Case Law Update 2019

Matthew J. Nolfo, Esq.
Matthew J. Nolfo & Associates, New York, NY

ELDER LAW UPDATE

Matthew Nolfo & Associates

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SECURE ACT

- "Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019"
- Bi-partisan Sponsorship and Support in the House – 417 to 3
- Effective Date: IRA owners that die in 2020 and later
- Government plans where owners die in 2022 and later?
- Special Delay for contracts under collective bargaining agreements?
- Companion Bill Pending in Senate

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SECURE ACT – STRETCH OUT CHANGES

- "Stretch Out" distributions after death of Owner to beneficiaries significantly altered in favor of 10 year Payout (Senate Bill is 5 years for Accounts over $450,000)
- 10 Year Payout starts to run in the year following the IRA or Plan Owner's Death (Pre or Post RBD)
- No RMDs, but instead just has to be withdrawn by the 10th year
- This applies to IRAs and other qualified plans and Roths

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SECURE ACT

- Exempt Beneficiaries:

1) Spouses
2) Disabled Individuals
3) "Certain Chronically Ill Individuals" – IRC 7702B
4) Beneficiaries whose age is within 10 years of the Deceased
5) Minors (10 year payout starts to run in the year when the Beneficiary reaches age of majority)
6) Recipients of certain annuitized payments that commenced before the enactment of the Secure Act

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SECURE ACT

- "Spouse"
- Still allowing for full rollover
- Concern that if surviving spouse lives for a long time, upon death, the 10 year payout will result in more tax being paid
- Consider having some of the Decedent spouse's IRA not rollover and disclaim
- Rate shopping

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SECURE ACT

- Disabled Individual
- Does not have to be a descendant of the IRA Owner
- Not fully defined – probably the SSA rules
- RMDs will still apply
- Accumulation Trusts will still work
- How will this impact 98 MA/024 for a beneficiary if not held in trust? Along with Federal Bankruptcy cases that say an Inherited IRA is not an exempt asset?

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SECURE ACT

- "Certain Chronically Ill Individuals" – appears to be those with Cognitive Impairment or who need substantial assistance with ADLs
- Beneficiaries whose Age is within 10 years of the Decedents
- Minors (has to be a child of the Decedent only)
- Age of Majority to start 10 year run. The age in the Bill is 21.

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SECURE ACT – NEW PLANNING?

- What does this do for planning?
- If you have a non-disabled person who is not a minor, RMDs do not matter, and can do a spendthrift trust, but will have to consider how the trust will be taxed on income
- Conduit Trusts – should be revisited. The consequences could be unintended
- Accumulation trusts will still work for disabled and minor beneficiaries
- Discretionary Spray Trusts for the rest – Children and Grandchildren because IRA distributions do not appear to be subject to the Kiddie Tax

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SECURE ACT – NEW PLANNING?

- Make payable to CRT if client is charitably inclined – no income tax going in – IRC Section 664
- When comes out to life beneficiary there is income tax due
- Rate Management
- Use Life Insurance to make up the difference or allow for the surviving spouse to do a Roth Conversion

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SECURE ACT – OTHER CHANGES

- Owners do not have to start taking distributions until the year he or she turns 72 (as opposed to 70 and ½)
- Traditional IRA contributions can be made at any age now
- Care Payments for Medicaid waiver programs – compensation can now be used to fund a retirement account
- 529 Distribution options are expanded
- Most small businesses will now be able to offer a plan
- Part time workers should now be eligible to participate with an employer plan

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RECENT CASES

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HOME CARE HOURS

- Andryeyeva v. New York Health Care, Inc. 2019 N.Y. LEXIS 617 (Court of Appeals)
- Issue whether employer must pay its home care aide employees for each hour of a 24 hour shift
- The DOL's interpretation of its Wage Order to require payment for 13 hours of a 24 hour shift is reasonable if the employee is allowed a sleep break for at least 8 hours and actually receives 5 hours of uninterrupted sleep and 3 hours of meal break time
- Because DOL's interpretation of its Wage Order was not irrational or unreasonable, it is upheld and the AD's finding that DOL's interpretation of its own Wage Order was not reasonable is reversed
- Remitted back to the lower courts to see if other class certification is warranted

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TINSMON CASE -SNT HOME PURCHASE

- Appellate Division, 3rd Department – 2019 NY Slip Op 01471
- Affirmance of Order of the Albany County Surrogate Court to allow Trustees of Self Settled Trust to use trust funds to purchase the residence for Trust beneficiary to be held in her name
- SSI POMS 01120.201(F)(1) allow for this as the house is a "durable item"
- Trustees are not obligated to conserve the Trust assets for the benefit of Medicaid for the payback
- Within the Trustee's discretion to make expenditures for disabled person's benefit after considering impact on the beneficiary's access to government benefits

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ESTATE OF ELI T., 2018 NYLJ LEXIS 4125 (DECEMBER 2018) 17-A DENIED

- Kings County Surrogate denied 17-A guardianship where respondent with IQ of 64 did not need guardian and that with support of loving family, he could make decisions on his own.
- "The appropriate legal standard is not whether the petitioners can make better decisions than respondent; rather, it is whether or not respondent has the capacity to make decisions." Advance directives could be executed for any authority his parents sought – more targeted than guardianship that takes away all rights of developmentally disabled person (not tailored approach like Article 81 guardianships).
- Good case for discussion on definition of a "developmentally disabled person" under 17-A.

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MATTER OF ANNA F., 2018 NY SLIP OP 05590 (AUGUST 2018) ARTICLE 17-A GRANTED

- Second Department reversed Brooklyn Surrogate Court's dismissal of a 17-A guardianship application for Petitioner's 51-year old sister, who had a severe intellectual disability for most of, if not all of her life, directing that the case be brought as an Article 81 guardianship. Second Department held that the Petitioner's sister was indeed intellectually disabled within the meaning of SCPA 17-A and deemed that the Petitioner was best suited to care for her sister, appointing her as guardian.

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MATTER OF DELANEY, NY SLIP OP 02090 (MARCH 2019) POA CREATES SNT

- Agent under durable POA signed by Principal with paranoid schizophrenia commenced proceeding in Rockland Surrogate's Court to create an SNT for individual who was receiving government benefits, including SSDI, to receive the principal's inheritance from his parents that had not yet been paid. SNT was for principal's supplemental care, maintenance, support, and education. Application was denied.
- 2nd Department reversed Rockland Surrogate's decision that the agent under durable POA did not have authority to commence proceeding to create SNT on principal's behalf. POA granted authority for, among other things, "claims and litigation", "estate transactions, and "all other matters", citing GOL 5-1502H; Matter of Perosi v. LiGreci 98 AD3d 230.

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BRONSTEIN V. CLEMENTS, 2019 NY SLIP OP 01470 (FEBRUARY 2019) STATE LAWS CONFLICT IN GUARDIANSHIP

- Defendant had IP sign 2 POAs in New York using PA form: one gave unrestricted authority to Plaintiff, and second gave restricted authority to Defendant to engage in real estate transactions and to create a trust for the IP. Plaintiff filed for guardianship in PA and was granted same and filed the Guardianship Order in NY pursuant to 83.39. Plaintiff commenced this proceeding to revoke the limited POA given to Defendant.
- Under PA law, the guardian could revoke POAs, but not the same under MHL 81.22(b)(2). Court held that POA fell under preview of GOL.
- Under a choice of law analysis: "the applicable law should be that of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation."
- Trial Court held and Third Dept. agreed that POA could be revoked given PA's greater concern in the matter.

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MATTER OF KRONIK, 2019 NY SLIP OP 30178(U) TRUST REVOKED BY GUARDIANSHIP COURT

- Decedent signed Irrevocable Trust and pour over Will in March 2000. Decedent found to be incapacitated in August 2000. Guardians applied for revocation of trust and after a jury trial it was determined that Decedent lacked capacity to sign Trust and that there was undue influence.
- Court held that the two instruments were part of same transaction. The Will was incidental to the Trust and any claim of its validity was barred.
- MHL 81.29 bars guardianship court from voiding a will; but that decision can indirectly occur with facts as they existed in this case.

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MATTER OF PROSPECT PARK UNION ASSOC. V. DEJESUS, 2018 NY SLIP OP 09016 FHA AND GUARDIANSHIP

- Landlord/tenant case (Bronx): GAL stipulated to have apartment cleaned by certain date as alternative to eviction of tenants in HUD section 8 housing. Tenant failed to comply with multiple stipulations. APS got involved and temporary guardian was appointed for both tenants and cured the problem.
- Motion to vacate the eviction was denied because cure was not timed and Appellate Term First Department affirmed.
- Appellate Division modified the decision saying that the landlord must make reasonable accommodations under the Fair Housing Act for mentally disabled people and that the case should be remanded to decide whether the existence of a guardianship is sufficient for tenant to fulfill lease obligations and avoid eviction.
- Appointment of Article 81 guardian sufficiently establishes that these tenants are "handicapped" within the meaning of the FHA.

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MATTER OF TIMPANO (MCGURK), 2018 NY SLIP OP 28298 COMPETING NH AND DSS JUDGMENTS

- NH obtained judgment over NH resident while living but did not yet begin collection on judgment before resident died. County was appointed Administrator of the estate and filed accounting and proposed to pay balance of estate to DSS (amount in estate was less than both NH and DSS's, separately).
- The Court held that the judgment that the NH had was not secured by real property and the NH had not already begun perfecting the lien against the decedent and the lien was not secured. The Court distinguished this case from a case where a DSS was not able to cut in front of NH, but in that case the NH had perfected the judgment by filing a lien against *real property*. The case at hand did not involve real property; thus, the judgment was not perfected and DSS was still a preferred creditor for balance of estate.
- If NH filed a UCC-1, may have led to different result as judgment would have been secured.

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MATTER OF BREIER V. NY DSS, 2019 NY SLIP OP 00433 SECOND DEPARTMENT (SUFFOLK) NH ACTS PRECLUDE APPEAL OF DENIAL

- Decedent's attorney-in-fact authorized Medicaid coordinator at NH to represent decedent during Medicaid eligibility process. Medicaid coordinator applied for benefits and was denied by County DSS due to failure to submit proper documentation. Coordinator reapplied and denied again. Then coordinator requested a fair hearing but was denied because the request had not been made in a timely manner.
- Petitioner argued that SOL on deadline to apply for fair hearing should have been tolled because the attorney-in-fact was not noticed. Court denied and said that the coordinator was the proper person to notice as they were authorized and recognized representative.

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MATTER OF SHAMBO 2019 NY SLIP OP 01280 (FEBRUARY 2019): ADMINISTRATOR SURCHARGED

- Third Department upheld surcharge against unfit Administrator
- Court held that Admin. failed to act diligently and prudently in the management of the estate's sole asset, which she could have sold at a reasonable price within a reasonable amount of time
- Medicaid was respondent in this case seeking to be paid their claim against estate for care provided to decedent

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MATTER OF ALEXANDER B.P., 2018 NY SLIP OP 07644 SECOND DEPARTMENT (NASSAU)

- Where Court found that a guardianship was not brought in bad faith by nursing home, it was an improvident exercise of discretion for the Court to require petitioner to pay the fee of the court appointed guardian.

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MATTER OR R.T. : JOINT ACCOUNTS BETWEEN SPOUSES; GUARDIANSHIP

- Broome County, May 15, 2019
- Spouse of IP cannot spend income being paid to a joint account in a manner inconsistent with prior spending pattern unless she has 1) the consent of the other joint holder spouse, and 2) doing so is a breach of her duty to conserve such marital funds once the other spouse/joint holder suffers diminished capacity.
- All expenditures made by the well spouse from the joint account that were not consistent with prior spending patterns were recovered by the children of the incapacitated spouse as they were spent on items that only benefitted the well spouse and her own family.

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MATTER OF A.B.D. : DD PERSON CAN PAY INCOME TO AN ABLE ACCOUNT

- Nassau County Surrogate Court June 13, 2019. 2019 N.Y. Misc. LEXIS 3237
- Guardians for DD Person (who is on SSI and Medicaid) applied to have income from internship paid to an ABLE account
- Because this account will not affect SSI or Medicaid if account is not more than $100,000 and the maximum annual contribution is not exceeded, the transfer to the ABLE account was allowed by the Court

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BEDNAREK V. INGERSOLL, 2019 NY SLIP OP 50142(U): PARTIES SUBJECT TO GUARDIANSHIP

- Chemung County, February 4, 2019
- Ms. I. was a person entitled to notice under an Article 81 proceeding under MHL 81.07
- Ms. I appeared at the initial hearing, pro se
- Attorney for Ms. I then appeared by filing a notice of appearance and participated on behalf of Ms. I in the guardianship
- Ms. I nor her counsel ever petitioned or cross petitioned in the matter
- Because of her appearance and participation in the hearing, she is a person subject to the jurisdiction of the court and the court had the power to order relief against her related to the guardianship

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FAIR HEARING 7923571Y: PROMISSORY NOTE UPHELD DESPITE NONCOMPLIANT PAYMENTS

- Genesee County 4/29/19
- Promissory Note that was otherwise DRA compliant
- DSS argued that Note was a countable resource because some of the payments were not made exactly as the Note has set forth
- Intent of the parties to the loan and circumstances surrounding the loan were considered more important than strict adherence
- DSS's claim that Promissory Note was a sham was rejected

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FH # 7393751Z: MLTC DECISION TO DENY 24 HOUR LIVE IN REVERSED

- NYC 5/23/19
- Increase in service sought and denied
- But MLTC's own UAS put the plan on notice of Appellant's "Mayer III" status
- GIS 97 MA 033 applies and this should require 24 hour care in the absence of formal or informal supports
- The UAS also showed a change in circumstances from a current stroke
- FH successful and 24 hour live in care required
-

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SECURE ACT

U.S. HOUSE VERSION

THE SETTING EVERY COMMUNITY UP FOR RETIREMENT ENHANCEMENT ACT OF 2019 (THE SECURE ACT)

TITLE I: Expanding and Preserving Retirement Savings

Section 101. Expand Retirement Savings by Increasing the Auto Enrollment Safe Harbor Cap

The legislation increases the cap from 10 to 15 percent of employee pay that required automatic escalation of employee deferrals go no higher than under an automatic enrollment safe harbor plan.

Section 102. Simplification of Safe Harbor 401(k) Rules

The legislation changes the nonelective contribution 401(k) safe harbor to provide greater flexibility, improve employee protection and facilitate plan adoption. The legislation eliminates the safe harbor notice requirement, but maintains the requirement to allow employees to make or change an election at least once per year. The bill also permits amendments to nonelective status at any time before the 30th day before the close of the plan year. Amendments after that time would be allowed if the amendment provides (1) a nonelective contribution of at least four percent of compensation (rather than at least three percent) for all eligible employees for that plan year, and (2) the plan is amended no later than the last day for distributing excess contributions for the plan year, that is, by the close of following plan year.

Sec. 103. Increase Credit Limitation for Small Employer Pension Plan Start-Up Costs

Increasing the credit for plan start-up costs will make it more affordable for small businesses to set up retirement plans. The legislation increases the credit by changing the calculation of the flat dollar amount limit on the credit to the greater of (1) $500 or (2) the lesser of (a) $250 multiplied by the number of nonhighly compensated employees of the eligible employer who are eligible to participate in the plan or (b) $5,000. The credit applies for up to three years.

Section 104. Small Employer Automatic Enrollment Credit

Automatic enrollment is shown to increase employee participation and higher retirement savings. The legislation creates a new tax credit of up to $500 per year to employers to defray startup costs for new section 401(k) plans and SIMPLE IRA plans that include automatic enrollment. The credit is in addition to the plan start-up credit allowed under present law and would be available for three years. The credit would also be available to employers that convert an existing plan to an automatic enrollment design.

Section 105. Treat Certain Taxable Non-Tuition Fellowship and Stipend Payments as Compensation for IRA Purposes

Stipends and non-tuition fellowship payments received by graduate and postdoctoral students are not treated as compensation and cannot be used as the basis for IRA contributions. The legislation removes this obstacle to retirement savings by taking such amounts that are includible in income into account for IRA contribution purposes. The change will enable these students to begin saving for retirement and accumulate tax-favored retirement savings.

Section 106. Repeal of Maximum Age for Traditional IRA Contributions

The legislation repeals the prohibition on contributions to a traditional IRA by an individual who has attained age 70½. As Americans live longer, an increasing number continue employment beyond traditional retirement age.

Section 107. Qualified Employer Plans Prohibited from Making Loans through Credit Cards and Other Similar Arrangements

The legislation prohibits the distribution of plan loans through credit cards or similar arrangements. The change will ensure that plan loans are not used for routine or small purchases, thereby preserving retirement savings.

Section 108. Portability of Lifetime Income Options

The legislation permits qualified defined contribution plans, section 403(b) plans, or governmental section 457(b) plans to make a direct trustee-to-trustee transfer to another employer-sponsored retirement plan or IRA of lifetime income investments or distributions of a lifetime income investment in the form of a qualified plan distribution annuity, if a lifetime income investment is no longer authorized to be held as an investment option under the plan. The change will permit participants to preserve their lifetime income investments and avoid surrender charges and fees.

Section 109. Treatment of Custodial Accounts on Termination of Section 403(b) Plans

Under the provision, not later than six months after the date of enactment, Treasury will issue guidance under which if an employer terminates a 403(b) custodial account, the distribution needed to effectuate the plan termination may be the distribution of an individual custodial account in kind to a participant or beneficiary. The individual custodial account will be maintained on a tax-deferred basis as a 403(b) custodial account until paid out, subject to the 403(b) rules in effect at the time that the individual custodial account is distributed. The Treasury guidance shall be retroactively effective for taxable years beginning after December 31, 2008.

Section 110. Clarification of Retirement Income Account Rules Relating to Church-Controlled Organizations

The legislation clarifies individuals that may be covered by plans maintained by church controlled organizations. Covered individuals include duly ordained, commissioned, or licensed ministers, regardless of the source of compensation; employees of a tax-exempt organization, controlled by or associated with a church or a convention or association of churches; and certain employees after

separation from service with a church, a convention or association of churches, or an organization described above.

Section 111. Allowing Long-term Part-time Workers to Participate in 401(k) Plans

Under current law, employers generally may exclude part-time employees (employees who work less than 1,000 hours per year) when providing a defined contribution plan to their employees. As women are more likely than men to work part-time, these rules can be quite harmful for women in preparing for retirement. Except in the case of collectively bargained plans, the bill will require employers maintaining a 401(k) plan to have a dual eligibility requirement under which an employee must complete either a one year of service requirement (with the 1,000-hour rule) or three consecutive years of service where the employee completes at least 500 hours of service. In the case of employees who are eligible solely by reason of the latter new rule, the employer may elect to exclude such employees from testing under the nondiscrimination and coverage rules, and from the application of the top-heavy rules.

Section 112. Penalty-free Withdrawals from Retirement Plans for Individuals in Case of Birth or Adoption

The legislation provides for penalty-free withdrawals from retirement plans for any "qualified birth or adoption distributions."

Section 113. Increase in Age for Required Beginning Date for Mandatory Distributions

Under current law, participants are generally required to begin taking distributions from their retirement plan at age 70 ½. The policy behind this rule is to ensure that individuals spend their retirement savings during their lifetime and not use their retirement plans for estate planning purposes to transfer wealth to beneficiaries. However, the age 70 ½ was first applied in the retirement plan context in the early 1960s and has never been adjusted to take into account increases in life expectancy. The bill increases the required minimum distribution age from 70 ½ to 72.

Section 114. Community Newspapers Pension Funding Relief

Community newspapers are generally family-owned, non-publicly traded, independent newspapers. This provision provides pension funding relief for community newspaper plan sponsors by increasing the interest rate to calculate those funding obligations to 8%. Additionally, this bill provides for a longer amortization period of 30 years from 7 years. These two changes would reduce the annual amount struggling community newspaper employers would be required to contribute to their pension plan.

Section 115. Treating Excluded Difficulty of Care Payments as Compensation for Determining Retirement Contribution Limitations

Many home healthcare workers do not have a taxable income because their only compensation comes from "difficulty of care" payments exempt from taxation under Code section 131. Because such workers do not have taxable income, they cannot save for retirement in a defined contribution plan or IRA. This provision would allow home healthcare workers to contribute to a plan or IRA by amending Code sections 415(c) and 408(o) to provide that tax exempt difficulty of care payments are treated as compensation for purposes of calculating the contribution limits to defined contribution plans and IRAs.

TITLE II: Administrative Improvements

Section 201. Plans Adopted by Filing Due Date for Year May Be Treated as in Effect as of Close of Year

The legislation permits businesses to treat qualified retirement plans adopted before the due date (including extensions) of the tax return for the taxable year to treat the plan as having been adopted as of the last day of the taxable year. The additional time to establish a plan provides flexibility for employers that are considering adopting a plan and the opportunity for employees to receive contributions for that earlier year and begin to accumulate retirement savings.

Section 202. Combined Annual Reports for Group of Plan

The legislation directs the IRS and DOL to effectuate the filing of a consolidated Form 5500 for similar plans. Plans eligible for consolidated filing must be defined contribution plans, with the same trustee, the same named fiduciary (or named fiduciaries) under ERISA, and the same administrator, using the same plan year, and providing the same investments or investment options to participants and beneficiaries. The change will reduce aggregate administrative costs, making it easier for small employers to sponsor a retirement plan and thus improving retirement savings.

Section 203. Disclosure Regarding Lifetime Income

The legislation requires benefit statements provided to defined contribution plan participants to include a lifetime income disclosure at least once during any 12-month period. The disclosure would illustrate the monthly payments the participant would receive if the total account balance were used to provide lifetime income streams, including a qualified joint and survivor annuity for the participant and the participant's surviving spouse and a single life annuity. The Secretary of Labor is directed to develop a model disclosure. Disclosure in terms of monthly payments will provide useful information to plan participants in correlating the funds in their defined contribution plan to lifetime income. Plan fiduciaries, plan sponsors, or other persons will have no liability under ERISA solely by reason of the provision of lifetime income stream equivalents that are derived in accordance with the assumptions and guidance under the provision and that include the explanations contained in the model disclosure.

Section 204. Fiduciary Safe Harbor for Selection of Lifetime Income Provider

The legislation provides certainty for plan sponsors in the selection of lifetime income providers, a fiduciary act under ERISA. Under the bill, fiduciaries are afforded an optional safe harbor to satisfy the prudence requirement with respect to the selection of insurers for a guaranteed retirement income contract and are protected from liability for any losses that may result to the participant or beneficiary due to an insurer's inability in the future to satisfy its financial obligations under the terms of the contract. Removing ambiguity about the applicable fiduciary standard eliminates a roadblock to offering lifetime income benefit options under a defined contribution plan.

Section 205. Modification of Nondiscrimination Rules to Protect Older, Longer Service Participation

The legislation modifies the nondiscrimination rules with respect to closed plans to permit existing participants to continue to accrue benefits. The modification will protect the benefits for older, longer-service employees as they near retirement.

TITLE III: Other Benefits

Section 301. Benefits for Volunteer Firefighters and Emergency Medical Responders

The legislation reinstates for one year the exclusions for qualified State or local tax benefits and qualified reimbursement payments provided to members of qualified volunteer emergency response organizations and increases the exclusion for qualified reimbursement payments to $50 for each month during which a volunteer performs services.

Section 302. Expansion of Section 529 Plans

The legislation expands 529 education savings accounts to cover costs associated with registered apprenticeships; homeschooling; up to $10,000 of qualified student loan repayments (including those for siblings); and private elementary, secondary, or religious schools.

