

HONG KONG / JUDGMENT

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Court of First Instance

DECIDED

23 March 2007

CASE / FILE NUMBER

HCMP2656/2006

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bjbj HCMP 2656/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 2656 OF 2006

IN THE MATTER of Part II of the Mental Health Ordinance, Cap. 136 (the Ordinance) and IN
THE MATTER of an alleged mentally incapacitated person LLC

Before: Hon. Lam J in Chambers (Not open to public) Date of Judgment: 23 March 2007 Date of
Hearing: 23 March 2007

J U D G M E N T

1. The substantive application in this matter is an application by the applicant, the niece of the lady who is alleged to be mentally incapacitated, for appointment of committee under Part II of the Mental Health Ordinance. The application was prompted by the discovery by the applicant of the possibility that the old lady had contacted solicitors for legal services pertaining to the making of a will. I do not think it is appropriate for me to go into the details at this stage. Suffice to say that subsequently it was found out, through investigation directed by the court and carried out by the Official Solicitor, that indeed a will was made and the staff of a bank were involved in the process. Certain information was obtained from the staff of the bank and a copy of the will was obtained from the solicitor firm that prepared the will for the old lady.
2. The question that I have to resolve this morning is whether I should give leave to disclose the contents of the will as well as information obtained by the Official Solicitor from the bank staff to the applicant for the purpose of the Part II proceedings. There is a concern on the part of the court about the confidentiality with regard to the will. It is quite possible that a testator might like to preserve the confidentiality of his will until the time of his death.

There could be many reasons for that. One possible reason is that a testator might not want the family members to have dispute about the matter or to treat him in a different manner after they have learned of the contents of the will. For this reason the court should always act cautiously in terms of the disclosure of the contents of a will to family members, even in a Part II context. One must bear in mind in usual circumstances, a testator has the right to change the will at any time before his death so unless he decided not to do so, what he has provided for in his will may not be his last wishes and he might well wish to keep that as a secret.

3. On the other hand, I must bear in mind the circumstances leading to the present application. The will that was made in 2006 was executed under circumstances which certainly call for investigation. The contents of the will differ substantially from a previous will made by the old lady. The beneficiaries under the previous will were disinherited; instead, under the 2006 will, the old lady provided for her estate to be donated to charities. We are not talking about a small estate. Based on information before the court, the old lady has substantial assets in her estate.
4. Because of the concern of the court as to how the matter should be proceeded with, submissions were invited from the Official Solicitor as well as leading counsel acting for the applicant. To facilitate this process, this court has granted leave to the lawyers acting for the applicant to have access to the 2006 will as well as information obtained by the Official Solicitor from the bank staff on a confidential basis, i.e., for the time being, the lawyers undertake not to disclose this information to the applicant without the leave of the court. I have received very helpful submissions from Mr Wong SC as well as the Official Solicitor.
5. Having considered the submissions, I agree with Mr Wong that the court has to perform a balancing exercise in these circumstances. The court would have regard to the confidentiality of the will in question and respect the interest of a testator in terms of keeping its contents secret in usual cases. On the other hand, the court must have regard to the interest of the applicant in terms of natural justice. The rule of natural justice implies that anything relevant to the court's decision should be seen by parties affected and opportunity should be given to parties concerned to deal with it.
6. Although there are cases where the harm that a disclosure of a certain document may be caused to the patient or the person alleged to be incapacitated might outweigh this consideration of natural justice, the court will have to assess any suggestion of harm or damage carefully. I am satisfied that the applicable principles are those set out in the cases cited by Mr Wong, namely *R v Plymouth City Council* [2002] 1 WLR 2583 and *Re: D* [1996] AC 593, in particular the judgment of Lord Mustill at page 615 of that report at which the following propositions were set out: "1. It is a fundamental principle of fairness that a party is entitled to the disclosure of all materials which may be taken into account by the court when reaching a decision adverse to that party;

2. In deciding whether a confidential report should be disclosed, the court should first consider whether disclosure of the material would involve a real possibility of significant harm to the child. [In the context of Part II application, the possibility of significant harm would be the possibility of such harm to the alleged mentally incapacitated person];
3. If it would, the court should next consider whether the overall interests of which [alleged MIP] would benefit from non-disclosure, weighing on the one hand, the interests of the MIP in having the material properly tested and, on the other, both of the magnitude of the risk that harm will incur and the gravity of the harm if it does occur;
4. If the court is satisfied that the interest of the MIP point towards non-disclosure, the next and final step is for the court to weigh that consideration and its strength in the circumstances of the case against the interests of the other party in having an opportunity to see and respond to the material. In the latter regard, the court should take into account the importance of the material to the issues in the case; and
5. Non-disclosure should be the exception and not the rule. The court should be rigorous in its examination of the risk and gravity of the feared harm to the MIP and should order non-disclosure only when the case for doing so is compelling."
7. Another case which has been referred to by Mr Wong is the case of *Re: K* [1965] AC 201. At page 219, Lord Evershed emphasised that although a party does not have an absolute right to have the material disclosed, the court should refuse disclosure in those rare cases where it is satisfied that there will be real harm to the person concerned should disclosure be made.
8. Applying these principles to the facts of the present case, bearing in mind the circumstances that the 2006 will came into existence, based on the material available at this stage, I cannot come to a clear conclusion that it must have been the wish of the old lady to keep the will as a secret from her family members. Of course, I am aware that once I grant leave to disclose the will to the applicant, and if it turns out it really was the old lady's wish to withhold it from the family members, that damage will be done and nothing can be done to remedy the situation. I bear that in mind but, as I gather from the authorities, I must balance that against the interests of the applicants in terms of natural justice. It seems to me that the circumstances leading to the execution of the will and the extent to which the alleged MIP was conversant and agreed with the contents of the will, will be the significant subjects which would have a bearing on the outcome of the Part II proceedings.
9. I do not propose to go into the details as regards what would happen in terms of the future conduct of the matter. But it is quite clear to me that these are circumstances which are directly relevant for the exercise of the court's power under Part II of the Mental Health Ordinance, particularly in regard to the question whether a committee should be appointed and, if so, who is to be appointed.

10. In the circumstances, weighing all the relevant considerations, I think, on balance, I should accept the submissions of the applicant and also the submissions of the Official Solicitor to grant leave to the lawyers acting for the applicant to disclose the contents of the will as well as the information obtained from the bank to the applicant for the purposes of the Part II application and I will order accordingly. (M H Lam) Judge of the Court of First Instance High Court Mr Horace Wong, SC, and Mr Wycliffs Ho, instructed by Messrs Hobson & Ma, for the Applicant Ms Sherman Cheung, of the Official Solicitors Office PAGE - PAGE CRT30/23.3.2007/MMcG HCMP2656/2006/Judgment A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V 9!ABa\$ 9!ABa\$ &`#\$ JUDGE.DOT setup Microsoft Word 9.0 judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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