

Practice Direction 30.1
Applications under
Part II of the Mental Health Ordinance (Cap. 136)

I. General

1.01 To date, there have been six judgments by Lam J on the practice and procedure for applications under Part II of the Mental Health Ordinance, Cap. 136 (“MHO”):

- (a) In *Re Madam A*, HCMP No. 44 of 2004, 5 March 2004
- (b) In *Re S*, HCMP No. 1287 of 2004, 28 May 2004
- (c) In *Re C*, HCMP No. 424 of 2004, 7 July 2004
- (d) In *Re L* [2004] 4 HKC 115
- (e) In *Re LWO*, HCMP No.2965 of 2001, 30 June 2005
- (f) In *Director of Social Welfare v Official Solicitor*, HCMP No.4297 of 2000, 14 September 2005

1.02 It was held in *Re Madam A* that an inquiry under Part II of the MHO involves a two-stage process: (a) the initial stage in which directions are sought from the court, (“the Directions Stage”) and (b) the stage where the actual inquiry takes place (“the Inquiry Stage”).

II. The Directions Stage

2.01 An Applicant should have regard to the provisions of s.7 to s.9 of the MHO in the preparation of materials to be placed before the court.

2.02 The Applicant's aim at this stage is to provide sufficient information to enable the Court to give directions for an inquiry to be held under s.10 of the MHO.

Who can apply?

2.03 Applications for an inquiry may be made by any of the parties referred to in s.7(3) of the MHO. A "relative" of the alleged mentally incapacitated person (see definition under s.2) may make the application. If there is no application by any relative, the Director of Social Welfare or the Official Solicitor or the guardian may apply.

Application for directions to be made ex parte

2.04 In general, it would be appropriate to apply *ex parte* for directions. Neither the alleged mentally incapacitated person nor the Official Solicitor should be named as the respondent (see *Re Madam A* paras. 8 to 15).

How to apply?

2.05 The application should follow the format of Annex A (Ex-parte Originating Summons). This format can be amended to suit the particular circumstances of any case.

2.06 The originating summons should be filed together with the supporting documents and a draft Order for directions to be given at the Directions Stage should also be lodged with the court. A return date for the hearing of the inquiry will not be given at this time. The papers will be placed before a judge for his consideration and directions. No return date will be given until the matter is ready for the hearing of the inquiry: see *Re Madam A* para.16.

All relevant & necessary information to be provided

- 2.07 At this stage of the application, the Applicant should ensure that there is at least prima facie evidence to justify an inquiry as to the allegation of mental incapacity.
- 2.08 The Applicant is duty bound to provide the court with all relevant and necessary information to enable the court to discharge its statutory duty under the MHO properly. Failure to do so will inevitably delay the application and increase the costs thereof.
- 2.09 The matters set out in s.7 of the MHO are the minimum requirements. In the majority of cases, the court will need much more information before it can discharge its duty properly and give appropriate and proper directions in preparation for the inquiry under s.10.
- 2.10 Particular regard should be paid to the matters referred to in s.7(2). The scope of the inquiry and any orders sought at the inquiry must be clearly identified at the Directions stage of the application.
- 2.11 The Applicant should take the precaution of canvassing the views of the alleged mentally incapacitated person and the relatives before an application is made. If the application is likely to be contested, the court must be informed of this as soon as possible. See *Re S* para.5.
- 2.12 A Certificate should accompany the application, following the format of Annex B (Certificate of Family and Property). The format can be amended to suit the particular circumstances of any case.
- 2.13 Where the Applicant seeks directions relating to the property and/or affairs of the alleged mentally incapacitated person, the nature and extent of his/her property as well as the number and identity of all relatives who may be affected must be made known to the court.

- 2.14 If the Applicant has reason to suspect or believe that the property or assets of the alleged mentally incapacitated person are being dissipated or mishandled, this should be brought to the attention of the court.
- 2.15 The Applicant must conduct all necessary investigations in his preparations for an application. He must ensure the adequacy of the evidence such as bank statements and medical reports. Insufficient evidence will inevitably lead to delay and the incurring of further costs.

Medical evidence

- 2.16 The requisite medical certificates under s.7(5) are essential (see also s. 2(2)). The medical certificates should follow the format of the specimen at Annex C (Medical Certificate in support of an Application under Part II of the MHO).
- 2.17 At least one of the medical certificates must be given by a medical practitioner approved for this purpose by the Hospital Authority within the meaning of the Hospital Authority Ordinance (Cap. 113) as having the relevant special experience (See s.2(2) of the MHO).
- 2.18 In order to satisfy the statutory requirements, it is essential that the medical certificates state that the alleged mentally incapacitated person is currently incapable, by reason of mental incapacity, of managing and administering his/her own property and affairs. See *Re C* paras.1 and 2.

