

HONG KONG / JUDGMENT

RE YWK

COURT

Court of First Instance

DECIDED

21 November 2007

CASE / FILE NUMBER

HCMP2467/2006

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bjbj HCMP 2467/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 2467 OF 2006

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

Before: Hon Lam J in Chambers (Not open to public) Date of Hearing: 15 November 2007 Date of
Decision: 21 November 2007

DECISION

The MIP in this case sustained injuries in an industrial accident and as a result, he became mentally incapacitated. His personal injuries claim was settled with the approval of the court by an order of Suffiad J on 3 May 2007. Under that order, the MIP was awarded a sum of \$6,189,834. In accordance with the practice in Re CK, HCMP 1150 of 2006, 4 Aug 2006, the balance of the compensation, after giving credit to periodic payments made by the defendant before the settlement, is held in court pending directions in Part II proceedings under the Mental Health Ordinance. On 1 August 2007, this court held a Part II inquiry and appointed a committee for the MIP. The Committee is also authorized to draw a monthly sum of \$23,500 for the benefit of the MIP and his family. The money held in court was \$5.7 million. The outstanding application in this matter is for authorization to the Committee to obtain two lump sum payments from monies held in court for the MIP for the following purposes,

- (a) repayment of loans in the sum of \$500,000;

- (b) reimbursement of special damages and costs of psychotherapy treatment for the wife (who is also the Committee) in the sum of \$100,000. On item (b), \$84,140 were said to be reimbursement for medical expenses, travelling expenses, tonic food and Chinese medicine. The figure was taken from the Revised Statement of Damages filed in the PI action. I am prepared to take this figure as correct. In addition, the wife was advised to undergo psychotherapy and the expenses for such treatment were included in the PI claim. I think it is in the interest of the MIP that the wife should have such treatment. Hence, I will authorize item (b) to be paid out from money in court. Item (a) is more problematic. The wife claimed that she had borrowed from relatives to maintain the family after the MIP met his accident. There is no satisfactory evidence regarding the loans. At the hearing of 1 August 2007, this court had raised concern about the lack of concrete evidence for the loans. After that, the applicant only filed some self-serving writings to support her application. The purported lenders (who were relatives of the applicant) were not even able to set out the precise amounts of the loans and the respective dates of advances. There was no contemporaneous document showing withdrawals of monies from the lenders accounts nor evidence of the deposits of such monies into the account of the applicant or the MIP. Given that the loan amounts were not small figures, this court could not place much weight on such self-serving assertions. The misgivings of this court were shared by the social worker who prepared a report on the matter on 5 October. When this court pressed the legal aid counsel acting for the applicant further on the evidential aspects, it was revealed that some of the loans were deposited into the bank account of the applicant. At the hearing, counsel told the court that such deposits were about \$300,000. However, when the relevant entries were identified in the documents submitted to the court after the hearing, the total was only \$117,500. I bear in mind that it is the applicant's case that she did not deposit all the monies she borrowed into the bank accounts. However, I have difficulty in believing that out of loans of \$500,000 in total, only \$117,500 is traceable through monies in bank accounts. In the end, the legal aid counsel accepted that the evidence is unsatisfactory and she put the application on the basis of the shortfall in the monthly expenses after deducting the periodic payments received from the employer and the social assistance. That approach suffers from several drawbacks. First, the monthly expenses figures were not properly investigated. In fact, the figure adopted by the legal aid counsel for her calculation, viz. \$25,345, in the letter of 22 October 2007 is not a figure for expenses. It is the figure for pre-accident income of the MIP taken from the Revised Statement of Damages. The current monthly expenses of the family was said to be \$23,500 in paragraph 6 of the affirmation of the applicant. On probing, the applicant revealed to this court that at the material times, the tuition and expenses for the two children were less: it was \$5,000 instead of \$7,000. No receipt was produced to substantiate these figures. The total amount of social assistance received was \$13,581 before the split of the household of the parents from that of the MIP in April 2003. Since then, the social assistance received by the MIP household has been \$8,580. Even though the household of the MIP could not make the ends meet (the expenses added up to at least \$18,500), the applicant said she paid a monthly maintenance of \$3,000 to the parents on top of the social assistance of \$5,489 received by them. I do not find that to be a credible

scenario and I have reservations about some items referred to in paragraph 6 of the applicant's affirmation. Further, the assumption that the family had no income other than the periodic payments from the employer and the \$8,580 social assistance has proved to be wrong. The applicant admitted that she had received regular assistance from a charitable organization. On the whole, I do not accept the calculations set out in the letter of 22 October 2007 to be correct. It is important that lawyers should fully understand what the court would expect in support of applications of this sort under Part II. Whilst it may not be necessary to go into the details of the loans and ask for objective evidence for the same in pursuing a personal injuries claim (since it would not usually be of great relevance), a court exercising its Part II jurisdiction is duty bound to raise queries when the evidence is unsatisfactory. The lawyer should be alert to the potential conflict of interest between the next friend who seeks reimbursement or repayment of loans and the MIP. At the PI action stage, a lawyer may not deem it necessary to examine the assertions of loans of this nature critically. However, in the context of a Part II application for reimbursement or repayment of loans, it is inadequate simply to take the instructions of a next friend on their face value. The lawyer owes a duty to the MIP to examine the matter closely and properly. Further, as I held in *Re C*, HCMP 15 of 2002, 14 March 2007, para. 16, if a committee were minded to borrow sums of money for certain purposes and if that loan is expected to be repaid out of the estate of the patient, I think in general a committee should obtain the approval of the court before he actually borrows that money. Any loans or borrowings made with the prior sanction of the court are at the committee's own risk. In other words, a committee may find that he is personally liable for the repayment of that loan and the court may not sanction the use of the estate's money to repay the loan. Hence, as soon as a lawyer becomes aware of a next friend borrowing monies to maintain the household of a person under disability with a view to finance the repayment out of compensation payable in the future, he should advise the next friend to come to the court to apply for Part II sanction of the loan. In any event, the loan should be properly documented and the cashflow should be properly evidenced by contemporaneous records. Coming to the present case, though I am prepared to accept the Applicant has borrowed money from her relatives in the past, I am not satisfied on the evidence presented to me that the loans were in the amounts alleged. Doing the best that I can in the circumstances, I will adopt a figure of \$17,000 as the monthly household expenses after making adjustments to the figures in paragraph 6 of the affirmation. As observed above, the income during the relevant period were more than those identified by the legal aid counsel in the letter of 22 October 2007. There will be no shortfall up to February 2003. After that date, I shall take it that there is a shortfall of \$7,000 per month taking into account of other sources of income not fully disclosed. The total shortfall works out to be \$254,166. Rounding it off to \$260,000, this is the amount I will authorize to be paid out of the monies in court as repayment of the alleged loans. I intend to release this Decision for circulation. If the applicant has any comment on such release, she can file her written comments within 5 days. (M H Lam) Judge of the Court of First Instance High Court Ms Joereen Kong, of Legal Aid Department, for the Applicant

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