

HONG KONG / JUDGMENT

RE CYL

COURT

Court of First Instance

DECIDED

20 June 2007

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HCMP 2567/2005

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO. 2567 OF 2005

IN THE MATTER of CYL

and

IN THE MATTER of Part II of the Mental Health Ordinance, Chapter 136

Before: Hon Lam J in Chambers (Not Open to Public)

Dates of Hearing: 26 & 27 April 2007 and 7 June 2007

Date of Judgment: 20 June 2007

J U D G M E N T

To preserve the privacy of the persons involved, I will not set out their names in full in this judgment. Parties should have no difficulty in understanding to whom I am referring. On 9 December 2005, this Court having been satisfied that CYL is incapable, by reason of mental incapacity, of managing and administering her property and affairs, appointed her daughter and a solicitor

s clerk as committee of her estate.

By an application made on 30 March 2006, the Committee applied for an order to authorize the execution on behalf of CYL a statutory will pursuant to section 10B(1)(e) of the Mental Health Ordinance. The summons also asked for relief with regard to the sale of a landed property held by CYL.

The application for the making of a statutory will was prompted by the discovery of a will made on 10 January 2005. That will was made at a time when CYL was subject to a Guardianship Order made by the Guardianship Board. That Guardianship Order was first made on 14 May 2004, subsequently renewed on 17 November 2004 and further renewed on 9 May 2005. Under the Guardianship Order, the Director of Social Welfare was appointed as a guardian of CYL.

In other words, the 2005 will was made at a time when CYL had been found by the Guardianship Board to be a mentally incapacitated person for whom a guardian needs to be appointed.

That will was also made at a time when the daughter of CYL had been living abroad in England for more than 15 years. Having heard the evidence, it is fair to say in between 1990 and May 2005, the daughter did not have frequent contacts with CYL. There was an unhappy incident in 1997, the details of which I need not recite in this judgment. Thereafter, there was virtually no contact between them. The person who had close contact with CYL around that time was a Madam Huang, who claimed to be a god-daughter of CYL.

Under the 2005 will, Madam Huang was appointed as the sole executrix and trustee of the will. According to the 2005 will, the estate of CYL is, subject to a specific bequest of two landed properties of CYL to Madam Huang, to be divided between Madam Huang and the daughter in equal shares.

The 2005 will was prepared by solicitor and was executed before a solicitor and his clerk.

Prior to the 2005 will, CYL had in fact made another will in 1982. Under the 1982 will, CYL bequeathed her entire estate to the daughter. That will was also made at a solicitor

s office and was witnessed by the solicitor and his clerk.

The Committee considered that the 2005 will did not represent the true wish of CYL and asked this Court to make a statutory will to the effect similar to the 1982 will.

After the issue of the summons for the present application, with a view to adduce evidence to satisfy the requirement of section 10B(4)(b) of the Mental Health Ordinance, the Committee arranged for the examination of CYL by two doctors. The two doctors formed the opinion that CYL has testamentary capacity. In the light of that, arrangement was then made for CYL to execute another will on 20 July 2006. In the 2006 will, the daughter is named as the sole executrix and beneficiary of the estate of CYL. That will was witnessed by the two doctors.

At the hearing on 17 August 2006, the Committee applied to withdraw the application regarding the making of a statutory will in the light of the execution of the 2006 will. This Court queried whether it is proper for the 2006 will to be made without any direction from the Court. In England, the practice is that the Court of Protection may direct examination of the patient by a medical visitor in such circumstances (see Heywood & Massey : Court of Protection Practice, 2005, para. 14-003; Practice Note (1935) Weekly Note page 54. This Court was also concerned about the fact that the two doctors who examined CYL in July 2006 were not the same doctors who have made reports in support of the application for the appointment of the Committee. The Official Solicitor also expressed concern in a letter dated 4 August 2006.

At the hearing on 17 August 2006, after hearing submissions from the parties, it was agreed that the Official Solicitor shall arrange for independent medical examination of CYL by an expert engaged by the Official Solicitor.

The Official Solicitor engaged Dr. Benjamin Lai to examine CYL on 13 August 2006. Dr. Lai was of the opinion that CYL was mentally incapacitated and she did not have testamentary capacity. At the time of the execution of the 2006 Will, it appeared to Dr Lai that CYL also did not have testamentary capacity.