The interests of the alleged mentally incapacitated person are paramount

- 2.19 In seeking directions, the Applicant must bear in mind that the interests and requirements of the alleged mentally incapacitated person are paramount see s.10A(2)(a). For instance the court will have regard to the existing and future care arrangements for the alleged mentally incapacitated person; the costs thereof; the health

condition of the alleged mentally incapacitated person; his life expectancy; the maintenance of the family members of the alleged mentally incapacitated person; the income and expenditure of the family of the alleged mentally incapacitated person and other matters. See *Re S* para.3.

Application for appointment of a committee of estate (s.11 of MHO)

- 2.20 Where the appointment of a committee of the estate of an alleged mentally incapacitated person is sought, the court must be provided with all relevant and necessary information regarding the members of the proposed committee. Information as to the background, training, qualification and experience of members of the committee must be provided, as well as the manner in which the Applicant envisages how the proposed committee will manage and administer the property and affairs of the alleged mentally incapacitated person. For the form of Consent to Appointment as Committee, see Annex D.

Notice to the Official Solicitor

- 2.21 Notice of the application should be given to the Official Solicitor. The Applicant should submit a set of draft directions together with the Originating Summons and other documents to the Official Solicitor.

Paper applications

- 2.22 Normally, directions will be given after consideration on the papers without a hearing unless the court considers, whether upon request or on the court's own motion, that a hearing should be held. Such a request should be made in writing at the time of the filing of the Originating Summons.

Notice of the Inquiry must be served on the alleged mentally incapacitated person

- 2.23 Notice of the inquiry must be served on the alleged mentally incapacitated person. Such Notice cannot be dispensed with. See *Re Madam A* paras.25 and 26.
- 2.24 In the application, the Applicant must indicate to the court the appropriate mode of service on the alleged mentally incapacitated person. Furthermore, the alleged mentally incapacitated person must be given reasonable notice of the time and place of the inquiry normally by personal service: see s.8 of the MHO. It is only if the alleged mentally incapacitated person is in such a state that personal service on him would be ineffectual that substituted service falls to be considered.
- 2.25 Substituted service in this context is not by way of advertisement in a newspaper: see *Re Madam A* para.25. Substituted service by way of serving the notice on the person in charge of the institution having the care of the alleged mentally incapacitated person may be considered.

Urgency

- 2.26 In cases of urgency the Applicant may consider an application under s.10D and/or s.10A(1), see *Re L*.

Estates without substantial assets

- 2.27 In cases where the estates do not involve substantial assets an order under s.24 should be considered.

Draft Order

- 2.28 Solicitors for the Applicant must ensure that the draft order contains all the directions to be sought in the s.7 application. The

draft order should be lodged at the time of the filing of the application and should follow the format of the specimen at Annex E.

2.29 The proposed directions should generally deal with the following matters:

- (a) a clear indication of the scope of the inquiry, e.g. appointment of a committee;
- (b) a list of the persons to be served with Notice of the inquiry;
- (c) the mode of service of the Notice on the alleged mentally incapacitated person, and whether it should be by way of substituted service, and if so, why;
- (d) whether further evidence will be required or adduced at the inquiry;
- (e) whether it is proposed that a medical examination be conducted;
- (f) whether it will be necessary to identify and/or trace relatives or next of kin;
- (g) proposed directions covering all aspects relating to the property and affairs of the alleged mentally incapacitated person;
- (h) whether the doctors who compiled the reports should attend the inquiry;
- (i) whether any interim relief is necessary, or any interim directions should be issued for the protection of the property of the alleged mentally incapacitated person;
- (j) an estimate of the length of the inquiry.

III. The Inquiry Stage

- 3.01 A draft order containing all the reliefs sought in the s.10 hearing must be submitted to the court. A draft order (which should follow the format of the specimen at Annex F) and skeleton bill of costs (if intended to be paid out of the estate of the mentally incapacitated person) shall be lodged with the court at least 10 clear days before hearing (Saturdays, Sundays and public holidays excluded). The court will usually fix the costs pursuant to Order 62 Rule 9(4)(b) instead of directing taxation in order to save costs.
- 3.02 Given the role of the Official Solicitor, applicants should send a set of papers to the Official Solicitor for comment well in advance of the inquiry.
- 3.03 At the inquiry, the court will consider and decide on those matters referred to in s.10 of the MHO.
- 3.04 At the inquiry, the Court may appoint a committee of the estate of the alleged mentally incapacitated person if it is satisfied that the person is, by reason of mental incapacity, incapable of managing and administering his property and affairs: see s.11.
- 3.05 The court may also direct the sale of any property of the mentally incapacitated person under s.10A and s.10B of the MHO. If this is contemplated, the application should be supported by proper valuation evidence. The draft order should also contain appropriate directions as to conduct of the sale and the distribution or disposal of sale proceeds.