TITLE IV: Revenue Provisions

Section 401. Modifications to Required Minimum Distribution Rules

The legislation modifies the required minimum distribution rules with respect to defined contribution plan and IRA balances upon the death of the account owner. Under the legislation, distributions to individuals other than the surviving spouse of the employee (or IRA owner), disabled or chronically ill individuals, individuals who are not more than 10 years younger than the employee (or IRA owner), or child of the employee (or IRA owner) who has not reached the age of majority are generally required to be distributed by the end of the tenth calendar year following the year of the employee or IRA owner's death.

Section 402. Increase in Penalty for Failure to File

The legislation increases the failure to file penalty to the lesser of $400 or 100 percent of the amount of the tax due. Increasing the penalties will encourage the filing of timely and accurate returns which, in turn, will improve overall tax administration.

Section 403. Increased Penalties for Failure to File Retirement Plan Returns

The legislation modifies the failure to file penalties for retirement plan returns. The Form 5500 penalty would be modified to $105 per day, not to exceed $50,000. Failure to file a registration statement would incur a penalty of $2 per participant per day, not to exceed $10,000. Failure to file a required notification of change would result in a penalty of $2 per day, not to exceed $5,000 for any failure. Failure to provide a required withholding notice results in a penalty of $100 for each failure, not to exceed $50,000 for all failures during any calendar year. Increasing the penalties will encourage the filing of timely and accurate information returns and statements and the provision of required notices, which, in turn, will improve overall tax administration.

Section 404. Increase Information Sharing to Administer Excise Taxes

The legislation allows the IRS to share returns and return information with the U.S. Customs and Border Protection for purposes of administering and collecting the heavy vehicle use tax.

ANDRYEYEVA HOME CARE HOURS

Copy Citation
Court of Appeals of New York
March 26, 2019, Decided
No. 11, No. 12
Reporter
2019 N.Y. LEXIS 617 * | 2019 NY Slip Op 02258 | 2019 WL 1333030

Lilya Andryeyeva, & c., et al., Respondents, v New York Health Care, Inc., d/b/a New York Home Attendant Agency, et al., Appellants.Adriana Moreno, & c., et al., Respondents, v Future Care Health Services, Inc., et al., Appellants.

Disposition:
For Case No. 11: Order reversed, with costs, matter remitted to Supreme Court, Kings County, for further proceedings in accordance with the opinion herein and certified question answered in the negative. For Case No. 12: Order, insofar as appealed from, reversed, with costs, matter remitted to the Appellate Division, Second Department, for further proceedings in accordance with the opinion herein and certified question answered in the negative.

Core Terms

sleep, wage order, aides, employees, minimum wage, home health care, meal, deference, labor law, breaks, plaintiffs', requirements, residential, regulation, patients, compensable, shifts, class certification, opinion letter, promulgated, interpreting, Occupations, Industries, on call, rule rule rule, uninterrupted, irrational, assigned, services, hours worked

Case Summary

Overview
ISSUE: [1]-The common issue presented in these joint appeals was whether, pursuant to the New York State Department of Labor's (DOL) Miscellaneous Industries and Occupations Minimum Wage Order (Wage Order), an employer must pay its home health care aide employees for each hour of a 24-hour shift; [2]-DOL has interpreted its Wage Order to require payment for at least 13 hours of a 24-hour shift if the employee is allowed a sleep break of at least 8 hours--and actually receives five hours of uninterrupted sleep--and three hours of meal break time. DOL's interpretation of its Wage Order did not conflict with the promulgated language, nor had DOL adopted an irrational or unreasonable construction, and so the Appellate Division erred in rejecting that interpretation.

Outcome
The court reversed the Appellate Division orders and remitted for consideration of alternative grounds for class certification for alleged violations of New York's Labor Law, inclusive of defendants' alleged systematic denial of wages earned and due, unaddressed by the courts below because of their erroneous rejection of DOL's interpretation.

LexisNexis® Headnotes

Administrative Law > Judicial Review > Standards of Review > Rule Interpretation
HN1 Rule Interpretation
The court's review of the New York State Department of Labor's interpretation of its Miscellaneous Industries and Occupations Minimum Wage Order is quite circumscribed. As a general rule, courts must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise. Thus, an agency's construction of its regulations, if not irrational or unreasonable, should be upheld. However, courts are not required to embrace a regulatory construction that conflicts with the plain meaning of the promulgated language. Judicial deference to an agency's interpretation of its rules and regulations is warranted because, having authored the promulgated text and exercised its legislatively delegated authority in interpreting it, the agency is best positioned to accurately describe the intent and construction of its chosen language. More like this Headnote
Shepardize - Narrow by this Headnote (0)

Administrative Law > Judicial Review > Standards of Review > Rule Interpretation
HN2 Rule Interpretation
When an agency adopts a construction which is then followed for "a long period of time," such interpretation is entitled to great weight and may not be ignored. Further, when set forth in official statements, an agency's consistent interpretation reflects an enduring body of informed administrative analysis and provides a reviewing court with the agency's interpretive position, as well as a measure of the enduring quality of the administrative judgment. Indeed, the court has previously given weight to the New York State Department of Labor's (DOL's) opinion letters when deciding whether to defer both to DOL's interpretation of its own regulations as well as the Labor Law. More like this Headnote
Shepardize - Narrow by this Headnote (0)

Administrative Law > Judicial Review > Standards of Review > Rule Interpretation
HN3 Rule Interpretation
Judicial deference to an agency's interpretation of its own regulations is a basic tenet of administrative law. More like this Headnote
Shepardize - Narrow by this Headnote (0)

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation
Administrative Law > Judicial Review > Standards of Review > Rule Interpretation
HN4 Deference to Agency Statutory Interpretation
An agency's interpretation is entitled to no deference where the question is one of pure legal interpretation of statutory terms. That rule does not apply to an agency's interpretation of its own

regulations. The court must defer to an administrative agency's rational interpretation of its own regulations. More like this Headnote
Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Wage & Hour Laws > Labor & Employment Law > Wage & Hour Laws
HN5 Wage & Hour Laws
The New York State Department of Labor's (DOL) Miscellaneous Industries and Occupations Minimum Wage Order does not define what it means for an employee to be "required to be available for work at a place prescribed by the employer" (refer to 12 NYCRR 142-2.1(b)). The New York State Department of Labor (DOL) has interpreted the phrase as applied to employees assigned to 24-hour shifts, (including home health care aides), to exclude up to 11 hours for sleep and meal breaks from compensable hours, based on DOL's understanding that these are regularly scheduled substantial periods of assignment-free personal time. Upon the court's review of the Wage Order and DOL's policy statements, the court concludes that DOL's interpretation is not inconsistent with the plain language as promulgated, nor is it an irrational or unreasonable construction of the Wage Order as applied to 24-hour shift workers. More like this Headnote
Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Wage & Hour Laws > Labor & Employment Law > Wage & Hour Laws
HN6 Wage & Hour Laws
The plain text of the New York State Department of Labor's (DOL) Miscellaneous Industries and Occupations Minimum Wage Order requires that an employee be paid the minimum wage for the time when they are "required to be available for work at a place prescribed by the employer" (12 NYCRR 142-2.1(b)). That language requires both presence and an availability during a time scheduled for actual work. More like this Headnote
Shepardize - Narrow by this Headnote (0)

Governments > Legislation > Interpretation
HN7 Interpretation
Two fundamental rules of statutory construction that apply with equal force in the administrative regulatory text are: words must be "harmonized" and read together to avoid surplusage. More like this Headnote
Shepardize - Narrow by this Headnote (0)

Governments > Legislation > Interpretation
HN8 Interpretation
All parts of a statute must be harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and every part and word thereof. Meaning must be given to every part and word. More like this Headnote
Shepardize - Narrow by this Headnote (0)

Administrative Law > Judicial Review > Standards of Review > Rule Interpretation
HN9 Rule Interpretation
That an agency's interpretation might not be the most natural reading of the regulation, or that the regulation could be interpreted in another way, does not make the interpretation irrational. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes
HN10 Certification of Classes
New York's statutory class certification provisions are to be liberally construed. More like this Headnote
Shepardize - Narrow by this Headnote (0)

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes
HN11 Certification of Classes
Claims of uniform systemwide violations are particularly appropriate for class certification. More like this Headnote
Shepardize - Narrow by this Headnote (0)

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality
HN12 Commonality
The fact that damages may vary by class member does not per se foreclose class certification. As the court has explained, the legislature enacted CPLR 901(a) with a specific allowance for class actions in cases where damages differed among the plaintiffs, stating the amount of damages suffered by each class member typically varies from individual to individual, but that fact will not prevent the suit from going forward as a class action if the important legal or factual issues involving liability are common to the class. A difference in damage awards is an insufficient basis to deny certification as a matter of law where the class may rely on representative evidence of the class-wide violations. More like this Headnote
Shepardize - Narrow by this Headnote (0)

Counsel: [*1] Sari E. Kolatch, for appellants (Case No. 11).

Jason J. Rozger, for respondents (Case No. 11).

Home Care Association of New York State, Inc. et al.; Consumer Directed Personal Assistance Association of New York State, Inc.; Home Care Association of America et al.; Greater New York Hospital Association, et al.; Sanford Heisler Sharp, LLP; Community Development Project, et al.; New York State Association of Health Care Providers, Inc.; New York State Department of Labor; National Center for Law and Economic Justice, amici curiae (Case No. 11).

Aaron C. Schlesinger, for appellants (Case No. 12:).

Michael J. D. Sweeney, for respondents (Case No. 12:).

Sanford Heisler Sharp, LLP; Greater New York Hospital Association, et al.; Community Development Project, et al.; New York State Department of Labor, amici curiae (Case No. 12:).

Judges: Opinion by Judge Rivera. Chief Judge DiFiore and Judges Stein, Wilson and Feinman concur. Judge Garcia dissents and votes to affirm in an opinion in which Judge Fahey concurs.

Opinion by: RIVERA

Opinion

RIVERA, J.

The common issue presented in these joint appeals is whether, pursuant to the New York State Department of Labor's (DOL) Miscellaneous Industries and Occupations Minimum Wage Order [*2] (Wage Order), an employer must pay its home health care aide employees for each hour of a 24-hour shift. DOL has interpreted its Wage Order to require payment for at least 13 hours of a 24-hour shift if the employee is allowed a sleep break of at least 8 hours-and actually receives five hours of uninterrupted sleep-and three hours of meal break time. DOL's interpretation of its Wage Order does not conflict with the promulgated language, nor has DOL adopted an irrational or unreasonable construction, and so the Appellate Division erred in rejecting that interpretation. Therefore, we reverse the Appellate Division orders and remit for consideration of alternative grounds for class certification for alleged violations of New York's Labor Law, inclusive of defendants' alleged systematic denial of wages earned and due, unaddressed by the courts below because of their erroneous rejection of DOL's interpretation.

I.

Statutory and regulatory background

New York's Labor Law requires that all employees be paid a minimum wage for each hour worked (Labor Law § 652). The Legislature passed the Minimum Wage Act (the "Act") in 1937 to ensure that workers "receive wages sufficient to provide adequate maintenance and [*3] to protect their health" (L 1937, ch 276, § 551). In 1971, the Legislature extended the Act to cover home health care aides living outside the employer's home (L 1971, ch 1165, § 1), and in 1978 again amended the Act to require a minimum wage for "each hour worked" (L 1978, ch 747, § 1).

The Act delegates to the Commissioner of Labor[1] the authority to set that minimum wage by issuing "wage orders" (L 1937, ch 276, §§ 555-557), which are promulgated as regulations in accordance with the State Administrative Procedure Act (SAPA) and the dictates of the Labor Law (see Labor Law § 659). The Commissioner has exercised this statutory authority periodically by publishing the minimum wage rate for employment in five industries, subclassified by occupation, employer size, and geographic location (12 NYCRR ch II, subch B, F).

Since 1972, home health care aides have come under DOL's Minimum Wage Order Number 11 for Miscellaneous Industries and Occupations (12 NYCRR part 142), which applies to all non-exempt employees who are not subject to a different wage order (i.e., those not in the hospitality industry, the building services industry, or farm workers) (see 12 NYCRR 142-2.14; DOL, Minimum Wage Order for Miscellaneous Industries and Occupations at 1 [effective [*4] Dec. 31, 2016] ["This Part shall apply to all employees, as such term is defined in this Part, except: (a) employees who are covered by minimum wage standards in any other minimum wage order promulgated by the commissioner; and (b) employees of a nonprofitmaking institution which has elected to be exempt from coverage under a minimum wage order, pursuant to subdivision 3 of section 652 of the Minimum Wage Act"]).

The Wage Order states, in relevant part:

"The minimum wage shall be paid for the time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee. However, a residential employee-one who lives on the premises of the employer-shall not be deemed to be permitted to work or required to be available for work:

(1) during [the employee's] normal sleeping hours solely because [the employee] is required to be on call during such hours; or

(2) at any other time when [the employee] is free to leave the place of employment" (12 NYCRR 142-2.1 [b]).

In March 2010, DOL issued an opinion letter, responding to questions about the application of the Wage Order [*5] to home health care aides, including the calculation of hours worked when assigned to a patient's home, referred to as a "live-in employee." The letter distinguishes between employees who are "on call"-meaning employees who are considered to be working during all hours they are required to remain in a particular work area, including when they are waiting to perform their services-and employees who are "subject to call" such that they are able to leave the work area between assignments and are paid only for work performed.

The letter further acknowledges that a "residential employee," defined in the Wage Order as a person who lives on the premises of the employer, is deemed not to be working during normal sleeping hours solely because they are "on call," or when free to leave the place of employment. The letter goes on to explain that DOL treats all "live-in" employees the same when determining the number of hours worked, regardless of whether they are residential employees. Specifically, the letter states that

"it is the opinion and policy of this Department that live-in employees must be paid not less than for thirteen hours per twenty-four hour period provided that they are afforded [*6] at least eight hours for sleep and actually receive five hours of uninterrupted sleep, and that they are afforded three hours for meals. If an aide does not receive five hours of uninterrupted sleep, the eight-hour sleep period exclusion is not applicable and the employee must be paid for all eight hours. Similarly, if the aide is not actually afforded three work-free hours for meals, the three-hour meal period exclusion is not applicable" (Opinion Letter from Maria L. Colavito, Counsel, DOL, Mar. 11, 2010).

The letter explains that home health care aides assigned to a 24-hour shift at a patient's home are live-in, nonresidential employees, who must be paid for at least 13 hours of work. Under DOL's interpretation of the Wage Order, the remaining 11 hours of the shift are not included in the calculation of compensable hours because this time is allocated for eight hours of sleep and three hours of meal time for the employee. If the home health care aide does not receive a minimum of five hours uninterrupted sleep and work-free meal breaks, the employer must pay for every hour of a 24-hour shift-meaning the employer cannot exclude 11 hours from the compensable hours total-because when [*7] the aide is not provided with actual and substantial duty-free periods for personal use, the employer rather than the employee benefits from the time and the employer must pay for profiting off the employee's labor.

The March 2010 opinion letter, issued prior to the filing of plaintiffs' underlying actions and specifically addressed to the status of home health care aides, is only a recent articulation in a long line of official statements by DOL explaining its general policy towards compensable work for 24-hour shift employees. For decades, DOL has consistently interpreted the Wage Order as applied across occupations to account for substantial periods of employee inactivity during a 24-hour shift when an employee is able to utilize the time for personal matters. As far back as 1969, DOL determined that, in the case of employees "required to be on duty for a 24 hour period," it would consider "up to 8 hours of sleeping time . . . as not being hours worked" within the meaning of the Wage Order, if certain conditions were met (DOL, Mem from George Ostrow to Daniel A. Daly [Oct. 27, 1969]). The exclusion would only apply if there was "express or implied agreement" to exclude time for sleep, [*8] the employer provided "adequate sleeping facilities for an uninterrupted night's sleep," the employee actually received five hours of sleep, and interruptions to perform duties were considered work time (id.).

In 1998, the Commissioner expressly addressed home health care aides, in response to a letter from an employee of a home health care provider and explained that, for "live-in" home health care aides, including those working an on-site 24-hour shift:

"it is the policy of the [DOL] that such persons must be paid for no less than 13 hours of each 24-hour day they are required to remain on call' in the home of the person receiving their

services-provided that they are afforded eight hours for sleep and actually receive five hours of uninterrupted sleep and that they are afforded three hours for meals. If a live-in' home health aide does not receive five hours of uninterrupted sleep the eight hour sleep period exclusion is not applicable, and the home health aide must be paid for all eight hours in question. Similarly, if a live-in' home health aide is not actually afforded three work-free hours for meals, the three-hour meal period exclusion is not applicable" (DOL, Letter from James [*9] J. McGowan [Oct. 27, 1998]).

This interpretation of the Wage Order is similar to the federal government's guidance on the minimum compensable hours for 24-hour shift employees under the Fair Labor and Standards Act (FLSA). According to the United States Department of Labor, when an employee is "required to be on call for 24 hours a day," but has "a normal night's sleep" and "ample time in which to eat . . . meals," it may be "justif[ied to conclude] that the employee is not working at all times during which [the employee] is subject to call in the event of an emergency" (U.S. Dept. of Labor, Interpretative Bulletin No. 13: Hours Worked - Determination of Hours for Which Employees are Entitled to Compensation Under the Fair Labor Standards Act of 1938 [July 1939] at 4). Under current federal regulations, an employer may exclude up to eight hours of sleep time from compensable time for employees who work 24-hour shifts, assuming certain conditions are satisfied (29 CFR 785.22).

II.

Plaintiffs' putative classes based on defendants' alleged New York Labor Law violations

In both appeals, plaintiffs seek certification of a class of home health care aides for alleged violations of the Labor Law based on their [*10] respective employer's failure to pay putative class members a required minimum wage for each hour of a 24-hour shift. Plaintiffs care for some of the most vulnerable members of our society, doing work essential to the survival of their patients. Plaintiffs allege that they are part of a workforce that is predominantly composed of women and recent immigrants, and one that they claim is easily exploited and vulnerable to various forms of wage abuse. Plaintiffs and amici paint a picture of a growing home health care industry where employers reap huge profits from both private and taxpayer funds, while refusing to pay the minimum wage for each hour worked to those who do challenging labor, at all hours of the day and night, often four or five times a week.

Defendants are private home health care companies and their owners who employ plaintiffs and other home health care aides to serve elderly and infirm patients for up to 24 hours at a time. Throughout these litigations, defendants maintained that the applicable law and DOL regulations do not mandate that they pay the equivalent of minimum wage for each hour of a 24-hour shift, relying on DOL's interpretation of its Wage Order.

Andryeyeva [*11] v New York Health Care, Inc.

Plaintiffs Lilya Andryeyeva and Marina Ordus are former employees of New York Home Attendant Agency, an entity formed by defendant New York Health Care (NYHC), a New York State Department of Health licensed home health care agency. They commenced an action individually and sought class certification on behalf of all other home health aides who were employed by NYHC and worked 24-hour shifts. NYHC provides home care services to elderly and disabled individuals in New York City and Nassau County pursuant to contracts with various managed care companies and local health departments. Defendants' home care aides assist patients with a range of tasks, including cooking, feeding, bathing, housework, using the restroom, and changing diapers.

NYHC regularly assigns home care aides to work 24-hour "sleep-in" shifts. During such shifts, a home care aide is required to be present in the patient's home for a full 24-hour period. Plaintiffs allege that defendants violated the Labor Law by failing to pay the required minimum wage, overtime, and "spread of hours" premiums2 to home aides who worked 24-hour shifts. Plaintiffs allege they routinely did not receive five hours [*12] of uninterrupted sleep because their patients required assistance multiple times each night. Plaintiffs also allege that they were never allowed to take meal breaks; indeed, NYHC's orientation manual states expressly: "Patients are never to be left alone!" According to Andryeyeva, the patient for whom she cared most frequently suffered from dementia, "never" slept through the night, and "usually got up two or three times each night to use the bathroom," requiring assistance each time. Plaintiffs further allege they were never told that they should receive five hours of uninterrupted sleep during 24-hour shifts and that defendants failed to record when (or even whether) plaintiffs took sleep and meal breaks. Defendants maintain that home health care aides in their employ are "expected" to receive an eight-hour sleep break and three hours of meal breaks per 24-hour shift.

In support of their motion for class certification, plaintiffs argued that they met each of the statutory requirements of CPLR 901, namely, numerosity, predominance, typicality, adequacy of representation, and superiority. Plaintiffs argued that the proposed class includes 1,063 employees who suffered the same core injury, i.e., [*13] defendants' alleged failure to pay lawful wages for each hour worked during 24-hour shifts. Plaintiffs further asserted that they would fairly and adequately represent the class because they had actively participated in the litigation and selected qualified class counsel, and that class treatment was superior to other methods of adjudication because a single judicial adjudication would be more efficient than numerous individual determinations. Plaintiffs argued that they satisfied the requirements of CPLR 902-the interest of class members in controlling the litigation, the inefficiency of individual actions, the extent of prior litigation in the controversy, the desirability of concentrating the litigation in the forum, and any difficulties that may arise in the management of the class action-for many of the same reasons.

In opposition, defendants asserted that they were not required to pay the minimum wage to home care aides for each hour of a 24-hour shift because the aides were "live-in employees," and under DOL's March 2010 opinion letter, they could be paid less than the minimum wage for up to eight hours of sleep time and three hours of meal time. Therefore, defendants argued, each worker's [*14] claim required an individual examination of the facts and circumstances of their respective employment, rendering the claims unsuitable for class certification.

Unpersuaded, Supreme Court refused to adopt DOL's interpretation and granted plaintiffs' motion to certify a class of home attendants who worked 24-hour shifts during a defined period. The Appellate Division affirmed, concluding that "DOL's interpretation is neither rational nor reasonable, because it conflicts with the plain language of the Wage Order" (Andryeyeva v New York Health Care, Inc., 153 AD3d 1216, 1218, 61 N.Y.S.3d 280 [2d Dept 2017]). The court reasoned that, because plaintiffs were required to be present at the patient's home and to perform services as needed if called upon, they were "available for work," regardless of whether they were afforded sleep and meal breaks. In reaching this conclusion, the court held that the phrase "available for work" includes nighttime hours when the employee was "not called upon to perform services" (id. at 1219). The court relied on the First Department's decision in Tokhtaman v Human Care, LLC (149 AD3d 476, 52 N.Y.S.3d 89 [1st Dept 2017]), in which that court similarly rejected DOL's interpretation of the Wage Order as in conflict with its plain meaning. The Second Department further concluded that plaintiffs adequately established the requirements of [*15] CPLR 901 and that none of the CPLR 902 factors warranted a denial of the certification motion. The Appellate Division granted defendants' motion for leave to appeal pursuant to CPLR 5602 (a).

Moreno v Future Care Health Servs., Inc.

Plaintiffs Adriana Moreno and Leonidas Peguero-Tineo are home health care aides employed by defendants Future Care Health Services, Inc. and Americare Certified Special Services, Inc. As in Andryeyeva, plaintiffs allege that defendants underpaid their employees by failing to pay the minimum wage for each hour of their assigned 24-hour shifts, not paying overtime, and failing to pay "spread of hours" premiums. The Moreno plaintiffs further allege that defendants failed to pay employees adequate wages to attend mandatory "in service" training sessions, reimburse employees for supplies or uniform cleaning, and maintain adequate employment records as required by Labor Law § 195 and 12 NYCRR 142-2.