Thus there was a difference in the opinions between the two doctors who witnessed the execution of the 2006 will and Dr. Lai.

Given the conflicting state of medical evidence, in the interest of certainty, the Committee decided to proceed with the application for the making of a statutory will.

Section 10B(4)(b) provides that the power of the Court to make or give an order, direction or authority for the execution of a statutory will shall not be exercised unless the Court has reason to believe that the mentally incapacitated person is incapable of making a valid will for himself.

I agree with the submission of Miss Wong, SC that this threshold does not require the Court to undertake a full and expensive trial on the issue of testamentary capacity (see Heywood & Massey : Court of Protection Practice, 2005, para. 14-007). If there were reasonable grounds to lead the Court to believe that the patient lacks testamentary capacity, the power to make a statutory will for a mentally incapacitated person can be exercised.

In the present case, there are differences in opinions between Dr. Lo and Dr. Ng on one part and Dr. Lai on the other.

At the hearing on 26 April 2007, this Court has the opportunity of seeing CYL and asking her some questions in order to test her capacity. The three doctors were also present and they were given the opportunity of talking to CYL afterwards.

Dr. Lo and Dr. Ng maintained their stance that CYL had testamentary capacity when she made the 2006 Will and she still has it. Dr.

Lai maintained his contrary stance.

In order to enable this Court to see whether there are reasonable grounds for believing that CYL does not have testamentary capacity, it is necessary to consider the reasons given by the respective doctors for their conclusions. For that purpose, this Court heard evidence from the three doctors.

Given my above observation as to the threshold requirement, the scope of investigation on testamentary capacity should be confined. The Court does not have to reach a finding on testamentary capacity.

Having heard the evidence of Dr. Lai, and considered his evidence against what had been said by Dr. Ng and Dr. Lo, and also bearing in mind the observation this Court can make in the exchange with CYL, I am of the view that there are sufficient materials before this Court to support a reasonable belief that CYL lacks testamentary capacity. It is quite obvious to me that she suffered serious impairment to her cognitive faculties and her memory is impaired. She also exhibited symptoms of confusion as to identity of persons. She thought she had three landed properties instead of two. She forgot about the 2005 will and also the 1982 will. There is also medical evidence indicating that she is susceptible to suggestions from others.

Hence, I am satisfied that the threshold under section 10B(4)(b) is satisfied.

The next question is whether this Court should exercise its discretion to authorize the execution of a will on behalf of CYL. In this connection, I respectfully follow the approach of Kempster J in *C v G* [1982] HKLR 523 at page 529 by adopting the views expressed by Nourse J in the unreported case of *Re D*.

It follows from my above observations with regard to the medical evidence on testamentary capacity of CYL and the existence of two conflicting wills (the 2005 and 2006 wills) that there is a possibility of a probate action after the death of CYL. It is quite clear that with sound advice, CYL may wish to avoid that if it is possible since a probate action can be expensive and the cost of the action may deplete a sizable portion of the estate. A simple solution in such circumstances is to make a new will.

I wish to emphasize this is only one factor that the Court will bear in mind in the exercise of its discretion. One should not assume that just because there has been doubt with regard to the validity of one or more existing wills, the Court will readily entertain an application to direct a statutory will be executed. Heywood & Massey made the following observation at para. 14-008 :

It is not necessarily appropriate to apply for a statutory will where the principal reason for review is that the last competent will is of doubtful validity. The Court of Protection has no jurisdiction to determine the validity of any existing will. In many circumstances one or more of the parties with an interest in the outcome may reasonably consider that it is preferable for a dispute which is really a dispute about the validity of an existing will to be litigated as a probate action. There are significant differences between the evidential requirements and costs risks of a statutory will application and a contentious probate action and these should be taken into account when considering an application of this nature.

Miss Wong submitted that this passage is inconsistent with authorities. With respect, I do not agree. I do not read the decision of Nourse J as preventing the Court from balancing the benefit that a statutory will application may generate to the estate of the patient against other relevant factors, including the matters mentioned by Heywood & Massey. I can envisage cases where the underlying factual matrix and other dispute involved are so complicated that the Court may query whether there is any advantage in terms of cost and time incurred for the disposal of a statutory will application as compared with a probate action.