IV. Further Directions after Appointment of Committee

- 4.01 From time to time a Committee of the estate appointed by the court may have to report to or seek directions from the court pursuant to section 13 or other provisions of the Ordinance.
- 4.02 Such reports or applications should be filed with court at the High Court Registry. Sending the documents by mail or simply lodging them at the Reception Counter of the High Court Registry does not comply with the duty to file under this paragraph.
- 4.03 When reports, applications, accounts or other documents are filed in the post-inquiry period, it is essential to state on the top of the first page of the document that it must be brought to the attention of the Judge or the Registrar as appropriate. Failure to do so may result in delay and inconvenience. Words to the effect that the document is “*For the attention of the Judge/Registrar*” will ensure that the document reaches the Judge or Registrar as early as possible.
- 4.04 Consideration could be given for the discharge of the committee after the more complicated steps in the administration and management of the estate have been completed and thereafter properties could be dealt with by a less costly alternative like an order under s.24, see *Director of Social Welfare v Official Solicitor*.

V. Personal Injuries Cases

- 5.01 In the handling of personal injuries cases in which an injured person who has been granted or who is seeking compensation may fall within the meaning of “a mentally incapacitated person” of the MHO, consideration should be given to whether an application under Part II of the MHO should be made, see *Re LWO*.

5.02 Where it is considered necessary for the Plaintiff to apply for a committee to be appointed, this should be brought to the notice of the judge hearing the PI claim. The compensation may include the costs of a Part II application.

VI. Miscellaneous

6.01 Applicants should exercise their own judgment as to whether they could simply adopt the forms included in the Annexures, or to make any modifications to the same as the circumstances of the case may require.

6.02 Applications under Part II of the Mental Health Ordinance fall within the same category as those set out in Paragraph 4 of PD25.1 and hearings are usually not open to the public.

6.03 This Practice Direction will come into effect on 31 October 2005.

Dated this 10th day of October 2005.

Andrew Li
Chief Justice

This SUMMONS was taken out by []

Solicitors for the Applicant.

To: The Official Solicitor, 34/Floor, Hopewell Centre, 183 Queen's Road East,
Wanchai, Hong Kong.

HCMP NO.[] /200[]

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO. [] OF 200 []

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 [*Add initials of MIP*]

.....

EX-PARTE ORIGINATING SUMMONS

.....

Filed this [] day of [] 200 []

HCMP No. [] / 200[]

IN THE HIGH COURT OF THE
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CERTIFICATE OF FAMILY AND PROPERTY

I, [] being the
Applicant in this matter, certify as follows:-

1. I am [*complete details*]. The following information is true and accurate to the best of my knowledge, information and belief.

2. The details of the family and the property given in this my Certificate, to the best of my knowledge, information and belief, are based on the information I have received from [] Attached to this Certificate are supporting documents.

3. [*Full name of MIP*]

(a) [*Add initials of MIP*], [], holder of Hong Kong Identity Card No. [] currently resides at [].

(c) [*Add initials of MIP*]'s annual income is as follows:
[include pension, dividends, rental income, salary, director's fees etc.]

(d) It is understood that the outgoings of [*add initials of MIP*] are approximately [HK\$] per annum (HK\$ per month) as follows (*include present and estimated future costs of care as well as, if relevant, maintenance requirements of family members of MIP*):-

<u>Description</u>	<u>Amount (HKD) per month</u>
[<i>give details</i>]	
Total:	_____

7. Will

I am aware that [*add initials of MIP*] [does/does not] have a Will. [*give details*]

8. Power of Attorney/Enduring Power of Attorney

The Applicant is [aware/unaware] if any Powers of Attorney/Enduring Power of Attorney *have/has* been executed by [*add initials of MIP*].

9. Committee

Subject to the Court's approval, it is proposed to appoint [] as Committee of [*add initials of MIP*] ("the Proposed Committee"). [*Give details of the Proposed Committee including qualifications and experience*] [*Give also details of how [add initials of MIP]'s financial affairs are to be managed in the future*].

10. Service of the Notice of Inquiry

[Please complete as to proposed arrangements for service and details of proposed substituted service, if applicable].

