicated antecedent financial picture (as disclosed at the hearing), the Board does not find that a private guardian should be appointed in this case. To safeguard the interests of the subject, and particularly to deal with the difficult personality of the Party Added, the Board takes the view that a public guardian is much needed.

29. Further and particularly, in 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: -

- (1) 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 very likely be challenged by the other side.
- (2) Also, a complaint by the other side against the private guardian will not be perceived to have been 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 her roles and duties timely and efficiently, due to conflicting relationships, for the best interests of the subject.

30. Accordingly, the Board decides to appoint Director of Social Welfare as the public guardian in this case.

DECISION

31. The Guardianship Board is satisfied on the evidence and accordingly finds: -

- (a) That the subject, as a result of cerebral vascular accident, 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, her own welfare plan, treatment plan and finances, which has caused conflict between family members in making decisions for subject's welfare or finance;

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.

32. 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-ye)
Chairperson of Guardianship Board