



REASONS FOR ORDER

Mental Health Ordinance (Cap. 136)¹

(Section 59O)

BETWEEN

The Director of Social Welfare

Guardian²

and

Madam MY

Subject³

Mr KY

1st Party added⁴

Madam YF

2nd Party added⁵

Members of Guardianship Board constituted

Chairperson of the Board: Mr Charles CHIU Chung-yee

Member referred to in section 59J (3) (b): Miss Vennus HO Yuen-wai

Member referred to in section 59J (3) (c): Ms LEUNG Tsui-han

Date of Reasons for order for Renewal: the 11th day of October 2018.

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 and S59U(4)(b) of Mental Health Ordinance

³ S2 of Mental Health Guardianship Board Rules and S59U(4)(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)(b) of Mental Health Ordinance

BOARD's ORDER

1. These Reasons for Decision are for the Board's Order for Renewal made on 11 October 2018 concerning Madam MY ("the subject"). The Board continued to appoint the Director of Social Welfare as the guardian of the subject for a period of three years, with powers to make decisions on the subject's behalf, as set out in the Board's Order for Renewal, and subject to the conditions referred to therein.

REASONING OF THE BOARD

Background to review

2. The subject is 85 years of age, woman, with cerebral vascular accident. The original guardianship order had been made on 16 May 2017 for a period of one year, with powers to make decisions on the subject's behalf as set out therein, and subject to the conditions referred to therein.

The Law

3. This Review was conducted under section 59U (2) (b) of the Mental Health Ordinance, which requires that a review must be conducted prior to the expiry of the original Guardianship Order.

Issues and Reasoning

Reasoning for continuing to receive the subject into guardianship and continuing to appoint the Director of Social Welfare as legal guardian

4. The 1st Party Added filed a direction application on 7 May 2018 for an order to transfer the subject (from the current care facility) to CPA Centre. In the application, he asked for a renewal of Guardianship Order with the Director of Social Welfare continuing as the public guardian. What is different today is that he asks to be appointed as the new private guardian of the subject in the place of the Director of Social Welfare. He has no legal representation at the hearing but he has sought the assistance of Mrs AT who appeared today. His counsel and solicitors (now ceased to act) have made written submissions to the Board before, which the Board has read. In those submissions, Mrs AT's assessment and opinion favouring for a change of the subject (inter alia) to CPA Centre were enclosed. The Board has also considered them.
5. The 2nd Party Added rejected all the applications made by the 1st Party Added and supported a renewal of Guardianship Order with Director of Social Welfare continues to act the guardian of the subject.
6. The Board therefore agrees with all parties' view that the Guardianship Order herein be renewed for another three years. The Board so orders.
7. The Board now turns to the issue of whether the subject should be, in her best interests, be changed to stay at CPA Centre.
8. The Board upon hearing from the parties and carefully considering all reports filed and submissions made, comes to a view that the subject shall remain at the present care facility, namely, The Centre R. Accordingly, the direction application of the 1st Party Added is dismissed, for the following reasons: -

- (1) The Board agrees with the view of the public guardian that there is no strong ground for a change of accommodation arrangement of the subject at the moment. (See paragraph 2 (iii) of Supplementary Information dated 9 October 2018.)

- (2) The Board observes that the subject has stably adjusted into the environment and the routines since admission in March 2017 till now. The Board does not find the 1st Party Added's various complaints against the service of The Centre R (raised in his various submissions and statements --- e.g. keeping no record of visitors, not checking visitors, lack of man power at nurse station, over-charging for services) as substantiated. The Board does not see any compelling need to move the subject to a new care facility where the subject would need to adjust herself again.

- (3) The subject is in her advance age of 85 and experiencing physical frailty. She is suffering from multiple chronic illnesses including multiple cerebral infarcts, severe dementia, congestive heart failure with atrial fibrillation. She was noted to have shortness of breath and breathing difficulties since January 2018 and was hospitalized at hospital in March 2018. The Board believes that, on balance, subject's medical need is more pre-dominant than any other needs, e.g. cognitive training, mobility training, speech therapy and many others. As such, The Centre R's strong, unique and adequate 24-hour medical support suits the subject best.

- (4) The Centre R, by its name, bears the connotation of a cancer centre. However, in commonplace, it is a well established care facility for end-of-life care of persons suffering from various kinds of chronic illnesses.

In the circumstances, The Centre R is, in the assessment of the Board, an appropriate care facility for the subject to continue her stay.

- (5) The public guardian is of the view that the subject should remain at The Centre R. The Board agrees. The Board fully endorses the detail analysis set out in paragraphs 18 to 28 and conclusion reached in paragraph 30 of the Supplementary Information dated 28 May 2018. The public guardian's other reasons set out in 2(i) and (iii) in her Supplementary Information dated 9 October 2018 are also endorsed by the Board as correct observations. The Board will not repeat them here.
- (6) For the above reasons, a suggestion for (moving over to) E Home for the Elderly is also rejected.
9. The Board now turns to the final issue of whether the 1st Party Added should be appointed as the new guardian.
10. In considering the candidature of a guardian, the Board duly takes the interests of the subject as paramount. The Board has carefully considered:
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(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).”

11. The Board will reiterate that the closeness of relationship or past efforts of a relative towards giving care to the subject do not necessarily entail his/her appointment or continual appointment as the legal guardian.

12. The Board now decides to appoint the Director of Social Welfare as the public guardian in view of the observations as follows: -
 - (1) It is more that obvious that, till today, the two sides, namely the 1st Party Added and 2nd Party Added, are in serious conflicts and disagreements over the subject’s accommodation and daily care arrangement. It is an undeniable fact. The 2nd Party Added strongly opposed to the 1st party Added’s application for appointment. As such, appointing either side as private guardian is most undesirable in these complicated circumstances. Further, since the appointment of public guardian, the subject’s affairs have been stabilised and the Board does not see any cogent and compelling reason for a change of the appointment at this time.

 - (2) 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.

 - (3) Also, a complaint by the other side against the private guardian will not 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 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.

- (4) The appointment of Director of Social Welfare as guardian is important to safeguard the long-term and best interests of the subject. The Board disagrees with the 1st Party Added's allegations against the public guardian as incompetent.
13. Accordingly, the Board receives and adopts the progress social enquiry report and the views and reasoning for recommending Guardianship Order as contained therein (particularly paragraph 35 of progress social enquiry report) and accordingly decides to continue to receive the subject into guardianship and the Director of Social Welfare to continue to be appointed as the guardian of the subject in this case in order to protect and promote the interests of welfare of subject.

DECISION

14. The Board is satisfied and accordingly finds that the subject remains a mentally incapacitated person for whom a guardian should be appointed as the order has resulted in maintenance of the subject's welfare and health. The subject still needs a guardian to make substitute decisions, as the subject lacks capacity to make reasonable decisions on personal and welfare matters including decision on accommodation. For the same reasons as stated in the original Guardianship Order, the Board is satisfied that there remained no less restrictive or intrusive alternative to guardianship. The Board concludes that it is in the interests of the welfare

of the subject to continue to be under guardianship and that the original guardianship order should be renewed.

15. The Guardianship Board applies the criteria in section 59S of the Mental Health Ordinance and is satisfied that the Director of Social Welfare is the most appropriate person to continue to be appointed the guardian of the subject.

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