As regards *C v G* [1982] HKLR 523, the application heard by Kempster J was a strike out application. The conclusion of the court in that case was that the application for a statutory will made in the circumstances of that case was not an abuse of the process. I do not think that is an authority prescribing how the court should exercise its discretion in the substantive matter.

Section 10B does not extend the powers conferred by section 10A. Instead, it gives some examples as to the way in which the powers conferred under section 10A may be exercised. See *Re C* [1991] 3 All ER 866 at page 869c. In HCMP 4628 of 2003, 27 February 2004 (unreported), this Court held that section 10B does not contain an exhaustive list of the powers of the Court.

Therefore, in deciding whether the Court should exercise its discretion to direct the execution of a statutory will, section 10A(2) has to be applied. The paramount consideration is the requirements of the patient. The Court shall also have regard to, amongst other matters set out in that subsection, the desirability of making provision for obligations of the patient notwithstanding that those obligations may not be legally enforceable.

In other words, the Court should give priority to the interest of the patient.

In the present circumstances, having regard to the complexity of the matter, the respective stance taken by the parties involved in the matter, and my assessment of the requirements of CYL, I am satisfied that it is appropriate for this Court to exercise its power to resolve the possible conflicts that might emerge from the differences between the 2005 will and the 2006 will. Hopefully, that would put an end to the fight between the daughter and Madam Huang which I am sure is not something which CYL would wish to continue.

The judgment of Sir Robert Megarry VC in *Re D(J)* [1982] 1 Ch 237, provides some guidance as to how the court should exercise its discretion in making a statutory will. The Vice Chancellor emphasized at page 244H that the matters set out in the judgment are not exhaustive and at page 249C applied his approach by reference to the matters as they stand at the time of the hearing and looking at matters broadly with emphasis more on recent event than what had happened in the distant past.

At page 243F to 244C, the Vice Chancellor highlighted that it is the actual patient who has to be considered and not a hypothetical patient. In other words, the idiosyncratic views of the patient could be far from impartial. This has to be taken into account but at the same time there would have to be allowance made for the passage of time

for sometimes strong feelings mellow into indifference, and even family feuds evaporate.

(page 244B). And the court should not give effect to antipathies or affections which are beyond reason (page 244B). In other words, it is not purely subjective and to a limited extent reasonableness does come into play. Thus, the Vice Chancellor put the test as follow :

I think the court must seek to make the will which the actual patient, acting reasonably, would have made if notionally restored to full mental capacity, memory and foresight.

The element of objectivity is further illustrated by reference to the assumption of sound legal advice being available, see page 244D.

Section 10A(1)(c) directs the Court to apply its mind to make provisions for persons or purposes for whom or for which the patient

might be expected to provide if he were not mentally incapacitated

. This is to be contrasted with a purely subjective test in terms of making provisions for persons or purposes for whom or for which

the patient would provide if he were not mentally incapacitated

. In this connection, there is a clear distinction between our legislation and that in section 26(b) of the Wills Act 1997 of Victoria which was the governing statute in several Victorian cases cited by Miss Wong.

Hence, in *Re C (a patient)* [1991] 3 All ER 866, Hoffmann J (as he then was) was able to make a statutory will for a person who had been suffering from severe mental disability from birth by reference to the assumption that she would have been a normal decent person who would have acted in accordance with contemporary standard of morality.

In the application of these principles to the present case, the first issue that I have to resolve is the extent to which Madam Huang had looked after CYL and whether she did so out of an intention to take advantage on CYL. Miss Wong submitted that the evidence clearly showed that Madam Huang had all along acted with an improper motive and there was evidence of financial abuse. Counsel further submitted that the development of friendship at a time when CYL was in a

vulnerable state should be viewed with jealousy. She asked the Court to take into account of the history of the guardianship proceedings and the various attempts to transfer money from CYL's accounts to joint name accounts and to withdraw money therefrom after the making of the Guardianship Order. Further, counsel submitted that the making of the 2005 will speaks for itself in terms of the financial abuse perpetuated by Madam Huang.

On the other hand, Madam Huang claimed that she had known CYL since 1990. Since then, according to Madam Huang, she had been taking care of CYL, cooking food for her and visiting her almost every other day. Very often, she had to incur expenses for CYL and she did not get reimbursement. She denied having any intention to take financial advantage of CYL. She said the joint name accounts were opened at the request of CYL in order to facilitate her drawing money for CYL

purposes. She also said that the 2005 Will was made at the request of CYL in accordance with her wishes.

