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**Making it work — lessons to learn from
challenging guardianship cases**

Mr Charles Chiu
Chairperson
Hong Kong Guardianship Board



Corridor

The Building





Guardianship Board

- established in February 1999
- a legal quasi-judicial tribunal of HKSAR
- operates under Part IVB of Mental Health Ordinance, Cap. 136
- sponsoring by a Government bureau - Labour and Welfare Bureau
- Board has a Chairperson and four staff
- Core function: appointing guardian/deputy and reviewing appointments



Application statistics January to December 2016

- 231 guardianship applications
- 154 orders made
- 82 cases: relatives and non-relatives appointed
- 72 cases: Director of Social Welfare appointed
- 165 cases: mainly involved financial management issues (72.3%)
- 296 review hearings
- 198 orders renewed
- 90 orders not renewed



Key Policy Objective

To promote and protect
the interests of
mentally incapacitated persons
(Substitute Decision-making model)



Guardian's powers

(the Court adopted a narrow “essential powers approach” – HCMP 953/2008)

1. accommodation
2. convey to specified place, reasonable force
3. attend as specified for treatment, occupation, education or training
4. give consent to medical or dental treatment
5. access to subject: any doctor, approved social worker or other person specified in the Guardianship Order
6. hold, receive or pay a monthly sum (currently a maximum of HK\$15,300=S\$2,600) for patient's maintenance and benefit



Accommodation

- 88 years old male, Alzheimer's disease
- Used to live with late wife at their joint property
- Due to health deteriorations of the couple, they were admitted to ordinary old age home (and later subsidised placement)
- Property vacant since their admission to aged home
- Not much savings at bank
- Even Committee order granted for the property, subject is still not able to live at home



Case Comment:

- **It will take a long time (43 months to subsidised place) before quality accommodation can be provided in public sector**
- **Cannot return home**
- **Part II Committee Order not functioning they way it should**



Medical

- 44-year-old mental handicap man with Conn's syndrome
- Mother applied Guardianship Order (GO) on doctor's advice
- suggested further investigation & treatment with surgical excision of adenoma
- Case medical officer (CMO) not invoked Part IVC
- GO granted



- At review, 1 year later, the Board noted that the CMO suggested **not** to renew the Order and opted for conservative treatment
- Doctor said too risky to carry the tests if subject not co-operated (should know earlier)
- Also, blood pressure was stably controlled under medication and other symptoms maintained stable over a year
- No investigation, treatment or surgery done in last year
- Order discharged



Case comment:

- 1. Enquiry stage essential & thorough**
- 2. Pre-mature application?**
- 3. Could not actually help improving medical conditions?**
- 4. Mis-use of application. A decision to proceed with test made before applications**
- 5. Should guardian/case worker press CMO to proceed?**



Access

- Family conflict case, 77-year woman with vascular dementia, living with son
- Daughter returned from Canada suddenly and “abducted/kidnapped” the mother from an day care centre one afternoon
- She kept the subject with her at her friend’s place overnight & the son refused to hand over the daily medication of the subject to her & made four reports to police that night



- Next day, the admission of the subject to hospital was resulted due to decreased conditions
- The Board appointed the Director of Social Welfare as the public guardian with restriction on access
- During 1st year of order, daughter attempted to take away subject from day care centre again and caused troubles
- At 1st annual review, Guardianship Order and access restriction continued



- The daughter appealed from the Board's decision, particularly on access restriction made against her (“guardian may only allow access to subject by family members in a place, and on such terms at guardian's absolute discretion”)
- The High Court decision (HCMP 953/2008) ruled on the jurisdiction of Board over the question of regulating, restricting or monitoring visits / access to the subject-person
- the Court adopted a narrow “essential powers approach” and allowed the appeal. Re-trial ordered.



Case Comment:

- 1. Case social worker/public guardian to present at all access**
- 2. Aged home staff to help monitoring if case social worker could not attend**
- 3. Recommending public guardian to apply to Court for access restriction order**



Financial

- 70 year-old woman who, suffering from dementia, was a singleton and lived alone in a sizeable flat of an upper class residential area
- An attempt to transfer \$7.5 million from a sole-name account to her joint account with one of the three strangers.
- reported to police immediately by bank staff
- Emergency Guardianship Order hearing arranged and appointed the Director of Social Welfare as the guardian



- 3 months later, Guardianship Order was continued for one year
- Subject had assets including over \$100 million worth of stocks, cash \$111 million at bank and she was the Administratrix of her late elder brother's residence
- recommended the public guardian to apply to Court for a committee order to manage the huge assets of the subject and to recover her abused money. Obviously the welfare plan was also pending.