Plaintiffs moved to certify "a class of current and former home health care workers employed by Defendants." Plaintiffs argued that they satisfied the requirements under CPLR 901 because the proposed class included at least 40 members and presented several common questions, including whether defendants "engaged in a pattern [*16] or practice of not paying all wages due for work performed and overtime" and "whether Defendants have kept true and accurate time records for all hours worked by Plaintiffs and the Class." They further argued that plaintiffs were adequate class representatives and had selected qualified counsel to prosecute the class wage claims. Finally, plaintiffs argued that class treatment was superior to other means of resolving their claims because requiring hundreds of class members to file separate actions alleging the same misconduct against the same defendants was inefficient and would waste judicial resources. Plaintiffs also argued that the requirements of CPLR 902 were satisfied.

Like the Andryeyeva defendants, the Moreno defendants responded in opposition that plaintiffs failed to establish grounds for certification because resolving plaintiffs' claims would require "individualized investigation, proof and determination." Defendants relied, in large part, on the fact that under DOL's interpretation of the Wage Order, plaintiffs' sleep and meal time was non-compensable and defendants were not obligated to pay the minimum wage for this time so long as plaintiffs received at least five hours of uninterrupted [*17] sleep and three hours for meals. With respect to plaintiffs' other claims, defendants asserted that there was no evidence to support plaintiffs' allegations. Defendants further argued that plaintiffs failed to satisfy CPLR 902, in part because the individualized issues presented by the litigation were not appropriate for resolution in a class action. Supreme Court agreed with defendants that certification was unwarranted and denied plaintiffs' motion.

The Appellate Division reversed in an opinion decided the same day as Andryeyeva. The court concluded that the DOL opinion letter "conflicts with the plain meaning of" the Wage Order, and that home health care aides were entitled to be paid the minimum wage for every hour of a 24-hour shift even if they were afforded sleep and meal time because they are not "residential employees" within the meaning of the Wage Order (Moreno v Future Care Health Servs., Inc., 153 AD3d 1254, 1255-1256, 61 N.Y.S.3d 589 [2d Dept 2017]), citing Andryeyeva, 153 AD3d at 1219). The court further concluded that plaintiffs had established the prerequisites for class treatment and certified the proposed class. As in Andryeyeva, the Appellate Division granted defendants' motion for leave to appeal to this Court.

DOL's Emergency Regulation

In direct response to these decisions and the holding in [*18] Tokhtaman, DOL issued an emergency regulation which added the following language to the Wage Order:

"Notwithstanding the above, this subdivision shall not be construed to require that the minimum wage be paid for meal periods and sleep times that are excluded from hours worked under the Fair Labor Standards Act of 1938, as amended, in accordance with sections 785.19 and 785.22 of 29 C.F.R. for a home care aide who works a shift of 24 hours or more" (NY Reg, Oct. 25, 2017 at 6).

In DOL's Notice of Emergency Rulemaking, it announced that the emergency regulation was "needed to preserve the status quo, prevent the collapse of the home care industry, and avoid

institutionalizing patients who could be cared for at home, in the face of recent decisions by the State Appellate Divisions that treat meal periods and sleep time by home care aides who work shifts of 24 hours or more as hours worked for purposes of state (but not federal) minimum wage" (id. at 5). In the accompanying Regulatory Impact Statement (RIS),3 DOL explained that its interpretation had been long-standing, and evolved as legislative expansions covered workers in the home. DOL explained that by the 1970s, the Commissioner interpreted the minimum wage requirement [*19] to exclude sleep and meal periods for these groups of workers, and included this interpretation in formal guidelines, legal opinions, investigators' manuals and the Commissioner's determinations. The RIS further stated that the Commissioner amended the Wage Order in 1986 to provide for overtime calculation in accordance with federal methodology and "grew increasingly to look to, and rely upon federal FLSA regulations interpreting" federal law regarding work hours, meal and sleep periods, "so that hours worked were calculated consistently at the state and federal level for overtime (and other) purposes" (id. at 6).

The emergency regulation expired approximately two months later, on January 2, 2018. To avoid any lapse in coverage, DOL promulgated a series of substantially identical emergency regulations between January and September 2018, as well as a proposed final rule on April 5, 2018 (NY Reg., Apr. 25, 2018 at 43-45). Then, in a separate action by different plaintiffs, Supreme Court invalidated the emergency regulation in September 2018, holding DOL failed to justify an emergency in accordance with the SAPA (see Matter of Chinese Staff and Workers Association v Reardon, 2018 NY Slip Op 32391[U], at *8 [Sup Ct, NY County 2018]).

III.

As defendants' respective challenges to the Appellate Division's approval [*20] of class certification in Andryeyeva and Moreno are analytically indistinguishable, we address these matters jointly. Defendants argue the Appellate Division should have deferred to DOL's rational and reasonable interpretation of the Wage Order, which requires individualized assessment of plaintiffs' minimum wage claims, thus precluding certification of a class. Plaintiffs in both appeals submit the same response namely, that the plain language of the Wage Order requires defendants to pay them minimum wage for every hour of their 24-hour shifts and issues common to their respective classes are defendants' alleged failure to comply with the Wage Order and with regulatory recording keeping requirements.4 Given the decisions below and the arguments as narrowed by defendants, the only issues before us are whether the Appellate Division erroneously disregarded DOL's interpretation of its Wage Order and, if so, whether application of the DOL's interpretation necessarily forecloses class certification. As we discuss, because of the posture of these appeals, we remit so that the courts below may consider unaddressed grounds for class certification.

Standard of Judicial Review

HN1 Our review of DOL's [*21] interpretation of its Wage Order is quite circumscribed. As a general rule, "courts must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise" (Matter of Peckham v Calogero, 12 NY3d 424, 431, 911 N.E.2d 813, 883 N.Y.S.2d 751 [2009]). Thus, an agency's construction of its regulations " if not irrational or unreasonable,' should be upheld" (Samiento v World Yacht Inc., 10 NY3d 70, 79, 883 N.E.2d 990, 854 N.Y.S.2d 83 [2008], quoting Matter of Chesterfield Assoc. v New York State Dept. of Labor, 4 NY3d 597, 604, 830 N.E.2d 287, 797 N.Y.S.2d 389 [2005]). However, "courts are not required to embrace a regulatory construction that conflicts with the plain meaning of the promulgated language" (Visiting Nurse Serv. of New York Home Care v New York State Dept. of Health, 5 NY3d 499, 506, 840 N.E.2d 577, 806 N.Y.S.2d 465 [2005], citing

Matter of 427 W. 51st St. Owners Corp. v. Division of Hous. & Community Renewal, 3 NY3d 337, 342, 819 N.E.2d 1032, 786 N.Y.S.2d 416 [2004]). Judicial deference to an agency's interpretation of its rules and regulations is warranted because, having authored the promulgated text and exercised its legislatively delegated authority in interpreting it, the agency is best positioned to accurately describe the intent and construction of its chosen language (see Peckham, 12 NY3d at 431).

HN2 When an agency adopts a construction which is then followed for "a long period of time," such interpretation "is entitled to great weight and may not be ignored" (Ferraiolo v O'Dwyer, 302 NY 371, 376, 98 N.E.2d 563 [1951]). Further, when set forth in official statements, an agency's consistent interpretation reflects an enduring body of informed administrative analysis (see Samiento, 10 NY3d at 79), and provides a reviewing court with the agency's interpretive position, as well [*22] as a measure of the enduring quality of the administrative judgment. Indeed, we have previously given weight to DOL's opinion letters when deciding whether to defer both to DOL's interpretation of its own regulations as well as the Labor Law (see e.g. Samiento, 10 NY3d at 79-80 [relying on DOL's opinion letters to support upholding DOL's interpretation of Labor Law § 196-d]).

We have no occasion to deviate from our well-settled law in the appeals before us. Thus, if DOL's interpretation of the Wage Order meets our deferential standard, we may not reject it. In making our determination, we must give our foremost consideration to DOL's opinion letters and prior statements because they represent a long-standing articulation of its interpretation of the Wage Order, as applied to nonresidential 24-hour shift employees, including home health care aides. We are also mindful that DOL's fair and studied consideration is grounded in its specialized knowledge and experience of both round-the-clock work assignments and the home health care industry.

There is nothing "novel" (dissenting op at 11) about the standard of review we reiterate today. As revealed by the case law cited above, HN3 judicial deference to an agency's interpretation of its [*23] own regulations is a basic tenet of administrative law. The dissent appears to confuse our discussion of the well-established justifications for deference (e.g., administrative expertise and the fact that an agency is best positioned to explain what it meant by the words it chose) for the standard itself. Further, the dissent relies on case law addressing agency interpretation of statutory-not regulatory-text to bootstrap an inapposite rule and observes that HN4 an agency's interpretation is entitled to no deference "where the question is one of pure legal interpretation of statutory terms'" (dissenting op at 10 [quoting Matter of Toys "R" Us v Silva, 89 N.Y.2d 411, 419, 676 N.E.2d 862, 654 N.Y.S.2d 100 [1996] [concluding that a municipal zoning board's determination revoking a building permit was not inconsistent with local zoning code]). That rule does not apply to an agency's interpretation of its own regulations. As noted above, the Court "must defer to an administrative agency's rational interpretation of its own regulations" (Peckham, 12 NY3d at 431 [emphasis added]; see also Visiting Nurse Serv., 5 NY3d at 506).

DOL's interpretation of the Wage Order

HN5 The Wage Order does not define what it means for an employee to be "required to be available for work at a place prescribed by the employer" (see 12 NYCRR 142-2.1 [b]). DOL has interpreted [*24] the phrase as applied to employees assigned to 24-hour shifts, (including home health care aides), to exclude up to 11 hours for sleep and meal breaks from compensable hours, based on DOL's understanding that these are regularly scheduled substantial periods of assignment-free personal time. DOL, appearing as amicus curiae, argues that we should defer to its construction because it is consistent with the plain text of the Wage Order, and reflects DOL's well-founded concern for the wellbeing of workers on round-the-clock assignment, informed judgment grounded in its specialized knowledge of the home health care industry, and the Commissioner's election to align the state's requirements with the federal

approach. Upon our review of the Wage Order and DOL's policy statements, we conclude that DOL's interpretation is not inconsistent with the plain language as promulgated, nor is it an irrational or unreasonable construction of the Wage Order as applied to 24-hour shift workers. DOL's interpretation is not inconsistent with HN6 the plain text of the Wage Order, which requires that an employee be paid the minimum wage for the time when they are "required to be available for work at a place prescribed [*25] by the employer" (12 NYCRR 142-2.1 [b]). That language requires both presence and an availability during a time scheduled for actual work. Plaintiffs mistakenly argue, and the Appellate Division erroneously concluded, that once a worker is physically present at the designated work site, they are thus able to work if called upon and so are "available for work." That interpretation ignores the entirety of the phrase and renders superfluous the regulation's separate requirement that the employee be both "available for work" and be so available "at a place prescribed by the employer," in violation of HN7 two fundamental rules of statutory construction that apply with equal force in the administrative regulatory text: words must be "harmonize[d]" and read together to avoid surplusage (Matter of Tall Trees Const. Corp. v Zoning Bd. of Appeals of Town of Huntington, 97 N.Y.2d 86, 91, 761 N.E.2d 565, 735 N.Y.S.2d 873 [2001]; Matter of Kamhi v Planning Bd. of Town of Yorktown, 59 NY2d 385, 391, 452 N.E.2d 1193, 465 N.Y.S.2d 865 [1983]; see also FDA v Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-133, 120 S. Ct. 1291, 146 L. Ed. 2d 121 [2000]); cf. McKinney's Cons. Statutes § 98 HN8 ["All parts of a statute must be harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and every part and word thereof"]). Put another way, if plaintiffs are correct that the only meaning that may be ascribed to this language is physical presence in the patient's home, then the Wage [*26] Order is internally redundant as it already conveys that with the words "or required to be at a place prescribed by the employer." By contrast, DOL has given meaning to the complete phrase by interpreting "available for work," in the context of a 24-hour shift to exclude the hours when the employee is not working because the employee is on a scheduled sleep and meal break (see Roberts v Tishman Speyer Properties, L.P., 13 NY3d 270, 289, 918 N.E.2d 900, 890 N.Y.S.2d 388 [2009] [meaning must be given to "every part and word"]). Moreover, plaintiff's alternative reading of the Wage Order is beside the point. HN9 "That [DOL's] interpretation might not be the most natural reading of the regulation, or that the regulation could be interpreted in another way, does not make the interpretation irrational" (Elcor Health Servs., Inc. v. Novello, 100 NY2d 273, 280, 794 N.E.2d 14, 763 N.Y.S.2d 232 [2003]).5

When it first adopted the Wage Order in 1960, DOL recognized the difficulty of defining hours worked for employees who are on call around the clock and the hardship imposed at setting a work day at 24 hours (DOL, Report of the Industrial Commissioner Upon the Promulgation of Minimum Wage Order No. 11 for Miscellaneous Industries and Occupations [Sept. 29, 1960] at 6). Nevertheless, the realities of the workplace are such that there are many industries and occupations where employees are assigned to 24-hour shifts. This is not a case where [*27] DOL has vacillated in its position, rendering its interpretation capricious or unmoored from the realities of workplace life. DOL's interpretation of the Wage Order language has been consistent for nearly five decades, during eight gubernatorial administrations and the tenure of 13 Commissioners of Labor, representing the same fair and studied judgment of officials throughout that time. DOL's position has been set forth and explained in its Investigator's Manual, DOL memoranda, and opinion letters, up to its recent March 2010 correspondence. As intended, this articulated position has informed and guided the industries that rely on 24-hour shift workers, including home health care services employers. This consistent interpretation is further support for this Court's deference to the DOL's reading of its own Wage Order (see Barenboim v Starbucks Corp., 21 NY3d 460, 471, 995 N.E.2d 153, 972 N.Y.S.2d 191 [2013]).6

Here, DOL explains that its interpretation is an attempt to apply the Wage Order's requirement that workers be paid for the time that they are "required to be available for work at a place prescribed by the employer" (12 NYCRR 142-2.1 [b]) with the realities of in-home health aides who work 24-hour shifts. According to its brief in this Court, DOL has "concluded that an employee who [*28] enjoys genuine sleep and meal breaks consistent with the strict requirements of DOL's policy-i.e., regularly scheduled, substantially uninterrupted, work-free times to eat and sleep-is not meaningfully available for work' during those breaks, precisely because DOL's criteria are intended to identify breaks that are predictably and largely free from work interruptions." This echoes the position it took in its 2010 opinion letter, where DOL distinguished between employees who are "on call" and "considered to be working during all the hours that they are confined to the workplace including those hours in which they do not actually perform their duties" and those who are "subject to call," which includes "that time in which employees are permitted to leave the work room or workplace between work assignments to engage in personal pursuits and activities" (2010 Opinion Letter at 3). DOL has concluded that "[i]n some cases, employees who are subject to call' may be restricted to a specified area, to be reachable by telephone or otherwise, to report to the work assignments within 15 to 30 minutes, etc. In cases in which an employee is subject to call,' working time starts when they are actually [*29] ordered to a specific assignment or at the time in which they perform work for the employer" (id.). In adopting its interpretation, DOL "sought to protect . . . employees' ability to engage in a significant degree of personal activity during their breaks by imposing strict rules that employers must comply with if they wish to exclude such breaks from compensable time." Moreover, DOL's interpretation of the Wage Order reflects its specialized knowledge of labor law's evolving application to domestic workers and the home health care industry (see International Union of Painters, 32 NY3d at 208-209; Matter of KSLM-Columbus Apts., Inc v New York State Div of Hous. & Community Renewal, 5 NY3d 303, 312, 835 N.E.2d 643, 801 N.Y.S.2d 783 [2005]). It further reflects DOL's expertise in handling labor law violations and its historical efforts to ensure that its policies reflect the realities of the diverse industries and occupations over which it has administrative oversight. With respect to home health care aides, this interpretation of the Wage Order is supported by DOL's experience with the particularities of this occupation, where the needs of some patients allow for regularly scheduled work-free uninterrupted periods to sleep and eat. In other words, DOL has determined that a patient may need an aide on site around-the-clock without requiring adult care services for all 24 hours [*30] of the day. Indeed, defendants maintain that when a patient requires full-time attention and care, two home health care aides are, or ought to be, assigned to separate twelve-hour shifts. DOL's interpretation based on this industry reality is neither irrational nor unreasonable.

DOL's interpretation also reflects the Commissioner's interest in conforming state and federal guidance on the proper calculation of compensable hours. Interpreting the Wage Order to exclude sleep and eating breaks in a 24-hour shift, on the presumption that the employer will in fact structure the work assignment to provide such time for a home health care aide, harmonizes with the federal approach. It is neither unreasonable nor irrational for DOL to interpret its Wage Order in a manner that reduces administrative burdens, such as dual-sovereign reporting and wage payment requirements, and also has the added benefit of avoiding intergovernmental conflict.7

Plaintiffs unpersuasively argue that DOL's interpretation is a misapplication of the residential exception set forth in the Wage Order. Contrary to plaintiffs' suggestion, the Wage Order's treatment of residential employees is not an exception or a particularized [*31] carve-out (which creates nothing more than a general exception) (see e.g. Mullen v. Zoebe, Inc., 86 NY2d 135, 142, 654 N.E.2d 90, 630 N.Y.S.2d 269 [1995]). The Wage Order does not exclude residential employees from coverage, but rather, subjects these workers to a particular interpretation of compensable hours, grounded in DOL's knowledge and experience with this type of work. Nor

do plaintiffs argue that a home health aide working a 24-hour shift who does not live in the employer's residence is a residential employee for purposes of the Wage Order (Matter of Settlement Home Care, Inc. v Industrial Bd. of Appeals of Dept. of Labor, 151 A.D.2d 580, 581, 542 N.Y.S.2d 346 [2d Dept 1989]). Instead, such an employee is covered under the remaining language of the Wage Order, language which DOL applies to an employee assigned to a 24-hour shift. Nothing in the Wage Order language precludes DOL from interpreting the remainder of the provision and, specifically, the "available for work" language, as implementing a similar approach to compensable hours for non-residential home health care employees working 24-hour shifts. Moreover, there is nothing unreasonable or irrational about recognizing the similarities and dissimilarities between residential and nonresidential employees to reach the conclusion that a home health care aide assigned to a 24-hour shift should have significant amounts of regularly scheduled [*32] work-free periods.8

Plaintiffs' argument is essentially a claim that DOL must issue a separate wage order for home health care aides. Although courts must ensure that administrative entities comply with their statutory, regulatory, and SAPA requirements in exercising their legislatively delegated powers, DOL's highly fact-specific, industry-specific interpretation of its own Wage Order is a far cry from the "fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers" that requires a separate rulemaking under SAPA (Roman Catholic Diocese of Albany v New York State Dept. of Health, 66 N.Y.2d 948, 951, 489 N.E.2d 749, 498 N.Y.S.2d 780 [1985]). Apart from the fact that DOL complied with procedural requirements when it promulgated the Wage Order, and plaintiffs do not argue to the contrary, plaintiffs' interpretation devolves to a requirement that DOL issue individualized wage orders for each of the numerous occupations across a variety of industries for which it has administrative responsibility. Plaintiffs' approach is in contravention of the Act's requirement of periodic publication of Wage Orders, is unworkable in practice and ignores DOL's administrative knowledge of how [*33] best to address the common concerns that arise for 24-hour shift workers.9

Significantly, DOL's interpretation is congruent with the enforcement provisions of the Labor Law, which authorize private and regulatory enforcement actions for wage theft and other minimum wage law violations as a means to hold an employer accountable for abuse and exploitation of its workers (Labor Law § 663 [1]-[2]). DOL has determined that it can avoid exploitation of these employees by interpreting its Wage order to mandate a substantive period for sleep and meals to directly benefit the employee. The employer must pay when the employee is interrupted during these breaks for any time worked and must pay for the entire break when the employee does not receive the requisite hours of sleep and meal breaks. In other words, when the employee is able to take the prescribed eight hours of sleep and three hours of meal breaks, the home health care aide is paid for working the remaining time of the 24-hour shift-13 hours. If, in fact, the aide does not receive the minimum break time because the patient needs assistance, the aide is paid for 24 hours of work time. As DOL confirms, failure to provide a home health care aide with the minimum [*34] sleep and meal times required under DOL's interpretation of the Wage Order is a "hair trigger" that immediately makes the employer liable for paying every hour of the 24-hour shift, not just the actual hours worked. Thus, even if a home health care aide sleeps without interruption for four hours and 59 minutes, but is not able to obtain five full hours of sleep, DOL mandates the employer pay for the entire eight hours allotted for sleep. This is not inconsistent with interpreting the Wage Order's mandate as requiring an employee be paid for when they are intended to be available for work, and there is nothing unreasonable or irrational about interpreting "available for work" in this way. Indeed, under DOL's interpretation of the Wage Order, a home health aide is paid for every hour during which patient care is actually provided.

While we ultimately conclude that the Appellate Division failed to afford adequate deference to DOL's interpretation of the Wage Order, we do not ignore plaintiffs' and amici's claims that a

vulnerable population of workers is being mistreated. Plaintiffs' allegations are disturbing and paint a picture of rampant and unchecked years-long exploitation. Plaintiffs [*35] allege, among other things, that they rarely received required sleep and meal time during 24-hour shifts, were expected and required to attend to patients numerous times each night, and that defendants failed to track actual hours worked or make a serious effort to ensure adequate sleep and meal times, as required by law. In concluding that DOL's interpretation of the Wage Order is rational, we express no opinion on the ultimate merits of plaintiffs' claims. Moreover, to the extent plaintiffs' allegations suggest current enforcement priorities and methods are inadequate, it is for DOL and the Legislature, not this Court, to consider whether the sleep and meal time exemption is a viable methodology to ensure employer compliance with the law and proper wage payment in the case of home health care aides.

IV.

Class Certification

Defendants in both appeals argue that, assuming we defer to DOL's interpretation of the Wage Order, individual issues preclude class certification.10 According to defendants, because each putative class member's claim is fact-specific and turns on whether the health care aide received the requisite number of uninterrupted sleep and meal hours, plaintiffs may not offer [*36] generalized proof on a class-wide basis. While we do not pass on the ultimate merits of plaintiffs' class certification motions, we observe that HN10 New York's statutory class certification provisions are to be liberally construed (City of New York v Maul, 14 NY3d 499, 509, 929 N.E.2d 366, 903 N.Y.S.2d 304 [2010]; Sponsor's Mem at 1, Bill Jacket, L 1975, ch 207 [Article 9 was intended to replace New York's prior "restrictive" class action rules which "fail(ed) to accommodate pressing needs for an effective, flexible and balanced group remedy"]. CPLR article 9 recognizes that certain claims are unlikely to be litigated because the costs of individual cases outweigh the possible damages, thus making those cases unattractive to the private bar and resource-strapped government and nonprofit entities (see Sperry v Crompton Corp., 8 NY3d 204, 213, 863 N.E.2d 1012, 831 N.Y.S.2d 760 [2007] ["class actions are designed in large part to incentivize plaintiffs to sue when the economic benefit would otherwise be too small, particularly when taking into account the court costs and attorneys' fees typically incurred"]; Sponsor's Mem at 1, Bill Jacket, L 1975, ch 207 ["(Article 9) will enable persons similarly aggrieved to enforce existing substantive rights, which presently go without redress solely because of the financial impracticability of financing individual suits"]; 82 NY Jur 2d § 254 ["The statutory criteria [*37] governing the permissibility of class actions should be liberally construed so as to allow for the adjudication of claims that would not be economically litigable except by means of a class action"]).