In my judgment, whilst I agree with Miss Wong that Madam Huang exaggerated her contribution to the well being of CYL in the past, I accept her evidence that she had known CYL since 1990 and since then she had visited her regularly. Amongst the documents produced by Madam Huang is a receipt for hospital charges issued by the Tung Wah Eastern Hospital in 1996. Madam Huang said CYL had an eye operation on 8 August 1996 and she looked after her while she was hospitalized. Madam Huang

case of looking after CYL for more than ten odd years is corroborated by a letter from a Madam Chiang. Both Madam Chiang and Madam Huang referred to an unhappy incident in 1997 when CYL went to England to visit the daughter but the daughter refused to see her. Although the daughter tried to give some explanation about that in her evidence, it remains the truth that she had actually refused to see her mother and since then they did not have any contact until the guardianship proceedings.

Madam Huang also produced some photographs showing that she had celebrated the birthday of CYL with her in 2002 and 2003 and they had happily made some trips to various places in Hong Kong.

When CYL attended the hearing on 26 April 2007, after some initial confusion, she was able to identify Madam Huang as her god-daughter and she confirmed she had known her for about ten years. CYL said she saw Madam Huang for less than once a month and she did not recall about the making of the 2005 Will. She also expressed the wish to give her assets to her own daughter. However, given her present mental condition, I must act with some caution in respect of her statements. But it is clear to me that CYL does have some affection towards Madam Huang as she spontaneously made some comments about the physical appearance of Madam Huang in a rather caring manner.

Regarding the allegation of financial abuse, Miss Wong specifically referred to two matters. First, there was a Hang Seng Bank account to which the disability allowance and rent collected were deposited. Madam Huang was added as a joint holder to this account and she had not disclosed this to the guardian although she drew money out of this account on behalf of CYL to pay for CYL's expenses. The Committee have not produced any specific evidence to cast doubt on Madam Huang

s explanation. On 20 December 2005, the Committee closed the bank account and there was a balance of \$34,599.10 transferred to the Committee

s account. If Madam Huang wished to take financial advantage of CYL, she could have withdrawn all the money before the Committee closed the account. The fact that Madam Huang had not done so speaks in her favour.

The second specific matter rely on by Miss Wong is the 2005 Will. The will was made at the time when the Guardianship Order had been made with regard to CYL. Madam Huang was aware of the Guardianship Order and CYL

s bank accounts were frozen. Madam Huang said CYL wanted to make a will because she wanted to rely on Madam Huang to look after her. She said at first CYL proposed to leave her entire estate to her and it was at Madam Huang

s suggestion that CYL provided for half of the residual estate to be given to the daughter. She also said CYL gave some specific instructions with regard to the two landed properties.

The 2005 Will was made at a time when CYL had lost contact with her daughter for a long time. As I said, I do not think there has been much contact between the daughter and CYL since 1990. CYL was greatly upset by the 1997 incident and that was why she had told Madam Huang and Madam Chiang about it. The daughter did nothing to restore the relationship between 1997 and January 2005 when the will was made.

On the other hand, Madam Huang had taken care of CYL for quite some time, including the time when CYL was hospitalized as well as those happy occasions as shown in the photographs.

In those circumstances, it is not surprising that CYL would choose to give away some of her estate to Madam Huang as opposed to giving her daughter the whole of her estate.

However, the 2005 Will was made at a time when CYL had been certified by doctors to be lacking in mental capacity. I also bear in mind the transfer of monies from CYL

s account to joint names account with Madam Huang around the time of the guardianship proceedings. I have difficulty in accepting Madam Huang

s evidence that the banking arrangements as well as the 2005 Will were solely the ideas of CYL.

I bear in mind that as far as the monies in the bank accounts are concerned, there is no evidence of financial abuse by Madam Huang. In addition to what I said above regarding the Hang Seng Bank account, I note that even though the two large fixed deposits were transferred into joint names in May 2004, and Madam Huang was in a position to make withdrawal from that account and to have the money transferred to whatever account she wished, the monies remained intact. Further, there is evidence to show that after the guardianship proceedings had been commenced, there were some delays before monies were available to the guardian for payment of monthly expenses of CYL. It is understandable that both CYL and Madam Huang did have some grievance in terms of not having the necessary funds for CYL

s own maintenance in good time.