11. Personal background of [add initials of MIP]

[please complete]

12. The circumstances giving rise to this Application

[please complete]

13. The attitude of [add initials of MIP] to the Application

[please complete]

14. The attitude of the relatives of [add initials of MIP] to the Application.

15. [Add initials of MIP]'s assets and financial affairs

SCHEDULE

Part 1 - Absolute Property

Cash

Amount (HKD)

[please complete]

=====

=====

Part 2 - Absolute Property

Pensions, Annuities, Allowances, Life Policies and Mandatory Provident Benefits

[*please complete*]

Part 3 - Absolute Property

Land and Property (Including Tenancies)

[*please complete*]

Part 4 - Absolute Property

Investments

=====

Part 5 - Trust Interests

[*please complete*]

Part 6 - Absolute Property

Miscellaneous

[Give details of jewellery, cars, valuable antiques etc.]

Part 7
Business Interests

[*please complete*]

Part 8
Debts and Liabilities

[*please complete*]

Dated this [] day of [] 200 []

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.....
CERTIFICATE OF FAMILY AND PROPERTY
.....

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**MEDICAL CERTIFICATE IN SUPPORT OF AN APPLICATION
UNDER PART II OF THE MENTAL HEALTH ORDINANCE, CAP.136**

I, [name of medical practitioner] hereby certify as
follows:-

1. I have the following professional qualifications:-

[

]

I [am/not] on the List of Approved Doctors for the purposes of section 2(2) of the
Mental Health Ordinance, Cap.136.

2. At the request of [] I examined [*full name of MIP*]
on the [] and in my opinion [*add initials of MIP*] is incapable by reason of
mental incapacity as defined in the Mental Health Ordinance Cap.136 of managing and
administering [his/her] property and affairs.

3. I based my opinion on the following grounds :-

[

]

4. How long has the present mental incapacity lasted?

[

]

5. Is [*add initials of MIP*] dangerous to [himself/herself] or others in any way?

[

]

6. Is [*add initials of MIP*] capable of appreciating [his/her] surroundings?

[

]

7. Does [*add initials of MIP*] need anything to provide additional comfort?

If so, what recommendations do you make?

[

]

8. [*Where the MIP is living in a hospital/nursing home*] Is there a reasonable prospect of [*add initials of MIP*] being discharged to a nursing home/own home? If so, in approximately how many months/years?

9. Is [*add initials of MIP*] visited by relatives or friends?

[
]

10. What is [*add initials of MIP*]'s date of birth and age?

11. What is [*add initials of MIP*]'s life expectancy?

[]

12. Brief summary of [*add initials of MIP*]'s physical condition:

[
]

13. What are [*add initials of MIP*]'s prospects of mental recovery?

[]

14. Additional comments (if any).

Nil.

Dated the [] day of [] 200 []

[NAME OF MEDICAL PRACTITIONER]

HCMP No.[]/ 200 []

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.....

MEDICAL CERTIFICATE
IN SUPPORT OF AN APPLICATION

.....

Filed this [] day of [] 200 []

HCMP No. []/200 []

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and

IN THE MATTER OF an alleged mentally
incapacitated person [*Add initials of MIP*]

.....
CONSENT TO APPOINTMENT AS COMMITTEE
.....

Filed this [] day of [] 200 []

2. It is [*unnecessary/necessary*] that Dr. [] and Dr. [] be present at the hearing.

3. A notice of the hearing of the Originating Summons and all other relevant documents be served on the following:

(a) [*add initials of MIP*]

(b) [*any other relevant person*]

Dated this [] day of [] 200 []

REGISTRAR

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.....

ORDER

.....

Filed this [] day of [] 200 []

income of [*add initials of MIP*] may be insufficient for those purposes, the Committee be entitled to resort to [*add initials of MIP*]'s capital.] [*if relevant*]

3. The Committee be authorized in the name and on behalf of [*add initials of MIP*] to give any necessary notices of withdrawal and to receive and to give a discharge for:-

- (a) all or any sums of money standing to the credit of [*add initials of MIP*] whether on current account, deposit account, fixed deposit or otherwise with, any licensed bank, restricted licensed bank, private bank, deposit-taking company, trust company doing business in Hong Kong or elsewhere whether the same be held in [*add initials of MIP*]'s own name or jointly with others and any investments held in the name of nominees in any financial institution;
- (b) all and any stock, shares, preferential shares and other similar assets held by [*add initials of MIP*] (whether alone or jointly with others) and any investments held in the name of nominees in any financial institution; and
- (c) all dividends, interest, payments from trusts, rent, licence fees, social security benefits and other income of whatever nature and from whatever source to which [*add initials of MIP*] is entitled (whether alone or jointly with others), or as may be directed by the Court.