Plaintiffs allege, and claim there is evidence of, defendants' systemic violations of the Wage Order and Labor Law, such as defendants' failure to adequately compensate home health care aides when they did not receive the minimum time for sleep and meal breaks during their 24-hour shifts, maintain adequate records of, or compensate for, the hours actually worked, and provide appropriate sleep facilities. HN11 Claims of uniform systemwide violations are particularly appropriate for class certification (see e.g. Maul, 14 NY3d at 513-514). Indeed, plaintiffs' allegations suggest a policy or practice of unlawful action of the type our courts have previously found ripe for class treatment (see id. at 513 [affirming certification of a class challenging "a de facto policy followed by (a city agency) of delaying the receipt of services as a result of its practices"]; Labor Law § 661; 12 NYCRR 142-2.6 [a] [4] [requiring employers to maintain records of "the number of hours worked daily and weekly]). DOL maintains that if plaintiffs establish prima facie that [*38] defendants failed to comply with Labor Law and regulatory record keeping requirements that the burden would shift to defendants to establish

they maintained the required work records, serving as another basis for class certification. We do not reach the underlying legal question raised by DOL's argument, but note only that assertion of these types of common questions may be considered by the courts in determining whether class certification is appropriate.

Conversely, HN12 the fact that damages may vary by class member does not per se foreclose class certification. As we have explained, "the legislature enacted CPLR 901 (a) with a specific allowance for class actions in cases where damages differed among the plaintiffs, stating the amount of damages suffered by each class member typically varies from individual to individual, but that fact will not prevent the suit from going forward as a class action if the important legal or factual issues involving liability are common to the class'" (Borden v 400 E. 55th St. Assocs., L.P., 24 N.Y.3d 382, 399, 998 N.Y.S.2d 729, 23 N.E.3d 997 [2014], quoting Mem of State Consumer Protection Bd at 3, Bill Jacket, L 1975, ch 207). A difference in damage awards is an insufficient basis to deny certification as a matter of law where the class may rely on representative evidence of the class-wide violations [*39] (see id.).11

Given the posture of these appeals-where the Appellate Division determined that class certification was appropriate under its erroneous interpretation of the Wage Order-we may not consider unaddressed or alternative grounds proffered for class certification. The courts below are charged with that task in the first instance and therefore we remit for that determination.

V.

For the reasons discussed, the Appellate Division orders should be reversed and the matters remitted to permit the courts below to evaluate the issues in accordance with DOL's interpretation of the Wage Order and to consider alternative bases for class certification. In Andryeyeva, because Supreme Court certified the class upon finding that DOL's interpretation did not apply to plaintiffs, and the Appellate Division affirmed, neither court reached the issue of whether class certification is otherwise warranted. Accordingly, in Andryeyeva, the Appellate Division order should be reversed, with costs, the matter remitted to Supreme Court for further proceedings in accordance with this decision, and the certified question answered in the negative. In Moreno, Supreme Court considered all of plaintiffs' [*40] alternative bases for class certification under DOL's interpretation of the Wage Order and the Appellate Division reversed based on that court's rejection of DOL's interpretation of the Wage Order. Accordingly, in Moreno, the Appellate Division order, insofar as appealed from, should be reversed, with costs, the matter remitted to the Appellate Division for further proceedings in accordance with this decision, and the certified question answered in the negative.

Lilya Andryeyeva v New York Health Care, Inc.
Adriana Moreno v Future Health Servs., Inc.
Nos. 11 & 12

Dissent by: GARCIA

Dissent

GARCIA, J. (dissenting):

Workers are entitled to a minimum wage for each hour worked (Labor Law § 652 [1]). Today, the majority defers to a New York State Department of Labor (DOL) interpretation of a wage order, allowing home health care aides to be paid an hourly rate less than minimum wage. That result is not only unfair, it is completely at odds with the plain text of the wage order. Accordingly, I dissent.

I.

The Minimum Wage Act, first enacted in 1937, was designed to address the financial hardship faced by those receiving "wages insufficient to provide adequate maintenance for themselves and their families" (Labor Law § 650). Payment of insufficient [*41] wages, the legislature noted, "threatens the health and well-being" of our State's workers (id.). In enacting the Minimum Wage Act, the legislature sought to provide relief "as rapidly as practicable without substantially curtailing opportunities for employment or earning power" (id.). Minimum wage standards are vital to accomplishing that goal (id.; see West Coast Hotel Co. v Parrish, 300 U.S. 379, 398-399, 57 S. Ct. 578, 81 L. Ed. 703 [1937] ["minimum wage requirements" prevent "the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living"]). Given these important policy objectives, and the careful balancing critical to setting a minimum wage, the Minimum Wage Act sets forth a detailed procedure for issuing wage orders-one that mandates transparency and the inclusion of various affected stakeholders (see Labor Law §§ 655-659).

As a first step, the Commissioner must convene and appoint a "wage board . . . composed of not more than three representatives of employers, an equal number of representatives of employees, and an equal number of persons selected from the general public" (Labor Law § 655 [1]). The wage board has extensive authority. It has the power to "conduct public hearings," "consult with employers and employees," issue subpoenas for "testimony . . . and books, records, [*42] and other evidence," and "cause depositions" (Labor Law § 655 [3]). The wage board's end goal is, with the approval of a "majority of its members," to "submit to the [C]ommissioner a report, including its recommendations as to minimum wages" in certain occupations (Labor Law § 655 [4]).

The wage board's submission of a report is followed by continued dialogue and consultation. The Commissioner is statutorily obligated to "publish a notice" of the report and to receive "objections to the report and recommendations" (Labor Law § 656). The Commissioner may then "accept . . . the board's report and recommendations"-potentially with modifications-or "reject" them (Labor Law § 657). If the board's report and recommendations are accepted, "[t]he Commissioner . . . thereafter issues a wage order setting a minimum wage in a specific occupation" (National Rest Ass'n v Comm'r of Labor, 141 AD3d 185, 192, 34 N.Y.S.3d 232 [3d Dept 2016]). The statute also contemplates further amendments; after the wage order "has been in effect for six months or more," the same wage board may be "reconvene[d]" by the Commissioner or on a "petition of fifty or more residents . . . in or affected by" the covered occupations (Labor Law § 659 [1]). "[A]ny minimum wage order . . . issued by the [C]ommissioner . . . shall, unless appealed from . . . be final" (Labor Law § 657 [1]).

This exhaustive process complies, [*43] as it must, with the strictures of the State Administrative Procedures Act (SAPA) (see majority op at 3). SAPA was formulated "[a]fter years of study . . . to guarantee that the actions of administrative agencies conform to uniform, sound and equitable standards" (Cortlandt Nursing Home v Axelrod, 66 NY2d 169, 177, 486 N.E.2d 785, 495 N.Y.S.2d 927 [1985]). Among other things, SAPA "outlines uniform administrative procedures that State agencies must follow in their rule making, adjudicatory and licensing processes" (Industrial Liaison Comm of Niagara Falls Area Chamber of Commerce v Williams, 72 NY2d 137, 144, 527 N.E.2d 274, 531 N.Y.S.2d 791 [1988]).

DOL's Minimum Wage Order Number 11 for Miscellaneous Industries and Occupations (the Wage Order) was passed in 1960 in accordance with the procedures required by SAPA and the Minimum Wage Act (see 12 NYCRR 142-2.14; see also Report of the Industrial Commissioner Upon the Promulgation of Minimum Wage Order No. 11 for Miscellaneous Industries and Occupations 1 [Sept 29, 1960]). In relevant part, the Wage Order provides:

"The minimum wage shall be paid for the time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in

traveling to the extent that such traveling is part of the duties of the employee. However, a residential employee-one who lives on the premises of the employer-shall not be deemed [*44] to be permitted to work or required to be available for work:

during [the employee's] normal sleeping hours solely because [they are] required to be on call during such hours; or

at any other time when [the employee] is free to leave the place of employment" (12 NYCRR 142-2.1 [b]).

As relevant here, the Wage Order mandates minimum wage compensation whenever an employee is "available for work at a place prescribed by the employer" (12 NYCRR 142-2.1 [b]). The Wage Order contains only one exception-applicable only to residential employees-permitting employers to deduct certain hours' of pay that would otherwise be compensable.

II.

Plaintiffs are non-residential home health care aides who work 24-hour shifts. During each shift, home health care aides are required to be present in the patient's home for the full 24-hour period (majority op at 9). They assist with a variety of tasks integral to a patient's daily functioning: "cooking, feeding, bathing, housework, using the restroom, and changing diapers" (majority op at 8). According to plaintiffs' allegations, home health care aides routinely do not receive meal breaks or adequate time for uninterrupted sleep, as their patients require assistance throughout the shift. As one employer's [*45] orientation manual states: "Patients are never to be left alone!" Plaintiffs further allege that defendants failed to record when (or even whether) plaintiffs took sleep and meal breaks, making it impossible to reconstruct their actual hours of work.

All agree that the Wage Order applies to plaintiffs in this case, and that plaintiffs do not fall within the Wage Order's "residential employee" exception (see majority op at 24-25). Though home health care aides are nowhere excepted from minimum wage requirements, DOL nonetheless contends that the Wage Order should be interpreted to exclude eleven hours of each plaintiff's work day: eight hours for "sleep time" and three hours for "meal time." Specifically, DOL argues that the phrase "available for work at a place prescribed by the employer" imposes two distinct requirements-"available for work" and "at a place prescribed by the employer"-such that physical presence on the premises is, by itself, inadequate for an employee to be deemed "available for work" (majority op at 19-20). In other words, DOL contends that, for non-residential employees like plaintiffs, the Wage Order should be interpreted to require both "presence and an availability [*46] during a time scheduled for actual work" (majority op at 19). Applying that interpretation, DOL asserts that home health care aides are not technically "available for work" during "sleep time" and "meal time," and therefore they need not be paid for those periods.

DOL (and the majority) may be correct that the Wage Order's "available for work" requirement entails more than physical presence at a place prescribed by the employer (majority op at 19). Unlike mere presence, the notion of availability implies that an employee is "ready, willing, and able to" take on work (Black's Law Dictionary, Available for Work [10th ed 2014]). Thus, an employee might not be "available for work" at a time when, for instance, the employee cannot be reached, or is otherwise guaranteed to remain undisturbed. Plaintiffs, then, must be both present and "available for work"-not merely present-to be entitled to minimum wage compensation.

But DOL (and the majority) cannot be correct that plaintiffs' sleep time may be excluded from their wages. Under the Wage Order's single exception-not applicable to plaintiffs-residential employees' "sleeping hours" are expressly excluded from the time they are considered "available [*47] for work," thereby allowing employers to deduct those hours' of pay. By providing that, for residential employees, sleep hours do not constitute time the employee is

"available for work," the exception signifies that, for all other employees, sleep hours do constitute time they are "available for work"-and, accordingly, must be paid (Walker v Town of Hempstead, 84 NY2d 360, 366-67, 643 N.E.2d 77, 618 N.Y.S.2d 758 [1994] [noting that it is "not . . . necessary" to provide exceptions to a general term if they "fall within the preceding general proscription"]; McKinney's Cons. Law of NY, Book 1, Statutes § 213 [noting that an exception encapsulates items that would "otherwise would fall within (the) scope" of a term]; CJS Statutes § 505 [noting that an exception operates to "remov(e) something . . . which would otherwise be within" the clause to which it applies]). Put differently, because residential employees' sleep hours are specifically excluded from compensable time, it must follow that sleep hours would otherwise constitute time for which the employee must be compensated; if sleep time did not fall within "available for work" time, there would be no need to expressly exclude it. Accordingly, while the "available for work" requirement might demand more than physical presence-for instance, [*48] prompt readiness or accessibility-it cannot exclude "sleeping hours" for non-residential employees.

The majority asserts that the "residential employee" exception does not "exclude" sleeping hours from compensable time, but rather serves only to "clarif[y] that sleeping hours shall not be deemed work hours solely because the employee is required to be on call during such hours" (majority op at 25 n 8 [quotation marks, brackets, and citation omitted]). Whether called an "exception" or a "clarification," the provision's import is the same: In specifying that a residential employee's sleeping hours should not be compensated solely because the employee is on call, the provision signifies that-for all other employees-sleeping hours should be compensated solely because they are on call.

By distinguishing residential from non-residential employees in this way, the Wage Order reflects the policies of dignity and fairness advanced by the Minimum Wage Act. Residential employees, by definition, have living quarters on the premises and are provided regular periods of rest. "In the ordinary course of events," a residential employee "has a normal night's sleep, has ample time in which to eat his meals, [*49] and has a certain amount of time for relaxation and entirely private pursuits," and "the employee may be free to come and go during certain periods" (U.S. Dept. of Labor, Interpretative Bulletin No. 13: Hours Worked - Determination of Hours for Which Employees are Entitled to Compensation Under the Fair Labor Standards Act of 1938 [July 1939] at 3). Recognizing this unique arrangement, the Wage Order permits employers to deduct a residential employee's "sleeping hours," as well as time when the employee is "free to leave the place of employment" (12 NYCRR 142-2.1 [b]).

Those presumptions of ample free time and private pursuits do not apply to non-residential home health care aides, who "do challenging labor, at all hours of the day and night" (majority op at 8; DOL Br at 29 ["To be sure, even during their sleep and meal breaks, employees working twenty-four hour shifts are not truly free from their employment - for example, they are generally not free to leave their employers' premises, and are expected to respond if called back to work"]). Unlike residential employees, who reside in their workplace, home health care aides report for a 24-hour shift, often remaining available from beginning to end. Given the nature [*50] of a home health care aide's work-providing 24-hour patient care without meaningful breaks-the Wage Order sensibly excludes them from the "residential employee" exception and its corresponding compensation deductions. In the context of "sleeping hours," the Wage Order recognizes that home health aides remain on call (i.e., "available for work") even during those hours designated for sleep12.

Under the plain terms of the Wage Order, for non-residential employees like plaintiffs-who remain consistently "available for work," even during sleeping hours-sleep time cannot be deducted from their pay. DOL's contrary reading is expressly belied by the text of the regulation, and therefore warrants no deference (see Visiting Nurse Serv. of New York Home Care v. New York State Dep't of Health, 5 NY3d 499, 506, 840 N.E.2d 577, 806 N.Y.S.2d 465 [2005]; Albano v Bd of Trustees of New York City Fire Dep't, 98 NY2d 548, 553, 780 N.E.2d 159, 750 N.Y.S.2d

558 [2002]; Raritan Dev Corp v Silva, 91 NY2d 98, 100, 689 N.E.2d 1373, 667 N.Y.S.2d 327 [1997]).

III.

Casting aside the plain text of the Wage Order, the majority defers to DOL's incompatible reading. Not only does that holding impose a new and problematic standard for agency deference, it enables DOL to circumvent statutory promulgation procedures in favor of an informal and erratic process replete with inconsistency. Worst of all, DOL's interpretation, now adopted by the majority, will have profound and far-reaching ramifications for a vulnerable and often mistreated workforce. [*51]

A.

Under the guise of deference, the majority adopts a construction of the Wage Order that runs contrary to the regulation's text. Deference is unwarranted, however, where an agency's interpretation is "irrational or unreasonable" (Matter of Howard v Wyman, 28 NY2d 434, 438, 271 N.E.2d 528, 322 N.Y.S.2d 683 [1971]) or, in other words, unsupported by the regulation's plain text (Visiting Nurse Serv, 5 NY3d at 506). While we will defer to "a rational interpretation that [is] not inconsistent with the plain language" (James Square Associates LP v Mullen, 21 NY3d 233, 251, 993 N.E.2d 374, 970 N.Y.S.2d 888 [2013]), we have never elevated deference over clear, unambiguous text.

Rather, as we have repeatedly emphasized, plain language must control over an inconsistent agency interpretation (see Raritan Dev Corp, 91 NY2d at 100 [noting our "long-established rule" that we "decline() to enforce" an agency interpretation that is "contrary to the plain meaning" of the relevant "language"]). We have therefore declined to "embrace a regulatory construction that conflicts with the plain meaning of the promulgated language" (Visiting Nurse Serv, 5 NY3d at 506). Indeed, where "the question is one of pure legal interpretation of statutory terms," we have held that "deference to the [agency] is not required" altogether (Matter of Toys "R" Us v Silva, 89 NY2d 411, 419, 676 N.E.2d 862, 654 N.Y.S.2d 100 [1996]). Because pure interpretation is the "function" of the courts, we have reasoned that there is "little basis to rely on any special competence [*52] or expertise of the administrative agency" (Albano v Board of Trustees of New York City Fire Dep't, 98 N.Y.2d 548, 553, 780 N.E.2d 159, 750 N.Y.S.2d 558 [2002]).

According to the majority, however, deference to DOL is warranted because, "having authored the promulgated text and exercised its legislatively delegated authority in interpreting it, the agency is best positioned to accurately describe the intent and construction of its chosen language" (majority op at 16). That is not, and has never been, a basis for deference at the expense of plain text13. The majority's novel standard elevates DOL's construction over the text of the Wage Order, suggesting that deference is warranted simply because DOL itself promulgated the regulation (majority op at 16-17). Of course, every agency interpreting its own regulation will satisfy the majority's negligible standard, even if the agency's construction is irrational or defied by the regulation's plain language. Such a toothless standard-deferring to an agency's construction of a regulation solely because the agency wrote it-not only distorts our principles of deference, it abandons the Court's role as the proper authority on matters of textual construction.

B.

DOL's atextual construction warrants particularly exacting scrutiny in light of the extensive, collaborative [*53] process by which wage orders must be created. The Minimum Wage Act establishes detailed procedures, involving research, consultation, public hearings, notice, and

input from various stakeholders. The transparency and delicate balancing that typify this process assure "fair and studied consideration" (majority op at 17), and ensure that each wage order furthers the critical policy goals underlying the Minimum Wage Act.

Rather than codify rules through the processes required by statute-mandating public notice, hearings, and comments-DOL opts to promulgate revised wage orders "under the guise of interpreting a regulation" (Christensen v Harris Cty, 529 U.S. 576, 588, 120 S. Ct. 1655, 146 L. Ed. 2d 621 [2000]; see also Talk Am, Inc v Michigan Bell Tel Co, 564 U.S. 50, 69, 131 S. Ct. 2254, 180 L. Ed. 2d 96 [2011] [Scalia, J., concurring] [allowing an agency "to do what it pleases" with an existing regulation "frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government"]; Axelrod, 66 NY2d at 177 [SAPA was designed to "guarantee that the actions of administrative agencies conform to uniform, sound and equitable standards"]). For instance, in support of its most recent interpretation of the Wage Order, DOL relies heavily on a 2010 opinion letter issued in response to the query of an undisclosed recipient. The opinion letter, signed only by an associate [*54] attorney at DOL, inserts a new exception into the Wage Order for "live-in, non-residential employees," permitting employers to compensate them for only 13 hours of each 24-hour shift (majority op at 5-6). Presumably, that opinion letter was never considered by the members of the wage board. It was never reviewed in consultation with affected employers or employees. And it certainly was never the subject of public notice or comment. Yet DOL contends that its opinion letter constitutes an "official statement" embodying the "general policy towards compensable work for 24-hour shift employees" (majority op at 6), irrespective of its consistency with the Wage Order's text. Such informal and unchecked modifications-through opinion letters, agency manuals, and other documents-enable DOL to circumvent statutory safeguards in favor of "interpretations" carrying the force of a duly promulgated regulation. And by issuing interpretations untethered to the Wage Order's text, DOL undermines the collective outcome of a comprehensive, statutorily-mandated process.

The majority predicts "staggering burdens" if DOL were forced to issue a separate regulation (majority op at 26 n 9). But the federal government's [*55] scheme-which the majority seeks to emulate (majority op at 24)-has done just that. In lieu of ever-changing "interpretations," the federal Department of Labor employs detailed, duly promulgated provisions aimed at implementing clear, codified rules (see 20 FR 9963, 9965 [Dec 24, 1955]). For instance, unlike the Wage Order, the relevant federal provisions expressly carve out exceptions for "employee[s] . . . required to be on duty for 24 hours or more" (20 FR at 9965; see also 29 CFR 785.22). For that category of employees, "the employer and employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished" (20 FR at 9965; see also 29 CFR 785.22). And for "[e]mployees residing on employer's premises," any "reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted" (20 FR at 9965; see also 29 CFR 785.23).

If DOL prefers an alternative compensation scheme-so as to dock eleven hours of plaintiffs' pay-it should amend the Wage Order in accordance with statutory procedure. While a "separate regulation" is not required "for every circumstance" (majority op at 26 n 8 [emphasis added]), it is required for those instances [*56] involving dramatic pay cuts that are directly precluded by existing regulations. DOL itself apparently recognizes the importance of the promulgation process in adopting exceptions to minimum wage requirements; DOL saw fit to codify the "residential employee" provision before implementing those pay exclusions. Given the devastating impact of DOL's "interpretation"-imposing substantive changes and substantial pay cuts-compliance with formal promulgation procedures is hardly an unreasonable requirement. Any "burdens" that may result (majority op at 26 n 9) are in place by design: the Minimum Wage Act requires a comprehensive and transparent process in order to ensure a balanced and fair result for our State's employees.

As this case bluntly demonstrates, agency regulations carry the force of law; they "frequently play a more direct role than statutes in defining the public's legal rights and obligations" (John F Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum L Rev 612, 615 [1996]). DOL's "experience with the particularities of this occupation" might well provide a basis for modifying the existing regulatory regime (majority op at 23). It does not, however, [*57] permit DOL to unilaterally impose an entirely new wage order.

C.

Seeing no issue with DOL's evasion, the majority asserts that deference is further warranted because, "for five decades," DOL has not "vacillated in its position" (majority op at 21). Even if a longstanding, uniform construction could supersede plain text, DOL has not exhibited the consistency or clarity that the majority describes. Rather, DOL has been consistent on one and only one position: nonresidential home health care aides may be paid for fewer hours than their shift requires. The interpretations that DOL has adopted to achieve that result have "vacillated" dramatically.

In a 1972 version of DOL's enforcement manual, investigators were told that, to discount a home health care aide's working hours, a "bona fide, regularly scheduled sleeping period'" must be established, and "[t]he employer and the employee [must] agree to exclude" those hours from "working time" (DOL Br at ADD91). The 1972 manual also stated that, in order to exclude an aide's sleeping period, "[a]dequate sleeping facilities" must be "provided" to the employee (id.). That guidance was relatively short-lived. In a 1988 opinion letter issued by the [*58] Supervisor for the Administrative Services Unit, DOL moved to a "rule of thumb" that fixed "13 hours as the normal standard for working time" for home health care aides (DOL Br at ADD134). A bona fide, regularly scheduled sleeping period was no longer required. An agreement between employer and employee was no longer required. And adequate sleeping facilities were no longer required.

DOL shifted yet again in 1995. That year, DOL Counsel's Office issued an opinion letter explicitly distinguishing between "live-in home health aides" and "non-live-in home health aides" (DOL Br at ADD139-140). For "non-live-in home health aides," the opinion letter established that only "time actually afforded for sleeping and eating" may be excluded from pay. The 13-hour "rule of thumb," however, no longer applied. Three years later, in 1998, the Commissioner issued another opinion letter returning to the 1988 rule (DOL Br at ADD148-149). Four years after that, in 2002, DOL Counsel's Office reverted back to the 1972 scheme, requiring an agreed-upon sleeping period and adequate sleeping facilitates (DOL Br at ADD150). Eventually, in opinion letters sent to various recipients in 2009 and 2010, DOL swung [*59] back to its "rule of thumb" (DOL Br at ADD153-160).

Far from "consistently interpret[ing] the Wage Order" (majority op at 6), DOL has adopted varying and even conflicting interpretations of the very same text. These so-called "minor variations" (majority op at 22 n 6) have very real effects on plaintiffs' lives: they make the difference between adequate sleeping facilities (or not), an agreed-upon schedule (or not), and a livable wage (or not). In light of the profound impact on plaintiffs' daily lives, they are certainly entitled to "quibble[]" (majority op at 21 n 6) over these meaningful departures from their governing wage order.