It is also quite apparent to me that in 2004, CYL did not accept that she had suffered from mental disability. This is reflected in the evidence she gave at the hearing in May 2004. It is also clear to me that Madam Huang was under the same misapprehension.

But the fact remains that CYL was mentally incapacitated and was susceptible to suggestions from others. Although I do not think Madam Huang

s care and attention for CYL in the past were provided by her with a view to benefit from CYL

s estate, I think she did make suggestions to CYL concerning the change of banking arrangements in 2004 and the making of the 2005 Will. I am however quite satisfied that Madam Huang did not make such suggestions with a view to take financial advantage of CYL during her lifetime. On the other hand, she might regard she has a legitimate claim to the estate of CYL after her death.

Such influence did cast a shadow over the relationship between Madam Huang and CYL and it is something I must take into account in deciding whether any provision should be made for Madam Huang in the statutory will and if so what should be the appropriate provision.

Madam Huang gave evidence that she had renovated the properties of CYL at her own expenses and she also had paid for the salaries and charges relating to CYL

s domestic helper for which she was not reimbursed. I take this into account in assessing the relationship between Madam Huang and CYL but there should not be any direct bearing between such reimbursements and the provision for Madam Huang (if any) in the statutory will.

Irrespective of the provision in the statutory will, Madam Huang is entitled to seek reimbursement for expenses she incurred on behalf of CYL. The Committee indicated to this court that they would reimburse Madam Huang upon receipts being produced. It is of course up to Madam Huang to decide whether she would seek any reimbursement. If the Committee have any difficulties in processing any claims for reimbursement, they could apply to this court for direction.

Turning back to the provisions in the statutory will, having regard to the relationship of CYL with the various parties, the character of CYL when she was not mentally disabled, the financial position of her estate and her future needs, applying the guidance set out in the authorities referred above, I am of the view that there should be provision in the statutory will for Madam Huang. I am also of the view that there should be provision for Lai Yee who had been brought up by CYL and had resumed regular contacts with CYL. At the same time, I accept Ms Wong's submissions that they cannot be placed in the same league as the daughter.

Ms Wong submitted that CYL adored her daughter and she also told the court at the hearing that she would give her estate to her daughter. This is also the effect of the 1982 Will and the 2006 Will. I do not think one can place much significance on the 1982 will. A lot has happened since then and whilst CYL might have reconciled with the daughter, I believe she also has affection for others who cared for her in times of needs.

As regards her statement at the hearing and the 2006 Will, I have already explained why the court needs to be cautious about placing too much weight on the same.

Whilst I acknowledge the idiosyncratic views of a patient could be far from impartial, I have also explained why the exercise is not purely subjective.

I believe on a lucid interval, with proper legal advice and full knowledge of the relevant matters set out above, CYL would include provisions for Madam Huang and Lai Yee in the statutory will. Bearing in mind the size of the estate as it is, taking into account of some inevitable depletion thereof in the years ahead, if CYL is notionally restored to full mental capacity, memory and foresight, it is my belief that she, acting reasonably, would include a specific legacy of \$300,000 for each of them in the statutory will. The residual estate will be devolved to the daughter.

The Committee shall file a draft order together with a draft will for my approval.

As regards the disposal of the Kiu Yu Property, having resolved the problem stemming from the 2005 Will, I agree that this property should be sold at a price not less than \$600,000. However, I do not think another property should be purchased. It is more in line with the interest of CYL to have more liquid assets.

I also make a costs order nisi that the costs of the Official Solicitor and the Committee in this application be borne by the estate and these parties shall file a skeleton bill to facilitate the fixing of such costs. Other than that, there shall be no order as to costs.

When this judgment is handed down, the court will arrange a court interpreter to translate the same to Madam Huang.

I intend to release this judgment for publication. If any person has any objection to such a course, such objection should be made in writing within 7 days.

(M H Lam)

Judge of the Court of First Instance

High Court

Miss Lisa K. Y. Wong, SC, instructed by Messrs P. C. Woo & Co., for the Applicant

Madam Huang, in person, present

Ms Sherlynn Chan of Official Solicitor

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