- At 1st review hearing, the Board noted subject lived in a 4-person room of an ordinary private care and attention home at a monthly fee of \$10,000
- the public guardian considered it was **not** necessary at this stage to apply a committee order .
- Board continued, in the best interests of subject (explained to the case workers in unequivocal terms), to **pursue** the public guardian to make the Court application



- At 2nd review hearing, the public guardian reported that the subject was diagnosed as suffering from liver cancer and government doctors said nothing can be done after trials of self-purchased chemotherapy
- first affirmation of the case social worker was filed with High Court for an urgent application.
- urgent interim order was granted by Court
- The Board expects that the new expert care at the new facility is beneficial to the subject's already deteriorating health



- second medical expert opinion for the subject from the private sector once the placement of the subject is settled
- Due to late court application, case social worker paid out of own pocket medical fee for the subject for the chemotherapy
- Subject was operated on at private hospital. She recovered well and occupied the best single room in the present renowned private nursing home operated by NGO



Case Comment:

Board can press for High Court application for wider financial power by interim reports and short review orders.



Dispute Resolution & Tribunal system

1. One of the Mission of the Board is “To facilitate the resolution of disputes with relatives and service providers, concerning the best interests of mentally incapacitated adults.”
2. A key legal criterion to observe is the “last resort principle” (s.59O(3)(c))
3. In appropriate cases, the Board will turn the table around into a dispute resolution setting i.e. adopting a conciliation/mediation approach instead of a proper hearing format.



Key advantages of multi-member tribunal system

1. Specialised administrative (quasi-judicial) tribunal by nature (Chairperson is a permanent officer)
2. Flexibilities of process, i.e. not necessarily adversarial, based on its own rules, master of its own procedures (design depending on case type), not bound of rules of evidence
3. Free from formalities and legal technicalities
4. Open accessibilities and customer oriented
5. Expertise of the hearing panel



Key limitations of multi-member tribunal system

1. Lack enforcement power
2. Multi-task of hearing panel (especially one side is not legally represented) – imbalance of power / perceived bias
3. Scarcity of panel member's individual expertise
4. Expertise of hearing panel (especially the chair) suiting case type



Case Example

[Is there a third way out?]



- ◆ A very complicated and bitter case due to the conflict between the (caring) daughter of the subject and a well established subvented residential care home for elderly (“Home”). The subject’s stay there was long and got gradual and later step-wise deteriorations till total dependency and finally lost most of her sentience.
- ◆ Subject, late stage dementia, bilateral AKA, mute, on Ryles’ tube and insulin.



- ◆ On the issue of providing wrist restrainer to the subject who used to pull out the feeding Ryle's tube in past recent 4.5 years totalling 153 times.
- ◆ Numerous lengthy reports from SWD and the Home
- ◆ To such use of a restraint, the daughter withdrew her consent early and refused to give further consent. According to the Handling Guideline issued by SWD, the Home could not therefore use the restraints.



- ◆ The daughter was very conscientious and attended the subject and kept close watch on the staff performance daily. Eventually she filed lots of written complaints to the management board and SWD.
- ◆ Finally, the staff installed a CCTV over the bed of the subject & started to apply for GO.
- ◆ 2 CGAT doctors certified use for wrist restrainers as part of medical treatment.
- ◆ SWD NOT recommend GO



- ◆ The hearing went through for hours and the result was remarkably well and parties shook hands with each other on leaving.
- ◆ The daughter signed the necessary consent before the Board and the matter stood adjourned sine die.
- ◆ Face preserved.
- ◆ Interests safeguarded.



- ◆ A direction was made to DSW to assign a local family service unit to follow up with the case.
- ◆ Though with a consent on hand, the Home has not applied the restrainer due to stable condition of the subject and the subject passed away peacefully in one year.



Thank you

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