IV.

As the majority notes, home health aides "care for some of the most vulnerable members of our society, doing work essential to the survival of their patients" (majority op at 7). These employees are "predominantly composed of women and recent immigrants" (majority op at 7),

and comprise a workforce that is "easily exploited and vulnerable to various forms of wage abuse" (majority op at 8). Plaintiffs allegations in this case are "disturbing" to say the least, and "paint a picture of rampant and unchecked years-long exploitation" (majority op at 28). DOL's [*60] interpretation of the Wage Order not only enables this mistreatment of home health care aides, it directly affects their livelihood: with eleven hours of pay deducted from their earnings, home health care aides are paid an hourly rate less than the statewide minimum wage. Rather than hold DOL accountable, the majority defers.

In lieu of relief, the majority instructs plaintiffs to go back and seek class certification-which may ultimately be denied-so they might retroactively recover pay for years-old violations of DOL's sleep and meal rules (majority op at 28-31). It is little consolation to afford plaintiffs merely a chance to win what they have already earned: a day's wages for a day's work.

For Case No. 11: Order reversed, with costs, matter remitted to Supreme Court, Kings County, for further proceedings in accordance with the opinion herein and certified question answered in the negative. Opinion by Judge Rivera. Chief Judge DiFiore and Judges Stein, Wilson and Feinman concur. Judge Garcia dissents and votes to affirm in an opinion in which Judge Fahey concurs.

For Case No. 12: Order, insofar as appealed from, reversed, with costs, matter remitted to the Appellate Division, Second [*61] Department, for further proceedings in accordance with the opinion herein and certified question answered in the negative. Opinion by Judge Rivera. Chief Judge DiFiore and Judges Stein, Wilson and Feinman concur. Judge Garcia dissents and votes to affirm in an opinion in which Judge Fahey concurs.

Decided March 26, 2019

Footnotes

1

The Act initially referred to the "Industrial Commissioner," which remained the title until 1982 when the Legislature renamed the position "Commissioner of Labor" (L 1982, ch 86, §§ 1-2). To avoid confusion, we refer to the individual holding this position as the "Commissioner."

2

Under DOL regulations, employers are required to pay a "spread of hours" premium of "one hour's pay at the basic minimum hourly wage rate" to a covered employee who works a shift of more than 10 hours (12 NYCRR 142-2.4 [a]).

3

The RIS is a statutory requirement. Pursuant to SAPA, except under circumstances not relevant to these appeals, an agency shall "issue a regulatory impact statement for a rule proposed for adoption or a rule adopted on an emergency basis," containing information such as the statutory basis for the proposed rule, "needs and benefits," projected costs of the rule, and a compliance schedule (SAPA § 202-a [2]-[3]).

4

Plaintiffs have not argued that DOL's interpretation of the Wage Order conflicts with New York State's Labor Law and no such question is presented in these appeals.

5

The dissent rejects DOL's interpretation of "available for work," in part, because home health care aides "provid[e] 24-hour patient care without meaningful breaks" (dissenting op at 8; see also dissenting op at 16 [plaintiffs are entitled to "a day's wages for a day's work"]). This conclusion assumes plaintiffs' allegations are true. If defendants complied with DOL's guidance, then plaintiffs should have been paid the minimum wage for every hour worked and received the required sleep and meal breaks. If, as plaintiffs allege and the dissent apparently accepts, plaintiffs worked 24-hour shifts without "meaningful breaks," then, as DOL agrees, plaintiffs would be entitled to compensation for the entire 24-hour period. In fact, it is possible that a home health care aide may be paid for more hours than they actually work

under DOL's interpretation. If an aide receives a modicum of sleep below the five-hour minimum and less than three hours of meal breaks, the employee must be paid for the full 24 hours. There is nothing irrational about this construction of the Wage Order, nor is it inconsistent with the plain language of the regulatory text.

6

The dissent's contention that DOL's interpretation has " vacillated' dramatically" (dissenting op at 14) is unfounded. The substance of DOL's interpretation is that employees who work 24-hour shifts and receive bona fide, uninterrupted sleep and meal breaks are not "working" within the meaning of the Wage Order during those breaks, unless actually called upon to perform tasks. The dissent does not argue-because it cannot-that DOL has departed from this core understanding in any of the publications it has issued over the past 50 years. Instead, the dissent quibbles that DOL stated in 1972 that the exclusion only applies when sleep breaks are "bona fide" and "regularly scheduled" and "[a]dequate sleeping facilities" are "provided," but then explained 16 years later that, as "a rule of thumb," DOL considered 13 hours to be the " normal standard for working time' for home health care aides" (dissenting op at 15). Minor variations in DOL's articulation do not change the fact that DOL has never said that a home health care aide must be paid the minimum wage for every hour of a 24-hour shift in all circumstances. Instead, DOL has consistently maintained that home health care aides are not "available for work" within the meaning of the Wage Order during sleep and meal breaks, but must be compensated if called upon to work.

7

The dissent is mistaken that the Court "seeks to emulate" the federal regulatory scheme (dissenting op at 12). The Court is not emulating or adopting any particular approach. Instead, we have applied our well-established jurisprudence to defer to DOL's interpretation because it is neither irrational nor unreasonable and is not contrary to the regulatory text. However, as explained above, we cannot see how it would be irrational or unreasonable for DOL to track the federal approach with respect to sleep and meal breaks for employees who work 24-hour shifts.

8

The dissent argues that the residential employee provision "expressly exclude[s]" such employees' sleeping hours, and so "it must follow" that sleep time is otherwise compensable under the Wage Order (dissenting op at 6-7). This analysis is fundamentally flawed. Contrary to the dissent's claim, the clause does not "expressly exclude[]" a residential employee's sleeping hours from compensable time. Rather, it clarifies that sleeping hours "shall not be deemed" work hours "solely because [the employee] is required to be on call during such hours" (12 NYCRR 142-2.1 [b] [1] [emphasis added]). The dissent contends that this language indicates that sleep time for all other employees "should be compensated solely because they are on call" (dissenting op at 7). However, the Wage Order's text does not compel that interpretation, and DOL has reasonably determined that home health care aides are not "on call" when asleep and certain conditions are satisfied.

9

The dissent appears to embrace this position, concluding that deference to DOL's interpretation allows the agency to "circumvent statutory safeguards in favor of interpretations'" (dissenting op at 12). The dissent's position is unprecedented and would upset established administrative law doctrine. Issuing interpretative guidance is a critical aspect of an agency's role, allowing regulated entities to understand how the law applies to their unique and varied circumstances. As noted above, the Wage Order was duly promulgated pursuant to SAPA. To require DOL to issue a separate regulation for every circumstance facing every profession is not required under SAPA and would impose staggering burdens on the State's administrative agencies.

10

The Andryeyeva defendants apparently concede that if we adopt plaintiffs' interpretation of the Wage Order, there is no statutory or factual impediment to class certification. The Moreno defendants contend that, regardless of whether the Court adopts DOL's interpretation, plaintiffs failed to offer sufficient evidence to satisfy the numerosity, commonality, or typicality requirements.

11

The Andryeyeva defendants' argument that Andryeyeva's disavowal of liquidated damages was an insufficient waiver on behalf of the class is without merit as she clearly stated she was waiving the liquidated damages claim in order to pursue the matter as a class action (see Borden, 24 NY3d at 394).

12

Whether a home health care aide is in fact called upon to perform services during "sleeping hours" does not determine whether the aide is, in the plain meaning of the term, "available for work."

13

Nor is that approach condoned by Matter of Peckham v Calogero (12 NY3d 424, 911 N.E.2d 813, 883 N.Y.S.2d 751 [2009]), the authority on which the majority relies (majority op at 16).

TINSMON CASE

Matter of Tinsmon (Lasher)

Matter of Tinsmon (Lasher) 2019 NY Slip Op 01471 Decided on February 28, 2019 Appellate Division, Third Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided and Entered: February 28, 2019
526747

[*1]Guardianship of JENNIFER LASHER TINSMON.

and

CHRISTOPHER J. LASHER et al., Respondents; ALBANY COUNTY DEPARTMENT OF SOCIAL SERVICES, Appellant.

Calendar Date: January 9, 2019
Before: Egan Jr., J.P., Clark, Mulvey, Devine and Rumsey, JJ.

Daniel Lynch, Albany County Attorney, Albany (Albert F. Dingley of counsel), for appellant.

Wilcenski & Pleat PLLC, Clifton Park (Edward V. Wilcenski of counsel), for respondents.

MEMORANDUM AND ORDER

Devine, J.

Appeal from an order of the Surrogate's Court of Albany County (Pettit, S.), entered February 22, 2018, which granted petitioners' application, in a proceeding pursuant to SCPA 2107, for advice and direction regarding a proposed sale of certain real property.

In 2011, Jennifer Lasher Tinsmon suffered a disabling traumatic brain injury at the age of 42. Petitioners are her parents and, following her injury, were named the guardians of her person and property. They are also the trustees of a first-party supplemental needs

trust that was established in August 2011 and exists "to shelter [Tinsmon's] assets for the dual purpose of securing or maintaining eligibility for state-funded services, and enhancing [her] quality of life with supplemental care paid by [the] trust assets" (Matter of Abraham XX., 11 NY3d 429, 434 [2008]; see 42 USC § 1396p [d] [4]). Tinsmon's home, which is jointly owned by herself and petitioner Helena Lasher, was not placed in trust inasmuch as a residence cannot be counted in determining eligibility for certain means-tested benefits (see 42 USC § 1382b [a] [1]; 20 CFR 416.1212 [a]; 18 NYCRR 360-1.4 [f]; 360-4.7 [a] [1]). Tinsmon qualified for and began receiving such benefits, namely, supplemental security income (hereinafter SSI) and Medicaid benefits.

In September 2017, petitioners commenced this proceeding pursuant to SCPA 2107 to obtain, as is relevant here, approval for their proposal to expend trust funds to purchase Lasher's interest in Tinsmon's home and pay off an encumbering mortgage on it, leaving them with title to the home as Tinsmon's guardians. Over respondent's opposition, Surrogate's Court approved the plan. Respondent now appeals.

We affirm. Petitioners proposed acquiring Lasher's interest in the home on very favorable terms and paying off the mortgage, actions that would leave Tinsmon, through petitioners as her guardians, as the sole owner of an unencumbered residence without impacting her SSI or Medicaid benefits. A guardian ad litem appointed for Tinsmon by Surrogate's Court supported this proposal, which appears to be well within petitioners' "sole and absolute discretion" under the trust agreement to make expenditures for Tinsmon's benefit after considering any impact on her access to government benefits (see EPTL 7-1.12). Respondent objected only to the proposed transfer of title to petitioners as Tinsmon's guardians, arguing that administrative interpretations of the applicable statutes require that petitioners either hold title to the home as trustees or provide security to the trust for its investment into the home. Respondent's interest in this regard may be explained by the fact that the trust assets remaining when Tinsmon dies, regardless of how old she is when that occurs, will be first used to reimburse the entities that provided Medicaid benefits to her during her life (see 42 USC § 1396p [d] [4] [A]; Social Services Law § 366 [2] [b] [2] [iii]; Matter of Abraham XX., 11 NY3d at 436; compare Social Services Law § 369 [2] [restricting the respondent's ability to recover against the assets of a benefits recipient who dies before reaching 55 years of age]).

Respondent does not point to, and our review does not disclose, any statutory authority that would require its desired outcome. Respondent suggests that such a requirement may be found in guidelines, used by the Social Security Administration to process SSI benefit claims, that reflect the agency's expertise in implementing the pertinent statutes and are "entitled to 'substantial deference'" (Lopes v Department of Social Servs., 696 F3d 180, 186 [2d Cir 2012], quoting Bubnis v Apfel, 150 F3d 177, 181 [2d Cir 1998]; see Matter of Jennings v Commissioner, N.Y.S. Dept. of Social Servs., 71 AD3d 98, 109 [2010]). The guidelines contradict respondent's argument, however, providing that when funds from a trust are "used to purchase durable items, e.g., a car or a house, the individual (or the trust) must be shown as the owner of the item in the percentage that the funds represent the [item's] value" (Program Operations Manual System [POMS]

former SI 01120.201 [F] [1] [emphasis added]). Further, petitioners are not obligated to conserve trust assets for respondent's eventual benefit, which would conflict with their mandate to act for Tinsmon's benefit by using "so much (even to the extent of the whole) of the net income and/or principal of th[e] trust" (EPTL 7-1.12 [e] [1] [1]; see e.g. Matter of Shah [Helen Hayes Hosp.], 95 NY2d 148, 163 [2000]). Surrogate's Court was accordingly correct to conclude that petitioners' proposal was permissible and did not err in approving it.

To the extent that the contention is properly before us, the Social Security Administration does not possess a "remainder interest" in the trust that would entitle it to notice of this proceeding (Social Services Law § 366 [b] [2] [v]; see 42 USC § 1396p [d] [4] [A]; SCPA 103 [39]; 2101 [3]). Respondent's remaining arguments have been examined and are lacking in merit.

Egan Jr., J.P., Clark, Mulvey and Rumsey, JJ., concur.

ORDERED that the order is affirmed, with costs.

ESTATE OF ELI T.

17-A APPLICATION DENIED

Elder Law and Special Needs Section

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Interesting Article 17-A case

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Ira Salzman

In this SCPA Article 17-A case the respondent had an IQ of 64. An application for the appointment of a guardian was denied because the court determined that with the support of his loving family he could make decisions on his own.

Estate of Eli T., 2018 NYLJ LEXIS 4125

Copy Citation

Surrogate's Court of New York, Kings County

December 12, 2018, Decided; December 14, 2018, Published

16-XXX/C

Reporter

2018 NYLJ LEXIS 4125 *

ESTATE OF ELI T., Deceased

Notice:

(ESTATE OF ELI T., Deceased (16-XXX/C), NYLJ, Dec. 14, 2018 at p.43, col.3)

Core Terms

guardianship, disability, appointment, make a decision, decisions, manage, best interest, psychologist, guardian, licensed, individual's

Judges: **[*1]** Surrogate Torres

Opinion

ESTATE OF ELI T., Deceased (16-XXX/C) Before the court is a guardianship proceeding pursuant to Article 17-A of the Surrogate's Court Procedure Act (Article 17-A) to appoint Sarah T. and Solomon T. (together, the petitioners) as guardians of the person of Eli T. (the respondent or Eli), and for the appointment of Chaim T. as stand-by guardian.

Article 17-A governs guardianship of persons who are diagnosed with an intellectual or developmental disability. SCPA 1750 , SCPA 1750-a . An intellectually disabled person is defined by SCPA 1750 as one who is permanently or indefinitely incapable of managing oneself and/or one's own affairs because of an intellectual disability. The condition must be certified by a licensed physician and a licensed psychologist or by two licensed physicians, one of whom has familiarity with or knowledge of the care and treatment of persons with intellectual disabilities. It must appear to the satisfaction of the court that the best interests of such person will be promoted by the appointment of a guardian. SCPA 1754 (5) . A developmentally disabled person is defined by SCPA 1750-a as one who has an impaired ability to understand and appreciate the nature and consequences of decisions which result in one's incapacity to manage oneself and/or one's **[*2]** own affairs. The developmental disability must be permanent or indefinite and attributable to cerebral palsy, epilepsy, neurological impairment, autism, traumatic brain injury, or any condition found to be closely related to intellectual disability. The condition must have originated before the age of 22, except for traumatic brain injury which has no age limit. As with SCPA 1750 , the condition must be certified by a licensed physician and a licensed psychologist or by two licensed physicians, one of whom has familiarity with or knowledge of the care and

treatment of persons with developmental disabilities, and the court must determine that it is in such person's best interest that a guardian is appointed. SCPA 1754 (5) . The legal analysis in determining the need for guardianship is functionally the same whether an individual's disability is categorized under section 1750 or 1750-a of SCPA and relies upon the same body of law.

Under Article 17-A, the appointment of guardianship results in the complete removal of the individual's legal right to make decisions over her or his own affairs. "The imposition of an Article 17-A guardianship is plenary, and, under the provisions of the statute, results in the total deprivation of the individual's **[*3]** liberties," Matter of Michael J.N., 58 Misc 3d 1204 (A) (Sur Ct, Erie County 2017). On its face, the plain statutory language of Article 17-A does not grant a court authority or discretion to limit or tailor the scope of guardianship to meet the individual's specific areas of need, unlike guardianships available under Article 81 of the Mental Hygiene Law (Article 81) which expressly provides a tailored approach to meeting the needs of an alleged incapacitated person. Matter of Chaim A.K., 26 Misc 3d 837 (Sur Ct, New York County 2009) ; Matter of D.D., 50 Misc 3d 666 (Sur Ct, Kings County 2015) ; Matter of Michael J.N., supra; Matter of Sean O., NYLJ, Oct. 7, 2016, at 26, col 6 (Sur Ct, Suffolk County). For this reason, an Article 17-A guardianship is the most restrictive type of guardianship available under New York law and should only be granted in the absence of less restrictive alternatives. See Matter of K.L., NYLJ 1202792444598 (Sur Ct, Richmond County 2017); Matter of Michelle M., 52 Misc 3d 1211(A) (Sur Ct Kings County 2016) .

Submitted in support of the petition are two requisite certifications, from Moshe Lazar, M.D., and Alan Blau, Ph.D.1 Dr. Blau, who supervised the administration of the Stanford Binet Intelligence Scales-Fifth Edition and Vineland Adaptive Behavior Scales, confirms the diagnosis of Downs Syndrome and adds, in his certification, that the respondent "functions within the mild range of intellectual disability" with a full scale IQ score of 64 and adaptive **[*4]** behavior composite score of 77. Dr. Lazar's certification, in describing the mental and physical condition of the respondent, simply states, "physical condition normal. Mental retardation. Down's syndrome."

A psychological evaluation from the New York State Hamaspik Association (the evaluation) and a psycho-social summary completed by Neil Weinstein, LMSW, were also submitted. The evaluation reveals that Eli's area of cognitive strength is fluid reasoning, described as "ability to solve verbal and nonverbal problems using inductive or deductive reasoning." His score of 79 in this area is classified as "borderline deficient." The evaluation also shows that Eli's area of relative cognitive weakness is knowledge, described as "acquired accumulated fund of general information acquired at home, school or work." His score of 60 in this area is classified as "mildly deficient." The

evaluation describes Eli as a young man who possesses communication, daily living, and socialization skills ranging from "adequate" in certain areas of adaptive behavior, to "moderately low" in others. In the area of communication, the psychologist found that Eli is capable of describing short and long term goals, [*5] giving directions to and receiving directions from others, and "using irregular plurals correctly." The psychologist further found that "Eli understands sayings that are not meant to be taken word for word. He follows three part instructions. Eli follows instructions in if-then form and follows instructions heard five minutes before." With respect to reading and writing skills, Eli reads on at least a fourth, sometimes a sixth grade level, and he writes reports, papers or essays that are one or more pages long, completes mailing and return addresses on letters and packages, and composes business letters and correspondence at least ten sentences long. The psychologist observed that Eli sometimes self-edits or corrects before submitting his written work. In the area of daily living skills, the evaluation shows that Eli is independent in all aspects of his personal hygiene. He also takes his medicine as directed, cares for minor cuts, and seeks medical help in an emergency. He is able to use the stove, oven and the microwave for heating, baking, or cooking meals. He prepares food using a sharp knife and uses ingredients that require measuring mixing and cooking. Mr. Weinstein described [*6] Eli as "a very sweet, good natured 22 year old young man with the diagnosis of Down Syndrome and mild intellectual disability." According his summary, Eli received centerbased education services, including speech therapy, occupational therapy, and physical therapy during his perschool years, and then was placed in a MIS-4 special education program through the Board of Education. After he graduated, he attended the Jewish Center for Special Education, a high school program for boys with Downs Syndrome, and attended their vocational training program. Having graduated, Eli volunteers at the Boro Park Rehabilitation Center (the Center).

A hearing was held during which oral testimony was given by Eli and the petitioners, who are Eli's parents, and who were represented by counsel. The Court had an opportunity to observe Eli's demeanor, which the Court found to be engaging, inquisitive, observant, informed, and highly conversant.

Eli testified that he volunteers five days a week at the Center, which he explained was a rehabilitation and healthcare center. His responsibility as a patient transporter is to bring patients from their rooms to the rehabilitation rooms, and then transport the patients [*7] back to their rooms in their wheelchairs. He testified he liked his job and when asked why, he responded, "Well, it keep me healthier. It keeps me on my feet." He testified that he tries to get to work at 9 o'clock but "it depends how long prayer takes." His shift ends at 2:30 p.m. Eli uses public transportation

independently. Although he has not yet been travel trained to use the subway, Eli uses buses to travel. In his commute to the Center, Eli rides the public bus for 45 minutes to an hour each way. Three times a week, he works out at a gym after work, traveling independently from the Center to the gym. "I take the B11 from the Center, and then from the gym I take the B68," Eli testified. At the gym, Eli works out on the treadmill, lifts weights, uses the bike, and engages in other aerobic activities. He testified that working out makes him feel better and helps him lose weight so he can avoid diabetes. The petitioners testified that Eli's doctor had informed them that he was a prediabetic candidate. Eli stated, "I've decided to get out of the zone before I get onto it," explaining his plan to start eating healthier and get more exercise.

Currently, Eli receives Supplemental Security [*8] Income (SSI) and his parents assist him in managing his money. Eli testified that most of his money is deposited at Signature Bank but he carries pocket money, given to him by his dad from his own account, from which he makes purchases on his own. Eli testified that he does not get paid for the work he does at the Center, but he would one day like to have a job that pays.

Eli expressed that he would like to get married at some point, and "the money in the bank will buy, I'd pay for the apartment and the mortgage." He does not currently have a girlfriend nor is he dating, which he described as "when you actually meet a girl and you take her out." At one point when the Court asked, "do you see girls in the synagogue?" Eli corrected, "I see ladies."

Eli testified that he enjoys listening to music, reading the Bible, dancing, watching the news as well as shows on YouTube such as "The Three Stooges," "The Dick Van Dyke Show," "I Love Lucy," and "the Honeymooners." When asked why he likes to watch these old shows, Eli explained that he learns lessons from them. From "The Honeymooners," Eli explained that he learned, "don't be a big shot," while from "I Love Lucy," he learned "don't get into [*9] so much trouble," elaborating that "Lucy is like, she's a simple lady who gets into a lot of trouble with her husband." He also opined that he would not like to have a marriage exactly like Lucy's; rather he would like his marriage to be "hopefully calm." When asked if he found the show to be calm, he responded, "No, no. Plenty of yelling , shouting, hitting...[t]hat's when you begin to fall apart...[t]hat's when you ruin a marriage." Eli also follows the news, noting that there are "interesting politics" with respect to the (then) upcoming presidential election. Eli testified he is registered to vote and planned to vote in the November presidential election. When asked who was running, he said "Hillary Clinton and some crazy guy that's Trump." He also observed "Well, it looks like Hillary is going to win the White House. That's what the polls are saying."

Eli resides with his parents, the petitioners, and is the youngest of 11 adult children. Eli testified

that his responsibilities at home include taking out the garbage and helping clean the house. He does not usually assist his mother, who does most of the cooking, in the kitchen but he testified he can cook light things like eggs [*10] and a sandwich, and in the past he has helped bake.

Eli testified that he believes he needs help with issues like medical choices. Aside from expressing concern over how knowing much medicine to take, Eli articulated no other type of medical situations for which he needed a guardian. He testified that he does not regularly take medicine, but during the previous summer he recalled having to take a "Z pack" for his sore throat. He appears to be generally healthy.