4. The Committee be authorised to revoke in the name and on behalf of [*add initials of MIP*] all mandates and authorities given by [*add initials of MIP*] jointly with others to any licensed bank, restricted licensed bank, private bank, deposit-taking company, stockbroker, fund manager, investment adviser or manager and others doing business in Hong Kong or elsewhere.

5. The Committee be authorised to open and procure the opening of any safe deposit boxes in Hong Kong and elsewhere registered in the name of [*add initials of MIP*] (whether alone or jointly with others) and to transfer the contents to a safe deposit box (or boxes) in its own name which it is hereby authorised to open.

6. The Committee be empowered to deal with any money under its control belonging to [add initials of MIP] and any sums received by it under this order as follows:-

- (a) to pay the amount owing for the maintenance and general benefit of [*add initials of MIP*];
- (b) to pay any debts of [*add initials of MIP*];
- (c) to pay the costs of this application, as hereinafter provided; and
- [(d) to invest the surplus in accordance with the provisions of the Trustee Ordinance, Cap 29] [*if relevant*].

7. The Committee be empowered to open up a Committee bank account or accounts and security and/or investment accounts in the name of the Committee.

[8. The Committee be authorized from time to time to engage stock brokers, merchant bankers, tax advisers, accountants, solicitors and Counsel as it may deem necessary to advise on [*add initials of MIP*]'s assets and former assets (including assets and former assets owned jointly with others), and on any dealings or transfers of [*his/her*] assets and former assets (including assets and former assets owned jointly with others), and on the investment and management of [*add initials of MIP*]'s estate, and on the conduct of this Committee and generally in connection with or incidental to the discharge of the Committee's duties under this and any subsequent order herein and to pay from [*add initials of MIP*]'s estate the fees of all such advisers for so acting. The Committee is to report to this Court within 120 days hereof, or such other period as this Court may direct on the investment of [*add initials of MIP*]'s personal estate.] [*if relevant*]

9. The Committee be empowered to take such steps as it deems necessary or appropriate to ascertain and verify the extent of [*add initials of MIP*]'s assets in Hong Kong and elsewhere (including assets owned jointly with others) and be

authorized to make such enquiries in the name of [*add initials of MIP*] and on [*his/her*] behalf as it considers appropriate for such purpose.

10. The Committee to account to the Court as and when required provided that it shall do so at least once in each calendar year from the date of this order and provided also that the first of such accounts shall be for the period ending 31st December [] and such accounts shall be submitted to this Court within 120 days or such other period as the Court may direct from the end of such period.

11. The Committee be empowered to take possession of all powers of attorney granted by [*add initials of MIP*] and all wills and any codicils thereto made by [*add initials of MIP*] and to make such enquiries on behalf of [*add initials of MIP*] in [*his/her*] name as it deems fit as to the terms of such powers of attorney, wills and codicils, [*his/her*] instructions in relation thereto, any advice (including legal advice) given to [*his/her*] in relation thereto and the circumstances in which such powers of attorney, wills and codicils were made.

12. Any securities and any title deeds belonging to [*add initials of MIP*] are to be deposited in the name of the Committee in a safe deposit box and to remain so deposited subject to the directions of the Court.

13. The costs of the Applicant and [*his/her*] solicitors and of the Committee of and incidental to and consequential upon this application are fixed pursuant to Order 62 Rule 9(4)(b) at \$ and the Committee is to pay the same from [*add initials of MIP*]'s assets.

14. [The Committee be remunerated for its services in accordance with the terms set out in its letter to the Applicant's Solicitors dated [] which is attached to the Certificate of Family and Property filed in these proceedings, subject to such further order in relation thereto as may hereinafter be made.] [*if relevant, usually the court will not allow remuneration for next of kin who acts as the Committee*]

15. [The Committee to act without providing security which is to be dispensed with.]

16. The Committee be at liberty to instruct solicitors and Counsel in Hong Kong and abroad at the expense of [*add initials of MIP*] generally in connection with or incidental to the discharge of its duties under this and any subsequent order herein. [*if relevant*]

17. There be liberty to apply.

[18. No information shall be published in relation to these proceedings or this and any subsequent order in these proceedings save as may be necessary for the purpose of carrying the same into effect and implementing the terms thereof or as may be expressly authorised by further order of this Court.]

[19. The Committee to report on enquiries of [*add initials of MIP*]'s relatives including the following:-

[*please complete*]]

[20. Add Orders with regard to for example :

- (a) Conducting legal proceedings;
- (b) the sale of property or leases for more than 3 years;
- (c) the possession of movable property not deposited in a safe deposit box.

[*please complete*]]

Dated this [] day of [] 200 []

REGISTRAR

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ORDER

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