Eli's mother testified that they would like to help Eli make wise decisions including medical and financial decisions. She testified that Eli can't do math problems, but she thinks he could learn how to manage a checking account. Eli's father testified that Eli's SSI checks are directly deposited into a joint checking account held in Eli's and his father's names. Eli's father further testified that he then writes out a check from that joint account to himself, deposits it into his personal account, and then he uses the funds for Eli's benefit. Often Eli's expenses exceed what he receives in SSI, and his parents make up the difference. Eli's father testified that there hasn't been anything that Eli has wanted that they did not [*11] provide for, which Eli confirmed. Eli's father expressed that they want to be included in Eli's medical care and to be able to discuss medical issues with Eli's doctors, although both parents testified that Eli has never objected to their presence and participation during his doctor's visits. Eli's father also testified that it would be must easier to talk with the SSI program. When asked to articulate any other reasons the petitioners seek guardianship, Eli's mother testified "I don't see the down side to it." The petitioners affirmed that they never looked into obtaining a healthcare proxy or becoming a payee for Eli's SSI funds. The sole area of contention between the petitioners and Eli, as presented, was with respect to the petitioners' concern about Eli's weight. Eli's mother testified that they have to monitor what Eli eats, and that she prepares Eli's breakfast and dinner in order to manage his food intake. "If we did not watch the pantry and minimize the amount of nosh in the house, things would get out of control," Eli's mother testified.

Aside from a disagreement between Eli and the petitioners over whether Eli administered medication independently or was assisted by Eli's [*12] mother, and an erroneous recollection of the duration of the "Z pack" medicine, there were no specific examples proffered of how Eli has made any medical decisions that have adversely affected his well-being. The petitioners, who make medical appointments for Eli, are always present and authorized by Eli to speak with his physicians. With his consent, Eli's finances are already managed by the petitioners in a joint bank

account, and to the extent that Eli desires that his parents communicate more directly with the Social Security Administration regarding his SSI, he may choose to designate the petitioners as his payee, a far less restrictive alternative to guardianship. With respect to Eli's weight, it has not been shown how the petitioner's desire to help Eli maintain a healthy weight, a goal which Eli evidently shares, will be aided by the imposition of an Article 17-A guardianship.

There is no doubt that the petitioners are deeply devoted to Eli and are motivated by what they believe is in his best interest. While one's natural instinct to protect one's loved one may be assuaged by the appointment of a guardian, it is not, however, in the best interest of a person who can make decisions **[*13]** aided by the support of those he trusts, to have his ability to make decisions wholly removed by appointing a Article 17-A guardian, no matter how well-intentioned the guardians. The appropriate legal standard is not whether the petitioners can make better decisions than Eli; rather, it is whether or not Eli has the capacity to make decisions. The record presented is devoid of evidence regarding Eli's inability to make decisions with the support he currently has; indeed, no actual harm resulting from Eli's decision-making, preventable by the appointment of guardianship, has been demonstrated or even alleged.

Upon the record presented, the credible evidence demonstrates that Eli is an adult who has cognitive limitations but also has capacity to make decisions affecting the management of his affairs with the sufficient and reliable support of his loving family. Where, as here, the individual has strong support from family members and/or supportive services with whom he already consults in managing his affairs and making decisions, imposing a plenary guardianship is not in the individual's "best interest." Matter of Dameris, supra at 579. To allow Eli to retain the legal right to make **[*14]** personal decisions about his own affairs, while providing him with any necessary assistance to make or communicate those decisions in a supported decision-making framework, is ultimately in his best interest.

To the extent that Eli may desire additional support, evidence of which has not been presented, alternatives to guardianship, such as a durable power of attorney, advance directives, health care proxies, and representative payee arrangements, can provide targeted assistance without wholly supplanting Eli's right to make decisions in every aspect of his affairs.

Accordingly, the petition is denied and dismissed.

Dated: December 5, 2018

Brooklyn, New York

Footnotes

- 1

  These certifications are generally boilerplate forms where the affirmant physician or psychologist checks off pre-printed conclusions relating to the decision-making capabilities of an intellectually or developmentally disabled individual. These forms are dismally wanting in details and useful information regarding the functional capacity of the respondent.

MATTER OF DELANEY

POA CAN CREATE SELF SETTLED SNT

Matter of Anna F., 2018 N.Y. App. Div. LEXIS 5541

Copy Citation

Supreme Court of New York, Appellate Division, Second Department

August 1, 2018, Decided

2017-07686

Reporter

2018 N.Y. App. Div. LEXIS 5541 * | 2018 NY Slip Op 05590 **

[**1] In the Matter of Anna F. (Anonymous). Faina Laut, petitioner-appellant. (File No. 1908/16)

Notice:

THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

Core Terms

disability, guardian, manage, intellectually, guardianship, appointed, evaluated, incapable, primary care physician, licensed psychologist, mentally retarded, best interest, court-authorized, indefinitely, affirmation, apartment, permanent, appeals, decree, lived, remit

Counsel: **[*1]** The Family Center, Brooklyn, NY (Lauren Elizabeth Groetch of counsel), for petitioner-appellant.

Judges: MARK C. DILLON, J.P., SHERI S. ROMAN, SYLVIA O. HINDS-RADIX, VALERIE BRATHWAITE NELSON, JJ. DILLON, J.P., ROMAN, HINDS-RADIX and BRATHWAITE NELSON,

JJ., concur.

Opinion

DECISION & ORDER

In a guardianship proceeding pursuant to Surrogate's Court Procedure Act article 17-A, the petitioner appeals from an order of the Surrogates Court, Kings County (Margarita Lopez Torres, S.), dated February 16, 2017. The order, after a hearing, denied the petition and dismissed the proceeding.

ORDERED that the order is reversed, on the law and the facts, without costs or disbursements, the petition for guardianship pursuant to Surrogate's Court Procedure Act article 17-A is granted, and the matter is remitted to the Surrogate's Court, Kings County, for the entry of an appropriate decree naming the petitioner to serve as guardian of Anna F.

The petitioner commenced this proceeding in August 2015, pursuant to Surrogate's Court Procedure Act article 17-A, seeking to be appointed guardian of her sister, Anna F. A hearing was held on the petition, at which the petitioner established that Anna, then 51 years old, had suffered severe intellectual disability most, if not all, of her life. Anna's primary care physician certified that Anna suffers from "cerebral [*2] palsy with profound mental retardation,"[1] and is in need of 24-hour supervision, as she is not capable of feeding herself or moving about on her own. A psychological evaluation by the YAI-National Institute for People with Disabilities confirmed that Anna was "largely nonverbal" and "non-ambulatory" and that she was so cognitively limited that her intelligence could not be successfully evaluated employing traditional IQ tests. Utilizing the Bayley Scales of Infant and Toddler Development, the evaluator assessed Anna of having attained a developmental age equivalent of 4 months, 10 days.

At the hearing, the petitioner testified that her parents had cared for Anna her entire life, until 2014, when both parents died. Since that time, Anna had remained in the apartment she had lived in with her parents, and home attendants were assisting her 24 hours a day. The petitioner further testified that although she had been able to manage some of Anna's affairs, she was limited without court-authorized guardianship, and had experienced difficulty in renewing the lease for the apartment where Anna lived and in maintaining Anna's Supplemental Nutritional Assistance Program benefits. In support [*3] of the petition, the petitioner submitted the affirmation of Anna's primary care physician and the affidavit of a licensed psychologist who also evaluated Anna, in [**2] which each independently concluded that Anna was incapable of managing herself and her affairs by reason of

her disability, which was permanent in nature or likely to continue indefinitely. In the order appealed from, the Surrogate's Court denied the petition and dismissed the proceeding, concluding, without discussion, that a proceeding under Mental Hygiene Law article 81 would be more appropriate. The petitioner appeals.

Pursuant to article 17-A of the Surrogate's Court Procedure Act, "the court is authorized to appoint a guardian of the person [who is intellectually disabled] . . . if such appointment . . . is in the best interest of the person who is intellectually disabled." Under the statutory scheme, a person is intellectually disabled if that person has been certified by, among other possibilities, one licensed physician and one licensed psychologist "as being incapable to manage him or herself and/or his or her affairs by reason of intellectual disability and that such condition is permanent in nature or likely to continue indefinitely" (SCPA 1750[1]).

Here, the record establishes that Anna is intellectually **[*4]** disabled within the meaning of Surrogate's Court Procedure Act article 17-A. Further, the record also establishes that it would be in Anna's best interest to have the petitioner appointed as her guardian. The record shows that Anna is incapable of providing for her most basic needs and that in the absence of court-authorized guardianship, the petitioner, Anna's only sibling, is unable to adequately manage Anna's affairs. Nothing in the record suggests that the petitioner is unqualified to act as Anna's guardian. To the contrary, despite the legal limitations she has encountered, the petitioner has been managing Anna's affairs and providing for Anna since their parents' deaths. Accordingly, the Surrogate's Court should have granted the petition (*see* *Matter of Mark C.H.*, 28 Misc 3d 765, 776 [Sur Ct, NY County]; *cf.* *Matter of Michelle M.*, 52 Misc 3d 1211[A] [Sur Ct, Kings County]; *Matter of Chaim A. K.*, 26 Misc 3d 837, 843 [Sur Ct, NY County]). We grant the petition and remit the matter to the Surrogate's Court, Kings County, for the entry of an appropriate decree naming the petitioner to serve as Anna's guardian (*see* SCPA 1754[5]).

DILLON, J.P., ROMAN, HINDS-RADIX and BRATHWAITE NELSON, JJ., concur.

Footnotes

- 1

  The physician's affirmation certifying Anna's diagnosis was dated March 17, 2015, which was prior to the July 21, 2016, amendments to article 17-A of the Surrogate's Court Procedure Act replacing "mental retardation" with "intellectual disability" (*see* L 2016, ch 198).

MATTER OF DELANEY

POA CAN CREATE SNT

Matter of Delaney, 2019 N.Y. App. Div. LEXIS 2095

Copy Citation

Supreme Court of New York, Appellate Division, Second Department

March 20, 2019, Decided

2017-11662

Reporter

2019 N.Y. App. Div. LEXIS 2095 * | 2019 NY Slip Op 02090 **

[**1] In the Matter of Thomas J. Ernest Delaney. Dean Pacchiana, appellant. (File No. 758/16)

Notice:

THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

Core Terms

supplemental, power of attorney, guardian ad litem, attorney-in-fact, commence, amended order, incapacity, funds, further proceedings, disabled person, short form, act act act, designated, disability, disbursed, appeals, remit, law law law, acknowledgment, schizophrenia, consequences, transactions, eligibility, competence, comprehend, conveyance, jeopardize, prescribed, provisions, appointed

Counsel: **[*1]** Mackey, Butts & Wise, LLP, Poughkeepsie, NY (Kyle A. Steller of counsel), for appellant.

Patrick J. Carle , New City, NY, guardian ad litem for Thomas J. Ernest Delaney.

Judges: RUTH C. BALKIN , J.P., CHERYL E. CHAMBERS , SHERI S. ROMAN , SYLVIA O. HINDS-RADIX , JJ. BALKIN , J.P., CHAMBERS , ROMAN and HINDS-RADIX , JJ., concur.

Opinion

DECISION & ORDER

In a proceeding to create a supplemental needs trust, the petitioner appeals from an amended order of the Surrogate's Court, Rockland County (Rolf Thorsen, S.), dated September 6, 2017. The amended order denied the petition to create a supplemental needs trust on behalf of an allegedly disabled person, Thomas J. Ernest Delaney, on the ground that the petitioner, as attorney-in-fact for the allegedly disabled person, lacked authority to commence the proceeding.

ORDERED that the amended order is reversed, on the law, without costs or disbursements, and the matter is remitted to the Surrogate's Court, Rockland County, for further proceedings consistent herewith.

On December 9, 2015, Thomas J. Ernest Delaney executed a statutory short form power of attorney designating Dean Pacchiana as his attorney-in-fact, and granting him authority, as his agent, to handle, among other **[*2]** things, "claims and litigation," "estate transactions," and "all other matters" on his behalf. On or about November 1, 2016, Pacchiana, acting as Delaney's agent under the power of attorney, commenced this proceeding in the Surrogate's Court seeking an order creating and funding a supplemental needs trust in order to provide for Delaney's "supplemental care, maintenance, support and education." The petition alleged that Delaney was disabled, had been diagnosed with paranoid schizophrenia, and received Social Security disability benefits. The petition further alleged that both of Delaney's parents were deceased, that the trust funds would consist of funds that Delaney had inherited from his mother, which had not yet been disbursed, and that the trust, when established, would enable Delaney to "maintain his medical insurance under the Medicaid Program."

The Surrogate's Court appointed a guardian ad litem to represent Delaney, and the guardian ad litem prepared a report dated March 31, 2017. In the report, the guardian ad litem found that the proposed supplemental needs trust "would not jeopardize [Delaney]'s [Medicaid] eligibility" and complied with the relevant provisions of Social Services Law § 366 . However, **[*3]** the guardian ad

litem asserted that Pacchiana, as Delaney's attorney-in-fact, was not permitted to commence a proceeding to create a supplemental needs trust on Delaney's behalf, and, further, that Pacchiana was not properly designated Delaney's attorney-in-fact. In the order appealed from, the Surrogate's Court denied the petition "for the reasons set forth in the Report of the Guardian Ad Litem." Pacchiana [**2] appeals.

To be valid, a statutory short form power of attorney must "[b]e signed and dated by a principal with capacity, with the signature of the principal duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property" (General Obligations Law § 5-1501B[1][b] ; *see* *Matter of Batlas*, 144 AD3d 791, 791-792) . "Capacity" is defined as the "ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in a power of attorney, or the authority of any person to act as agent under a power of attorney" (General Obligations Law § 5-1501[2][c]). "A party's competence to enter into a transaction is presumed, even if the party suffers from a condition affecting cognitive function, and the party asserting incapacity bears the burden of proof'" (*Pruden v Bruce*, 129 AD3d 506, 507 , quoting *Er-Loom Realty, LLC v Prelosh Realty, LLC*, 77 AD3d 546, 548 ; *see* *Buckley v Ritchie Knop, Inc.*, 40 AD3d 794, 795) . "The incapacity must **[*4]** be shown to exist at the time the pertinent document was executed" (*Lynch v Carlozzi*, 129 AD3d 1240, 1241). Such incapacity was not shown here (*see* *Pruden v Bruce*, 129 AD3d 506, 507).

Pacchiana, as Delaney's attorney-in-fact, had the authority to commence a proceeding in the Surrogate's Court for the creation of a supplemental trust in Delaney's behalf (*see* General Obligations Law § 5-1502H; *Matter of Perosi v LiGreci*, 98 AD3d 230, 238; *Matter of Community Hosp. at Glen Cove v D'Elia*, 79 AD2d 1025; *Matter of Lando*, 11 Misc 3d 866, 867 [Sur Ct, Rockland County]). Accordingly, the court should not have denied the petition on the ground that Pacchiana lacked the authority to commence the proceeding, and we remit the matter for further proceedings on the petition.

BALKIN, J.P., CHAMBERS, ROMAN and HINDS-RADIX, JJ., concur.

BRONSTEIN

STATE LAW CONFLICT

Bronstein v Clements, 2019 N.Y. App. Div. LEXIS 1447

Copy Citation

Supreme Court of New York, Appellate Division, Third Department

February 28, 2019, Decided; February 28, 2019, Entered

526669

Reporter

2019 N.Y. App. Div. LEXIS 1447 * | 2019 NY Slip Op 01470 ** | 2019 WL 960164

[**1] ANITA L. BRONSTEIN, as Guardian of the Person and Property of SEYMOUR B. BRONSTEIN SR., Respondent, v MAHLON T. CLEMENTS, Appellant.

Notice:

THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

Core Terms

power of attorney, limited power, law law law, appointing, powers, revoke, act act act, guardian, transactions, revocation, principles, unavailing, prohibits, mortgage, purposes, listing, loyalty, lease

Case Summary

Overview

HOLDINGS: [1]-The trial court properly granted a guardian's motion for summary judgment action seeking, among other things, a revocation of a Pennsylvania limited power of attorney (POA) given to a friend by the ward because Pennsylvania had the greater concern with the dispute at issue where the POA did not fall within the ambit of General Obligations Law § 5-1501C(1) or (9) -the POA, on its face, did not indicate that it was created primarily for business or commercial purposes and the record did not reflect that buying and selling real property was the ward's primary business-and Mental Hygiene Law § 81.22(b)(2) prohibited the guardian from unilaterally revoking the POA.

Outcome

Order affirmed.

LexisNexis® Headnotes

- Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Choice of Law

HN1 **Federal & State Interrelationships, Choice of Law**

The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved. More like this Headnote

Shepardize - Narrow by this Headnote

- Estate, Gift & Trust Law > Estate Planning > Powers of Attorney

HN2 **Estate Planning, Powers of Attorney**

General Obligations Law § 5-1501 generally governs powers of attorney. More like this Headnote

Shepardize - Narrow by this Headnote

- Estate, Gift & Trust Law > Estate Planning > Powers of Attorney > Construction & Interpretation

HN3 **Powers of Attorney, Construction & Interpretation**

General Obligations Law § 5-1501C(1) and (9) exclude from § 5-1501 , respectively, "a power of attorney given primarily for a business or commercial purpose" and "a power given to a licensed real estate broker to take action in connection with a listing of real property, mortgage loan, lease, or management agreement," among others. More like this Headnote

Shepardize - Narrow by this Headnote

- Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Significant Relationships

HN4 **Choice of Law, Significant Relationships**

Under established conflict of laws principles, the applicable law should be that of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation. More like this Headnote

Shepardize - Narrow by this Headnote

Counsel: **[*1]** The Clements Firm, Glens Falls (Thomas G. Clements of counsel), for appellant.

Barclay Damon LLP , Syracuse (Michael J. Balestra of counsel), for respondent.

Judges: Before: Garry , P.J., Egan Jr. , Aarons , Rumsey and Pritzker , JJ. Garry , P.J., Egan Jr. , Rumsey and Pritzker , JJ., concur.

Opinion by: Aarons

Opinion

MEMORANDUM AND ORDER

Aarons , J.

Appeal from an order of the Supreme Court (Farley, J.), entered July 17, 2017 in St. Lawrence County, which granted plaintiff's motion for summary judgment.

Defendant and Seymour B. Bronstein Sr., a physician who resided in Pennsylvania, are personal acquaintances who also had some real estate matters with each other. In 2013, Bronstein took a bus to visit defendant in New York. Due to Bronstein's declining mental health, Bronstein missed his bus stop and lost his briefcase, causing defendant to have to pick him up. Defendant thereafter assisted Bronstein in preparing two powers of attorney. One power of attorney granted unrestricted authority to plaintiff. The other power of attorney was a limited power of attorney appointing defendant as Bronstein's agent and granted him two powers - "[t]o create a trust for [Bronstein's] benefit" and "[t]o engage in real property transactions **[*2]** in New York State" on Bronstein's behalf. Defendant used a Pennsylvania form for both powers of attorney, and Bronstein executed them in New York.

After Bronstein's health continued to decline, plaintiff, based upon the general power of attorney to act on Bronstein's behalf, sent a purported revocation of defendant's limited power of attorney. Notwithstanding the foregoing, defendant continued to engage in real estate transactions on Bronstein's behalf. In January 2016, plaintiff advised defendant that Bronstein suffered from dementia and that defendant's power of attorney had been revoked. Plaintiff subsequently commenced a proceeding in Pennsylvania for plenary guardianship of Bronstein. In May 2016, an order was issued in this Pennsylvania proceeding appointing plaintiff as Bronstein's guardian. Plaintiff then filed a certified copy of the Pennsylvania order in the St. Lawrence County Clerk's office, as well as a revocation of defendant's power of attorney. Plaintiff thereafter commenced this action seeking, among other things, a revocation of the limited power of attorney given to

defendant by Bronstein. Following joinder of issue, plaintiff moved for, among other things, summary [*3] judgment seeking a declaration that defendant's limited power of attorney was revoked. Supreme Court, among other things, granted plaintiff's motion. Defendant appeals. We affirm.

HN1 "The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved" (*Allstate Ins. Co. v. Stolarz*, 81 NY2d 219, 223, 613 N.E.2d 936, 597 N.Y.S.2d 904 [1993]). Under the Pennsylvania statute in effect at the relevant time, plaintiff could revoke any prior powers of attorney made by Bronstein once she was appointed as his guardian (*see* 20 Pa Code § 5604 [c] [former (1)]). Meanwhile, under New York law, a guardian may not "revoke an appointment . . . made by the incapacitated person pursuant to [General Obligations Law §§ 5-1501, 5-1601 and 5-1602]" (Mental Hygiene Law § 81.22 [b] [2]). As such, whether a conflict between New York and Pennsylvania law exists turns on whether the limited power of attorney given to defendant was made, as relevant here, pursuant to General Obligations Law § 5-1501. If so, then a conflict exists; if not, there is no conflict.

HN2 General Obligations Law § 5-1501 generally governs powers of attorney. Plaintiff relies on ***HN3*** General Obligations Law § 5-1501C (1) and (9), which excludes from General Obligations Law § 5-1501, respectively, "a power of attorney given primarily for a business or commercial purpose" and "a power given to a licensed real estate broker [*4] to take action in connection with a listing of real property, mortgage loan, lease or management agreement," among others. To that end, plaintiff maintains that because the limited power of attorney issued to defendant falls into either of these two categories, it does not constitute an appointment made pursuant to General Obligations Law § 5-1501. We disagree. Such document, on its face, does not indicate that it was created primarily for business or commercial purposes. Nor does the record reflect that buying and selling real property was Bronstein's primary business. Indeed, defendant averred in his affidavit that Bronstein owned a house in the Town of Oswegatchie in St. Lawrence County and that he would spend time there. Furthermore, the two powers given to defendant in the limited power of attorney - creating a trust for Bronstein's benefit or to engage in real estate transactions on his behalf in New York - are not powers that are solely reserved for business or commercial purposes. The record also does not indicate that these two powers were given to defendant so that he could take action in connection with a listing of real property, mortgage loan, lease or management agreement. As such, because the limited [*5] power of attorney does not fall within the ambit of General Obligations Law § 5-1501C (1) or (9), it is not excluded from General Obligations Law §

5-1501 . More to the point, because it is not excluded from General Obligations Law § 5-1501 , New York law prohibits plaintiff from unilaterally revoking it (*see* Mental Hygiene Law § 81.22 [b] [2]). Accordingly, a conflict between Pennsylvania law and New York law exists.1

HN4 "Under established conflict of laws principles, the applicable law should be that of 'the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation'" (*Matter of Doe*, 14 NY3d 100, 109, 923 N.E.2d 1129, 896 N.Y.S.2d 741 [2010] , quoting *Babcock v Jackson*, 12 NY2d 473, 481, 191 N.E.2d 279, 240 N.Y.S.2d 743 [1963]) . Defendant, as Bronstein's agent, "must act in the utmost good faith and undivided loyalty toward [Bronstein], and must act in accordance with the highest principles of morality, fidelity, loyalty and fair dealing" (*Semmler v Naples*, 166 AD2d 751, 752, 563 N.Y.S.2d 116 [1990] [internal quotation marks and citation omitted], *appeal dismissed* 77 NY2d 936, 572 N.E.2d 48, 569 N.Y.S.2d 607 [1991]) . The record discloses that Bronstein was a resident of Pennsylvania, defendant does not dispute that a Pennsylvania form was used to create both powers of attorney, defendant referred to the limited power of attorney as a "Pennsylvania Durable Power of Attorney" and the limited power of attorney noted that the powers granted to defendant were "explained more fully **[*6]** in Pa. C.S. Chapter 56." In view of the foregoing and [**2] taking into account that defendant was required to act for the benefit of Bronstein, we find that Pennsylvania has the greater concern with the dispute at issue and, therefore, Supreme Court correctly granted plaintiff's motion. Defendant's remaining arguments have been examined and are unavailing.

Garry, P.J., Egan Jr., Rumsey and Pritzker, JJ., concur.

ORDERED that the order is affirmed, with costs.

Footnotes

- 1

  Although plaintiff, once she registered the Pennsylvania order appointing her as Bronstein's guardian, could "exercise in [New York] all powers authorized in the order of appointment," she could only do so to the extent such powers were not "prohibited by the laws of [New York]" (Mental Hygiene Law § 83.39 [a]). In view of our determination that Mental Hygiene Law § 81.22 (b) (2) prohibits plaintiff from revoking any prior powers of attorney given by Bronstein, plaintiff's reliance on Mental Hygiene Law § 83.39 (a) is unavailing.

KRONIK

TRUST REVOKED IN GUARDIANSHIP CASE

Matter of Kronik, 2019 N.Y. Misc. LEXIS 328

Surrogate's Court of New York, New York County

January 28, 2019, Decided

2009-2812.1

Reporter

2019 N.Y. Misc. LEXIS 328 * | 2019 NY Slip Op 30178(U) **

[**1] Probate Proceeding, Estate of JOSEPH KRONIK, Deceased.

Core Terms

decedent, purported, probate, undue influence, invalid, irrevocable trust, propounded, revocation, res judicata, the will, revoked, doctrine doctrine doctrine, testamentary, collateral, estoppel, privity, movant, admitting, Invoking, guardian, litigate, testator, exerted, wishes, law law law, counter-judgment, conclusively, requirements, transactions, dispositive

Judges: **[*1]** Rita M. Mella , SURROGATE.

Opinion by: Rita M. Mella

Opinion

DECISION

Marek Rozen, petitioner in a proceeding to probate a June 24, 1976 instrument in the estate of Joseph Kronik, has moved for summary determination of his petition - including dismissal of objections filed on June 8, 2010 by distributees Leib Kuzniec and Helena Kronik Bartash - and the issuance of a decree admitting the June 24, 1976 instrument to probate (*see* CPLR 3212).1

Decedent died on March 13, 2009, at age 85, leaving a $2.5 million estate, survived by no one more closely related than first cousins. Marek Rozen, the brother of decedent's predeceased wife, filed a petition on July 31, 2009, and an amended petition on January 14, 2010, for probate of the June 24, 1976 instrument and the issuance to him of letters of administration c.t.a. The propounded instrument contains a single dispositive provision: The estate is bequeathed to [**2] decedent's spouse, but if she does not survive the decedent, then to the decedent's brother, Isaak Kronik, and to Marek Rozen, "jointly in equal shares as their joint property."

The probate petition includes a request, "That the instrument purporting to be the Decedent's Last Will and Testament, dated March 22, 2000[,] be **[*2]** denied probate and declared invalid." Under the March 22, 2000 purported will, the entire estate is left to the trustee of the "Joseph Kronik Trust Dated March 22, 2000."

In an August 15, 2000 bench decision, the Nassau County Supreme Court - in determining a petition that had been filed by decedent's wife on May 26, 2000 - found decedent to be incapacitated, as defined in Mental Hygiene Law § 81.02 , and appointed Mr. Rozen (rather than decedent's wife) guardian of decedent's person and property and authorized Mr. Rozen as such guardian, "to apply for revocation of the [March 22, 2000 Joseph Kronik irrevocable] trust" (*see Matter of Rozen*, NYLJ, Aug. 6, 2002, at 23, col 1 [Sup Ct, Nassau County]). Thereafter, Mr. Rozen, as such guardian, sought - and obtained - from the Nassau County Supreme Court, after a jury trial, a determination that the "Joseph Kronik Irrevocable Trust Dated March 22, 2000" was invalid. The court invalidated the trust on two bases. First, the court determined that decedent had lacked capacity to enter into a trust agreement on March 22, 2000. In addition, the court adjudicated the March 22, 2000 trust instrument to be the product of undue influence exercised by one Lucy Lam.2

The objections **[*3]** to probate of the June 24, 1976 instrument read: "[S]aid Will [**3] was revoked by the Will dated March 22, 2000[,] and said Will does not meet the statutory requirements."3

Invoking EPTL 3-4.1 , objectants allege, in essence, that the language in the introduction of the March 22, 2000 purported will, revoking "any and all of my prior Wills and Codicils," effectively revoked the June 24, 1976 instrument. If objectants are correct, the single disposition contained in

the March 22, 2000 purported will having been rendered ineffectual by the invalidation of the March 22, 2000 trust agreement, decedent died intestate.

In the instant motion, Rozen seeks dismissal of the objections, filed on June 8, 2010, to the probate of the June 24, 1976 instrument, "on the grounds that Objectants are precluded as a matter of law from arguing that the Instrument dated March 22, 2000 purporting to be the Last Will and Testament of Joseph Kronik is a valid instrument." Specifically, movant invokes the doctrines of collateral estoppel "and/or" *res judicata* and argues that, because one objectant, Lieb Kuzniec, was a party to the proceeding whereby the March 22, 2000 trust agreement was invalidated, and because the other objectant, **[*4]** Helena Kronik Bartash, being a distributee of decedent's estate, was in privity with decedent, both are precluded from arguing that: (1) decedent had capacity to execute the March 22, 2000 instrument purporting to be a will - including its provision revoking all prior testamentary instruments - and (2) the execution of such instrument was free of undue influence.

Collateral estoppel, a doctrine "intended to reduce litigation and conserve the resources of the court and litigants," precludes parties from relitigating issues that have been previously decided against them in a prior proceeding in which they had a fair opportunity to litigate the [**4] point (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455, 482 N.E.2d 63, 492 N.Y.S.2d 584 [1985]) . It is well established that "[t]he doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349, 712 N.E.2d 647, 690 N.Y.S.2d 478 [1999]) .

Res judicata, or claim preclusion, is a broader doctrine of which collateral estoppel is a component (*Gramatan Home Investors Corp. v Lopez*, 46 NY2d 481, 485, 386 N.E.2d 1328, 414 N.Y.S.2d 308 [1979]) . It bars successive litigation based upon the same transaction or series of transactions when "(i) there is a judgment on the merits rendered by a court of competent **[*5]** jurisdiction, and (ii) the party against whom the doctrine is invoked was a party to the previous action, or in privity with a party who was" (*Matter of Spitzer v Applied Card Systems, Inc.*, 11 NY3d 105, 122, 894 N.E.2d 1, 863 N.Y.S.2d 615 [2008]) . Claims arising out of the same series of transactions are barred under *res judicata* "even if based upon different theories or if seeking a different remedy" (*Parker*, 93 NY2d at 347 , quoting *O'Brien v City of Syracuse*, 54 NY2d 353, 357, 429 N.E.2d 1158, 445 N.Y.S.2d 687 [1981]) .

When a party establishes that a claim is barred by collateral estoppel or *res judicata*, summary judgment may be properly granted in favor of such party (*Ryan v New York Telephone Co.*, 62 NY2d 494, 467 N.E.2d 487, 478 N.Y.S.2d 823 [1984] ; *Luscher v Arrua*, 21 AD3d 1005, 801 N.Y.S.2d 379 [2d Dept 2005]) .

DISCUSSION

In rendering its advisory opinion that the creation of the March 22, 2000 irrevocable trust was the product of undue influence, the jury applied the same standard that is used to evaluate whether a will is the result of influence exerted by another and not a reflection of a testator's intent ("To be 'undue', the influence exerted must amount to mental coercion that led the testator [**5] to carry out the wishes of another, instead of [his, her] own wishes, because the testator was unable to refuse or too weak to resist" [PJI 7:55]). Agreeing with the jury, the Nassau County Supreme Court determined conclusively in its January 6, 2003 counter-judgment: "[T]he execution of the Trust on March 22, 2000 by Joseph Kronik was **[*6]** procured by the undue influence of Lucy Lam and, accordingly, the Trust is declared invalid." The question now presented is: Are objectants therefore precluded from arguing that the revocation clause in the March 22, 2000 purported will was executed by a decedent free of restraint, specifically, free of the undue influence exercised by Lucy Lam?

The March 22, 2000 purported will and irrevocable trust were integral parts of a single estate plan, one orchestrated by Lucy Lam. The two instruments were also the product of the same transaction, and the purported will was merely incidental to the trust. Although a finding of undue influence does not necessarily invalidate an entire testamentary instrument (*see* *Riggs v Palmer*, 115 NY 506, 512, 22 N.E. 188 [1889] [a particular portion of a will may be excluded from probate if induced by undue influence or the party in whose favor it is]; *Matter of von Knapitsch*, 296 AD2d 144, 148, 746 N.Y.S.2d 694 [1st Dept 2002] [partial probate may be granted and portions of will that do not benefit party who exerted undue influence may be admitted to probate]), here the revocation clause of the March 22, 2000 purported will served the interests of the undue influencer: it - along with the sole dispositive provision of the purported will - ensured that any asset owned **[*7]** by decedent at his death, and subject to administration, would be disposed of in accordance with the terms of the March 22, 2000 irrevocable trust. Therefore, the issue of the invalidity of the revocation clause of the March 22, 2000 purported will was "necessarily decided and material" in the Nassau County Supreme Court proceeding (*Parker*, 93 NY2d at 349). Further, the claim that [**6] the transaction that resulted in the creation of the March 22, 2000 irrevocable trust was procured by Ms. Lam's undue influence was conclusively decided by that court. Accordingly, any claim by objectants that the purported will and its revocation clause, which were an integral part of that same transaction, are a reflection of decedent's wishes and not the product of any restraint is barred by *res judicata* (*id.* at 347).

Objectants' arguments concerning lack of privity are easily addressed. Leib Kuzniec was a party to the proceeding to invalidate the March 22, 2000 irrevocable trust and actively litigated it, and Helena Kronik Bartash, as decedent's distributee is in privity with him. Both are bound by the determination on that proceeding (*Matter of Werger*, 64 Misc 2d 1094, 1097, 315 N.Y.S.2d 943 [Sur Ct, N.Y. County 1970] ; *Matter of Baker*, 189 Misc 159, 160-161, 69 N.Y.S.2d 626 [Sur Ct, Bronx County 1947]) .

The Public Administrator, a statutory party in this probate proceeding (*see* SCPA 1123 [2] [i] [2]), agrees with this **[*8]** court's conclusion concerning the preclusive effect of the Nassau County Supreme Court determination and does not oppose the petition for probate.

Despite being requested on movant's papers, the relief of admitting the June 24, 1976 instrument to probate may not be granted on the application before the court. Movant argues that objectants "do not challenge the validity of the [June 24, 1976] in any respect." The objections filed in this case, however, cite to EPTL 3-2.1 and allege, as previously stated, that the propounded instrument "does not meet the statutory requirements." To be sure, by the instant decision, this court is dismissing those objections to probate which allege that the propounded instrument was revoked by the purported March 22, 2000 will. The other objections remain and, if movant desires to seek summary determination of the validity of the propounded instrument, it is still incumbent upon him, as proponent, to make a prima facie showing that, on June 24, 1976, [**7] decedent had testamentary capacity, duly executed the propounded instrument, and was free of undue influence or any other restraint.

CONCLUSION

Marek Rozen having established that objectants are precluded, as a matter **[*9]** of law, from claiming that the March 22, 2000 purported will effected a revocation of the propounded instrument, and objectants having failed to raise a material issue of fact, his motion is granted. In light of this determination, the court need not address the question of whether objectants are precluded from arguing that decedent lacked testamentary capacity when he executed the March 22, 2000 purported will. To the extent the motion sought a decree admitting the June 24, 1976 instrument to probate, it is denied without prejudice.

This decision constitutes the order of the court.

Clerk to notify.

Dated: January 28, 2019

/s/ Rita M. Mella

SURROGATE

DEJESUS

GUARDIANSHIP AND FHA

Matter of Prospect Union Assoc. v DeJesus, 2018 N.Y. App. Div. LEXIS 8962

Copy Citation

Supreme Court of New York, Appellate Division, First Department

December 27, 2018, Decided; December 27, 2018, Entered

7585, 570838/16, 46932/15

Reporter

2018 N.Y. App. Div. LEXIS 8962 * | 2018 NY Slip Op 09016 **

[**1] In re Prospect Union Associates, Petitioner-Respondent, v Bienvenida DeJesus, et al., Respondents-Appellants.

Notice:

THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

Core Terms

tenants, apartment, eviction, guardian, Housing, extermination, permanent, landlord, appointment, stipulations, handicapped, reasonable accommodation, temporary, services, inspect, vacate

Counsel: **[*1]** Bronx Legal Services, Bronx (Sara E. Smith of counsel), for appellants.

Heiberger & Associates, P.C., New York (Lawrence C. McCourt of counsel), for respondent.

Judges: Sweeny, J.P., Manzanet-Daniels, Gische, Gesmer, Singh, JJ.

Opinion

Order, Appellate Term, First Department, entered June 6, 2017, which affirmed an order of the Civil Court, Bronx County (Arlene H. Hahn , J.), dated April 18, 2016, which denied respondents tenants' motion to vacate three stipulations of settlement in the summary holdover proceeding, and an order of the same court and Judge, dated October 31, 2016, which denied respondents' motion to vacate the final judgment of possession and for a permanent stay of the warrant of eviction, unanimously modified, in the exercise of discretion, to grant respondents' motion to vacate the final judgment of possession and for a permanent stay of the warrant of eviction to the extent of granting a temporary stay of the warrant of eviction and remanding the matter to the Civil Court for a hearing on whether to permanently stay the eviction.

Tenants, a married couple, have resided in this HUD regulated, Section 8 subsidized, multifamily housing project since 1998. The wife, Mrs. DeJesus, age 54, claimed **[*2]** before the motion court that she suffers from a cognitive impairment and that her husband, Mr. DeJesus, age 73, has mobility limitations. He uses a cane, crutches, or a wheelchair. As discussed further below, in April 2016, a temporary Mental Hygiene Law article 81 guardian was appointed for both tenants upon a prima facie showing that they both were incapacitated and unable to provide for their personal needs and manage their property and financial affairs.

In June 2015, petitioner landlord served tenants with a notice of termination alleging that they had failed to maintain their apartment in a safe and sanitary condition. The conditions included bedbugs, keeping the apartment in a Collyer-like, cluttered condition posing a fire hazard, and failing to prepare the apartment for extermination. In September 2015, a guardian ad litem (GAL) was appointed for them by Housing Court (CPLR 1201), after this summary holdover proceeding was commenced. The GAL signed three stipulations on tenants' behalf.

In the first stipulation, dated October 22, 2015, the GAL acknowledged that extermination could not take place without proper preparation of the apartment, and agreed to effectuate the completion and return of certain forms so the **[*3]** landlord could inspect and have the apartment exterminated. When that did not occur, the GAL entered into a second stipulation, dated December 9, 2015, which afforded tenants more time to comply with the terms of the first stipulation. In the second stipulation, the GAL consented to entry of a final judgment of possession, but with execution of the warrant of eviction stayed until December 31, 2015 so that tenants would have another opportunity to prepare their apartment for extermination. When, once again, that did not occur, the GAL negotiated a third stipulation (dated January 6, 2016), with a further stay of eviction so that the apartment could be inspected and exterminated on January 11, 2016. Tenants failed to comply with that stipulation as

well. With eviction imminent, tenants obtained legal counsel, who moved to vacate the stipulations on the basis that the GAL had exceeded her authority and tenants had not consented to the stipulations. Housing Court denied the motion and, in its April 18, 2016 order of denial, directed that the New York City Human Resources Administration's (HRA) Adult Protective Services (APS), be notified.

APS commenced an article 81 proceeding on tenants' **[*4]** behalf in Supreme Court, Bronx [**2] County. By order dated April 26, 2016, the court appointed Self Help Community Services, Inc. as tenants' temporary guardian1 under article 81 of the Mental Hygiene Law and ordered that the guardian immediately arrange for a "heavy duty cleaning [and] extermination" of tenants' apartment. The court also ordered a stay of eviction so that the cleaning could be effectuated. HRA exterminated the apartment on June 9 and, in a follow-up inspection report dated June 17, the HRA exterminator reported that he had found no evidence of live bedbugs or roaches. Satisfied with this progress, Supreme Court extended the temporary article 81 guardianship, and granted tenants a further stay of eviction until August 12, 2016.

In Housing Court, before the stay expired, tenants moved to dismiss the judgment of possession and warrant of eviction on the basis that the article 81 guardian had cured the conditions and was in the process of applying for certain benefits and services that would permanently resolve the problem of access and the condition alleged. Landlord opposed the motion, claiming that its agent had inspected the apartment and found that it was still cluttered, but could not inspect for live vermin **[*5]** because the tenant asked him to leave. Housing Court denied tenants' motion in its entirety (Order October 31, 2016), stating that even if tenants had finally cured most of the conditions alleged in the termination notice, the cure was untimely. The court stated that tenants were not entitled to any postjudgment relief because their non-cooperation throughout the proceedings had "severely prejudiced" the landlord. Appellate Term affirmed both the April 8 and October 31, 2016 orders.

We affirm Appellate Term's decision with respect to Housing Court's April 18, 2016 order, denying tenants' motion to vacate the stipulations that the GAL signed on their behalf. A GAL "is not a decision-making position; it is an appointment of assistance. The GAL provides invaluable service to the ward, such as applying for public assistance or arranging clean-ups" (*1234 Broadway LLC v Feng Chai Lin*, 25 Misc 3d 476, 495, 883 N.Y.S.2d 864 [Civ Ct, NY County 2009]) . As opposed to a guardian under article 81 of the Mental Hygiene Law , the GAL is required to appear and "adequately assert and protect the rights" of his or her ward (*New York Life Ins. Co. v V.K.*, 184 Misc 2d 727, 729, 711 N.Y.S.2d 90 [Civ Ct, NY County 1999]) . The record, viewed as a whole, shows that the GAL attempted to help her wards protect their rights during the proceeding by obtaining

extensions of time for them to comply with landlord's demand for access to their **[*6]** apartment. There is no evidence that she forced a settlement or that tenants would have fared any better by going to trial. Tenants failed to meet their burden of showing that the GAL either inadvisedly entered into those stipulations or failed to look out for their best interests.

We modify, however, because we disagree with Housing Court's determination that tenants are not entitled a permanent stay of eviction because the conditions in the apartment were not timely cured or they are ongoing. Aside from blanket statements by the landlord and the court about the likelihood of an ongoing "exodus" of bedbugs into neighboring apartments, there are no affidavits by neighbors or statements by any other individuals with personal knowledge of those facts. The determination that tenants are incapable of keeping the apartment in a safe and clean condition going forward is a serious determination that was made without the benefit of a hearing and without a proper evaluation of whether the article 81 guardian's management of their personal (and property) affairs will now make a difference in their ability to stay in their home without harming others.

Under the Fair Housing Act (FHA) , as amended, **[*7]** it is unlawful to discriminate in housing practices on the basis of a "handicap" (42 USC § 3604[f][2][A]). Handicap is very broadly defined, and a person is considered handicapped and thereby protected under the FHA if he or she:

1. Has a physical or mental impairment that substantially limits one or more major life activities, or
2. Has a record of such impairment, or
3. Is regarded as having such an impairment.

No specific diagnosis is necessary for a person to be "handicapped" and protected under the statute. In fact, the determination may even be based upon the observations of a lay person (*Douglas v Kriegsfeld Corp.*, 884 A2d 1109, 1131 [DC 2005]) . The appointment of an article 81 guardian for tenants sufficiently establishes that these tenants are "handicapped" within the meaning of the FHA, leading us to consider whether they are entitled to a reasonable accommodation. What is "reasonable" varies from case to case, because it is necessarily fact-specific (*see Shapiro v Cadman Towers Inc.*, 844 FSupp 116 [EDNY 1994] [bladder disorder necessitated moving tenant to the top of the waiting list for an indoor parking spot], *affd* 51 F3d 328 [2d Cir 1995]) . The overarching guiding factor, however, is that a landlord is obligated to provide a tenant with a reasonable accommodation if necessary for the tenant to keep his or her apartment. The " refusal **[*8]** to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [the handicapped individual] equal opportunity to use and enjoy a dwelling"' is a discriminatory practice (*see e.g. Shapiro* 51 F3d at 333 , quoting 42 USC § 3604[f][3][B]). A landlord does not have to provide a reasonable accommodation if it puts other tenants at risk, but should consider whether such risks can be minimized (*see Sinisgallo v Town of Islip Hous. Auth.*, 865 F

Supp 2d 307 [ED NY 2012] [a reasonable accommodation might be imposition of a probationary period after tenant with bipolar disorder attacked a neighbor]).

The circumstances before us warrant a hearing on whether tenants are entitled to a permanent stay of eviction as an accommodation. More narrowly, the issue is whether, with the involvement of the article 81 guardian and its management of their affairs, tenants can fulfill their lease obligations and avoid eviction. Housing Court failed to consider whether with ongoing supportive services and suitable monitoring tenants can continue to live an orderly existence in the apartment without harming or affecting their neighbors (*RCG-UA Glenwood, LLC v Young*, 9 Misc 3d 25, 801 N.Y.S.2d 481 [App Term, 2d Dept 2005] [tenant offered evidence of his improved behavior after enrollment in a treatment program]). We remand for a hearing to determine **[*9]** whether the accommodations proposed by the guardian are reasonable, whether they will curtail the risk of the nuisance recurring, and whether there should be a permanent stay of eviction (*see Strata Realty Corp. v Pena*, AD3d , 86 N.Y.S.3d 74, 2018 NY Slip Op 07350 [1st Dept 2018]).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 27, 2018

Footnotes

- 1

  Although this appointment was intended to be temporary, tenants' attorney informed this Court at oral argument that it is now a permanent appointment.

TIMPANO

COMPETING JUDGMENTS

Matter of Timpano (McGurk), 2018 N.Y. Misc. LEXIS 4140

Copy Citation

Surrogate's Court of New York, Oneida County

September 25, 2018, Decided

2011-907/B

Reporter

2018 N.Y. Misc. LEXIS 4140 * | 2018 NY Slip Op 28298 **

[**1] In the Matter of the Accounting of Joseph J. Timpano as the Administrator of the Estate of Jean McGurk, Deceased.

Notice:

THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

Core Terms

Decedent, nursing home, real property, funds, personal property, summary judgment, docketed, services

Counsel: **[*1]** For the Petitioner: Alison Steates, Esq.

For the Objectant/Movant: Michael D. Callan, Esq.

For the Cross-Movant: John A. Herbowy, Esq.

Judges: Hon. Louis P. Gigliotti, Surrogate.

Opinion by: Louis P. Gigliotti

Opinion

Louis P. Gigliotti, S.

Decedent Jean McGurk died intestate on October 25, 2011. At the time of her death, Decedent resided in a nursing home and was a recipient of Medicaid assistance. Voluntary administration proceedings were commenced in 2012 for the purpose of liquidating assets to pay the funeral home expenses. Joseph Timpano, Oneida County Comptroller, subsequently was appointed Administrator of her Estate on July 31, 2012. Having concluded his work, Mr. Timpano filed a petition for judicial settlement of account. He reports having received a total of $14,329.80 in assets and income, with a net balance of $10,247.30 after payment of attorney's fees, costs and commissions. Mr. Timpano proposes to pay this amount to the Oneida County Department of Social Services, hereinafter referred to as "DSS," in partial satisfaction of the Medicaid lien.

In February 2012, prior to Mr. Timpano's appointment, St. Joseph's Pastoral Care, Inc., which operated the nursing home where Decedent lived and will hereinafter **[*2]** be referred to as the "Nursing Home," filed a claim against the estate for $99,530.50 for unpaid nursing home services. The Nursing Home then filed another notice of claim in September 2014 in the amount of $107,626.84. After Mr. Timpano filed his accounting, the Nursing Home filed an objection to the account and moved for summary judgment on the ground that its claim against decedent has priority over the Medicaid lien.1 DSS cross-moved for summary judgment. Oral argument was [**2] heard May 15, 2018, following which this Court reserved decision.

Factual Background

Decedent entered the Nursing Home in April 2009. Afterward, her son Timothy wrote checks to himself from her bank account in excess of $26,000.00. He was subsequently prosecuted. The principal received by the estate consists of the court-ordered restitution payments collected from

Timothy. Even though he still owes money in this regard, Timothy left the area in 2016. The Administrator has been unable to locate him, despite diligent efforts to do so.

Meanwhile, on April 11, 2011, DSS issued its determination that Decedent qualified for Medicaid coverage retroactively to September 1, 2010. On October 19, 2010, the Nursing Home commenced **[*3]** a collections action against Decedent and Timothy. On October 11, 2011, Supreme Court issued an order awarding judgment to the Nursing Home to cover services, attorney's fees and costs. Although Decedent and her son defaulted in appearing in the action, Timothy did appear at the damages inquest but presented no evidence. The record before this Court does not indicate that a *guardian ad litem* was appointed to appear on Decedent's behalf. Judgment on default was entered on October 24, 2011 in the amount of $99,530.50.

Decedent died the day after the default judgment was entered. The Nursing Home served Timothy with a notice of entry on November 1, 2011. On March 13, 2014, the Oneida County Sheriff received the Nursing Home's income execution relative to Timothy. On November 14, 2014, Supreme Court issued a conditional order requiring Timothy to make biweekly installments toward the total judgment owed.

The Court must now consider the priority of the judgment obtained by the Nursing Home relative to the Medicaid lien asserted by DSS.

Legal Analysis

The Nursing Home concedes that pursuant to statute, DSS is a preferred creditor. (*See* Social Services Law § 104(1) ["In all claims of the public welfare official made under **[*4]** this section the public welfare official shall be a preferred creditor."]). The Nursing Home argues however, that its judgment lien nevertheless takes priority because it was docketed prior to the effective date of the Medicaid lien, which according to federal and state laws cited by the Nursing Home, is the date of death.

The Nursing Home's argument relies in part on two cases. The first is *Matter of Pierce*, 106 AD2d 892 [4th Dept 1984], *lv. denied*, 64 NY2d 609 [1985]. In this memorandum decision, the Fourth Department concluded that a hospital with docketed judgments against the decedent held a "prior specific lien" superior to a Medicaid lien. The Nursing Home suggests this general principal applies here, as it too has a docketed judgment against Decedent. As DSS points out however, the appellate decision must be read in conjunction with the underlying Surrogate's Court opinion, *Matter of Pierce*, 122 Misc 2d 908 [Sur Ct, Onondaga County 1984], to gain a complete

understanding of the factual circumstances in which this legal principle was applied.

The decedent in *Pierce* died owning real and personal property. Prior to decedent's death, the hospital obtained and filed two judgments. Decedent also received Medicaid assistance. As part of the estate proceedings, the hospital claimed that it was a preferred creditor **[*5]** relative to the real estate and an unsecured creditor relative to the personal property. The Surrogate interpreted the CPLR to mean that once the judgments were docketed, the hospital's liens attached immediately to the real property. Since these docketed liens preceded the Medicaid lien, and since the value of the hospital's liens exceeded the value of the real property, the Surrogate held that the value of the *real property* was to be credited entirely toward the hospital debt.

The distinction drawn between real property and personal property is important in the case at hand, since Decedent in the instant matter died without owning real property. With only personal property available to satisfy estate debts, and employing the rationale of both the Surrogate's Court and the hospital in *Pierce*, the Nursing Home is nothing more than an unsecured creditor. The Medicaid lien would be given priority regardless of the date on which the Nursing Home's judgment was entered.

The Nursing Home tries to avoid this outcome by citing to *Matter of Pizzirusso*, NYLJ, Nov. 17, 2005 at 32, col 3 [Sur Ct, Westchester County 2005]. Aware of the holding in *Pierce*, the Surrogate in *Pizzirusso* determined that **[*6]** DSS held a priority lien not only because the decedent died owning no real property, but also because the respondent judgment creditor had taken no action during the decedent's lifetime to perfect his lien upon the decedent's personal property by utilizing such tools as are found in CPLR article 52. The Nursing Home argues that unlike the general creditor in *Pizzirusso*, it did take such steps by filing an income execution and obtaining a conditional order in Supreme Court for payments toward the amount owed. The flaw in this logic however, is that these steps were taken against Decedent's son Timothy and not Decedent herself. The fact that Decedent died the day after entry of the default judgment and before collection efforts could be initiated against her does not permit the Court to presume the Nursing Home would have taken such steps. Furthermore, simply because Timothy stole Decedent's money does not mean the collection efforts undertaken against Timothy should be viewed as having been executed against Decedent personally. The Nursing Home still has the option of enforcing its judgment against Timothy. The practical barriers to doing so will not permit the Nursing Home to leapfrog the priority **[*7]** Medicaid lien relative to settling Decedent's estate. In the alternative, the Nursing Home reasons that because DSS knew about the stolen funds at the time Medicaid assistance was approved, and because those funds were taken at a time when

Decedent was a private pay resident, the restitution payments now held by the estate should be applied toward the Nursing Home lien because "[DSS] would have categorized said monies as uncompensated transfers or excess resources, and [DSS] would have ordered the uncompensated transfers or excess resources to be paid directly to the [Nursing Home] prior to Medicaid becoming effective." (Affidavit of Elizabeth Kearns in support of summary judgment, sworn to March 7, 2018, ¶ 25). The Court finds this logic unavailing. First of all, the monies taken by Timothy were not uncompensated transfers made by Decedent, but rather funds taken without Decedent's permission as evidenced by Timothy's criminal conviction. Second, even if the Nursing Home were correct that DSS did not take the stolen funds into consideration when approving Decedent's Medicaid application, the Court is unaware of authority granted to DSS to [**3] "order" uncompensated transfer funds (presuming **[*8]** such funds can be recovered) be paid to a creditor. Third, as DSS points out, Medicaid coverage began prior to the Nursing Home obtaining its judgment. Prior to the entry of such judgment, the validity of the Nursing Home's claim against Decedent was not yet determined.

At oral argument, the Nursing Home added that once Decedent became Medicaid eligible, she was obligated to make NAMI payments to the Nursing Home to supplement her Medicaid assistance. The judgment lien however, is for services provided when Decedent was a private pay resident. Whatever monies Decedent may have owed after she became Medicaid eligible have not been reduced to judgment.

In sum, both caselaw and the specific facts of this particular proceeding support a finding that Mr. Timpano's account correctly allocates the payment of assets to DSS. As such, it is hereby

ORDERED that the motion for summary judgment brought by the Nursing Home is DENIED; and it is further

ORDERED that the cross-motion for summary judgment brought by DSS is GRANTED; and it is further

ORDERED that the objections to the petition for judicial settlement of account brought by the Nursing Home are DISMISSED; and it is further

ORDERED that counsel **[*9]** for Mr. Timpano is to submit a proposed decree in accordance with this Decision and Order.

Dated: September 25, 2018

Hon. Louis P. Gigliotti, Surrogate

Footnotes

- 1

The Nursing Home's moving papers consist of an affidavit signed by an individual who describes herself as an "Authorized Representative" (as opposed to an officer or member of the Board). When asked at oral argument what legal grounds supported this Authorized Representative submitting such an affidavit, counsel indicated she is a Board member and received Board authorization. The Court will accept this explanation at face value, even though the Court has no independent verification such as a copy of the resolution or a copy of the corporate by-laws. The Court does however, recommend that legal arguments not be included in a layperson's affidavit, as was done here.

BREIER

NURSING HOME EMPLOYEE AMD FAIR HEARINGS

Matter of Breier v New York State Dept. of Social Servs., 2019 N.Y. App. Div. LEXIS 491

Copy Citation

Supreme Court of New York, Appellate Division, Second Department

January 23, 2019, Decided

2016-00656

Reporter

2019 N.Y. App. Div. LEXIS 491 * | 2019 NY Slip Op 00433 ** | 2019 WL 288154

[**1] In the Matter of Arthur D. Breier, deceased, by Marc J. Breier, administrator of the estate of Arthur D. Breier, petitioner, v New York State Department of Social Services, et al., respondents. (Index No. 156/15)

Notice:

THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

Core Terms

decedent's, fair hearing, attorney-in-fact, applications, benefits, notices, review a determination, statute of limitations, medical assistance, proper party, tolled

Counsel: [*1] Marc J. Breier, petitioner, Pro se, Old Bethpage, NY.

Letitia James, Attorney General, New York, NY (Andrew W. Amend and David Lawrence III of counsel), for respondents New York State Department of Social Services and New York State Department of Health.

Dennis M. Brown, County Attorney, Hauppauge, NY (L. Adriana Lopez and Dana Kobos of counsel), for respondent Suffolk County Department of Social Services.

Judges: WILLIAM F. MASTRO, J.P., REINALDO E. RIVERA, COLLEEN D. DUFFY, VALERIE BRATHWAITE NELSON, JJ. MASTRO, J.P., RIVERA, DUFFY and BRATHWAITE NELSON, JJ., concur.

Opinion

DECISION, ORDER & JUDGMENT

Proceeding pursuant to CPLR article 78 to review a determination of the Commissioner of the New York State Department of Health dated September 5, 2014. The determination, after a hearing, denied, as untimely, the petitioner's request for a fair hearing to review two separate determinations of the Suffolk County Department of Social Services, dated July 13, 2013, and December 5, 2013, respectively, denying the decedent's applications for medical assistance benefits.

ORDERED that the proceeding is dismissed insofar as asserted against the Suffolk County Department of Social Services; and it is further,

ADJUDGED that the determination [*2] is confirmed, the petition is otherwise denied, and the proceeding is otherwise dismissed on the merits, without costs or disbursements.

In 2013, the decedent was admitted to long-term care at the Franklin Center for Rehabilitation & Nursing (hereinafter Franklin). The decedent's attorney-in-fact authorized Mayda Cruz, a Medicaid coordinator employed by Franklin, to represent the decedent during the Medicaid eligibility process. On June 18, 2013, Cruz filed, on behalf of the decedent, an application for medical assistance benefits, which was denied by the Suffolk County Department of Social Services

(hereinafter the DSS) on July 13, 2013, due to the failure to submit proper documentation. Cruz refiled on September 11, 2013, and on December 5, 2013, DSS denied that application on the same ground. On February 24, 2014, Cruz requested a fair hearing regarding the denials dated July 13, 2013, and December 5, 2013. In a determination dated September 5, 2014, made after a fair hearing, the Commissioner of the New York State Department of Health (hereinafter the DOH) denied the request for a fair hearing regarding those denials because the request had not been made in a timely manner. The [*3] petitioner, the administrator of the decedent's estate, then commenced this CPLR article 78 [**2] proceeding, contending that the applicable statute of limitations should have been tolled because the notices denying the applications were not sent to the decedent's attorney-in-fact. The proceeding was then transferred to this Court pursuant to CPLR 7804(g) .

The determination by the DOH that, since the request for a fair hearing was made more than 60 days after the DSS denied the applications, the DOH was without jurisdiction to review the determinations, is supported by substantial evidence (*see* Social Services Law § 22[4][a]; 18 NYCRR 358-3.5[b][1]; *Matter of Notman v New York State Dept. of Health*, 162 AD3d 1704, 1705, 80 N.Y.S.3d 763 ; *Matter of Fieldston Lodge Nursing Home v DeBuono*, 261 AD2d 543, 543-544, 690 N.Y.S.2d 606 ; *Glengariff Health Care Ctr. v Glass*, 231 AD2d 717, 718, 647 N.Y.S.2d 998) .

Contrary to the petitioner's contention, the statute of limitations was not tolled on the ground that the denial notices were not sent to the decedent's attorney-in-fact. Cruz, who had applied for Medicaid benefits on behalf of the decedent as his recognized representative, was the proper party to receive the notices of denial (*see* Social Services Law § 22[12]; 18 NYCRR 358-3.1[a]; *Matter of Fieldston Lodge Nursing Home v DeBuono*, 261 AD2d at 544).

Additionally, since the determination of the DOH is final and binding on the DSS, and the DSS must comply with it (*see* 18 NYCRR 358-6.1[b]), the DSS is not a proper party to this proceeding and the proceeding should be dismissed insofar as asserted against it (*see Matter of Weiss v Suffolk County Dept. of Social Servs.*, 121 AD3d 703, 706, 993 N.Y.S.2d 368 ; *Matter of Loiacono v Demarzo*, 72 AD3d 969, 898 N.Y.S.2d 513).

MASTRO , J.P., RIVERA, [*4] DUFFY and BRATHWAITE NELSON, JJ., concur.

ESTATE OF SHAMBO

ADMINISTRATOR SURCHARGED

Matter of Shambo, 2019 N.Y. App. Div. LEXIS 1310

Copy Citation

Supreme Court of New York, Appellate Division, Third Department

February 21, 2019, Decided; February 21, 2019, Entered

526709

Reporter

2019 N.Y. App. Div. LEXIS 1310 * | 2019 NY Slip Op 01280 **

[**1] In the Matter of the Estate of PENNY LEE SHAMBO, Deceased. MELISSA THOMPSON, as Administrator of the Estate of PENNY LEE SHAMBO, Appellant; SARATOGA COUNTY DEPARTMENT OF SOCIAL SERVICES, Respondent. (Proceeding No. 1.);In the Matter of the Estate of PENNY LEE SHAMBO, Deceased. ROWLANDS & LeBROU, PLLC, Appellant; SARATOGA COUNTY DEPARTMENT OF SOCIAL SERVICES, Respondent. (Proceeding No. 2.)

Notice:

Core Terms

expenses, decedent, decedent's estate, real property, sell property, reimbursement, fiduciary, surcharge, mortgage, summary judgment, estate's assets, accounting, administrator's letter, counsel fees, outstanding, funeral, parties, removal, circumstances, documentation, improvidence, dissipation, diligence, benefits, modified, prudent, reside, unpaid, facie, law law law

Counsel: [*1] Rowlands & LeBrou, PLLC, Latham (Nicholas J. Orecki of counsel), for appellants.

Stephen M. Dorsey, County Attorney, Ballston Spa (Hugh G. Burke of counsel), for respondent.

Judges: Before: Lynch, J.P., Clark, Mulvey, Devine and Aarons, JJ. Lynch, J.P., Mulvey, Devine and Aarons, JJ., concur.

Opinion by: Clark

Opinion

MEMORANDUM AND ORDER

Clark, J.

Appeal from an order of the Surrogate's Court of Saratoga County (Kupferman, S.), entered July 20, 2017, which, among other things, in proceeding No. 1 pursuant to SCPA article 22, partially granted respondent's motion for summary judgment on its objections to petitioner's accounting.

This appeal arises out of the administration of the estate of Penny Lee Shambo (hereinafter decedent), who died intestate on September 26, 2009 as a resident of Saratoga County. However, for purposes of this appeal, we must rewind to November 24, 2007, when decedent's spouse, William J. Shambo Jr. (hereinafter Shambo), passed intestate. At the time of his passing, Shambo resided in a home, located in the Town of Rotterdam, Schenectady County, that he owned with decedent and which had an outstanding mortgage of $49,603.70.

In May 2008, Schenectady County Surrogate's Court granted petitioner Melissa Thompson, [*2] the daughter of Shambo and decedent, limited letters of administration in Shambo's estate. Two months later, Thompson obtained an appraisal of the real property owned by Shambo and decedent, which was given an "as is" value of $125,000. Thompson thereafter sought and, by a March 2009 order, received judicial authority to establish a special needs trust for the benefit of decedent, who had been receiving Medicaid benefits since June 2004. Thompson also received judicial authority to sell the property to herself, her husband, her half sister (who is the daughter of Shambo, but not decedent) and her half sister's husband at the discounted price of $117,500 "in order to have a quick closing and to expedite the funding of" the special needs trust. The March 2009 order further directed that the proceeds from the sale of the real property be used to fund the special needs trust

after reimbursing Thompson for certain expenses - in particular, property expenses totaling $11,634.33, estate administration expenses totaling $12,368.91 and the payment of counsel fees in the amount of $7,0551 . Thompson was ultimately reimbursed, from Shambo's estate, for the $12,368.91 spent on administration expenses, [*3] but her reimbursement for the $11,634.33 spent on the property, as well as the counsel fee award, was dependent on the sale of the real property to herself and her three relatives. That sale never occurred.

Roughly seven months after entry of the March 2009 order authorizing the sale of the property, decedent died. Perplexingly, and without explanation in the record, Thompson did not seek clarification or modification of the March 2009 order and she did not petition Surrogate's Court for letters of administration in decedent's estate until November 2012, more than three years after decedent's death. All the while, Thompson continued to pay various expenses relating to the real property, which included sporadic payments toward the outstanding mortgage.

In December 2012, after the Saratoga County Surrogate's Court granted Thompson letters of administration in decedent's estate, respondent filed a claim against decedent's estate for reimbursement of $466,625.59 - the amount of Medicaid benefits that decedent had received from June 1, 2004 through her death on September 26, 2009 - plus interest. Respondent thereafter sought to compel an accounting in decedent's estate. In response, Thompson [*4] filed a petition for judicial settlement of the account (proceeding No. 1), along with a formal accounting, which listed unpaid administration expenses totaling $84,289.26. These [**2] administration expenses included the unpaid amounts due under the March 2009 order, additional counsel fees incurred to settle and close out the administration of Shambo's estate, a $6,000 commission to Thompson and the reimbursement of court and funeral expenses in decedent's estate, as well as costs relating to the real property from November 2008 through July 2013. Respondent filed formal objections to the accounting, alleging that Thompson failed to sell the property within a reasonable amount of time and seeking, among other things, an order imposing surcharges on Thompson.

Thereafter, by a November 2013 order issued upon consent of the parties, Thompson was authorized and directed to list the property for $115,000 and sell it for a minimum of $110,000 and to place the sale proceeds in escrow pending a determination as to whether respondent's Medicaid claim had priority over the existing mortgage on the property2 . About a week later, Wells Fargo Bank, N.A., the mortgage holder, commenced an action in Schenectady [*5] County to foreclose on the property. The foreclosure action was later transferred to Surrogate's Court and consolidated with the administration of decedent's estate.

In April 2015, over five years after decedent's death and more than 16 months after Thompson was authorized to list and sell the property, Surrogate's Court granted, upon the parties' stipulation,

Thompson's request to sell the property to her husband for $110,000 and directed that the sale close within 30 days. The property was ultimately sold to Thompson's husband and, in July 2015, $110,064.35 was deposited with the Saratoga County Treasurer. One year later, Surrogate's Court issued a decree establishing $74,475.28 as the verified mortgage claim of Wells Fargo.

In September 2016, petitioner Rowlands & LeBrou, PLLC - counsel to Thompson as the administrator of decedent's estate - commenced proceeding No. 2 to fix and determine counsel fees (*see* SCPA 2110), which were alleged in the amount of $32,661.32. Following an examination of Thompson pursuant to SCPA 2211 , respondent moved for summary judgment on its objections. Surrogate's Court partially granted respondent's motion for summary judgment and, based on what it found to be Thompson's **[*6]** improvident management of decedent's estate and dereliction of duty, removed Thompson as the administrator of the estate, denied her a commission for her role as administrator and declined to reimburse her for the unpaid administration expenses listed in her account, except for reasonable funeral expenses and the outstanding amounts due under the March 2009 order. The court further found that decedent's real property reasonably should have been sold by July 1, 2013 for $117,500 and, so as to place respondent in the position that it would have been in had such a sale occurred at that time, imposed a $14,174.74 surcharge upon Thompson. Finally, Surrogate's Court denied the payment of counsel fees to Rowlands & LeBrou out of decedent's estate, finding that the value of the legal representation provided to the estate did not justify payment of the $32,661.32 fee. Petitioners appeal.3

Respondent's objections to the accounting were largely premised upon Thompson's failure to promptly sell the real property, thereby resulting in the prolonged and unnecessary payment of the property's carrying charges and a corresponding diminution of estate assets that could be used to satisfy respondent's **[*7]** outstanding Medicaid claim. Thus, Surrogate's Court properly identified the dispositive question raised by respondent's objections to be whether Thompson "acted as a diligent and prudent fiduciary." "'[A] fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect'" and, when "acting on behalf of an estate[,] is required to employ such diligence and prudence to the care and management of the estate assets and affairs as would prudent persons of discretion and intelligence in their own like affairs" (*Matter of Billmyer*, 142 AD3d 1000, 1001 [2016] , quoting *Birnbaum v Birnbaum*, 73 NY2d 461, 466 [1989] ; *see Matter of Donner*, 82 NY2d 574, 584 [1993] ; *Matter of Carbone*, 101 AD3d 866, 868 [2012]) .

We agree with Surrogate's Court that respondent came forward with prima facie evidence demonstrating Thompson's mismanagement of decedent's estate and overall dereliction of duty and that petitioners, who were required to lay bare their proof in opposition to respondent's motion (*see Wasson v Bond*, 80 AD3d 1114, 1115 [2011] ; *Johnson v Title N., Inc.*, 31 AD3d 1071, 1072 [2006]) ,

failed to raise a triable question of fact precluding summary judgment on that issue. The legitimacy of respondent's objections to Thompson's unreasonable delay in selling the real property, resulting in an ongoing dissipation of the estate's assets, was readily apparent from the accounting, as well as the irrefutable timeline of events **[*8]** (*see* *Matter of Carbone*, 101 AD3d at 869).

As Surrogate's Court correctly noted, it did not have jurisdiction over Thompson's conduct prior to the issuance of letters of administration in decedent's estate (*see generally* SCPA 203). Nevertheless, Thompson's failure to comply with the March 2009 order authorizing the expedited sale of the property to her and her three relatives, as well as the unexplained three-year delay in applying for letters of administration in decedent's estate, are relevant to the underlying question of whether Thompson's delay in selling the property was unreasonable. Because decedent was not residing at the property at the time of Shambo's death and did not thereafter return to the property to reside, Thompson had access to and possession of the property for an extended period of time prior to the issuance of the letters of administration in November 2012. Thus, she was uniquely positioned to ensure an expeditious sale, so as to preserve the value of the estate's asset, once she did receive the letters of administration. Nevertheless, the property was not sold to her husband until July 2015, more than 18 months after Surrogate's Court had authorized Thompson to sell the property for at least $110,000. **[*9]** The evidence demonstrated that, during this 18-month period, the mortgage encumbrance increased by roughly $30,000.

Thompson's broad and conclusory testimony that she was unable to sell the property due to its poor condition was insufficient to defeat respondent's prima facie showing that she had unreasonably delayed in liquidating the estate's sole asset. Thompson did not, in opposition to respondent's motion for summary judgment, provide any documentation to substantiate her claim [**3] that she had unsuccessfully attempted to sell the house or otherwise demonstrate that she had taken any meaningful steps to sell the property for a reasonable price within a reasonable amount of time. She provided no listing for the house, no documentation of any offers received and rejected or any evidence to establish when and for how long the property was listed for sale. Under these circumstances, Surrogate's Court properly determined, as a matter of law, that respondent was entitled to summary judgment on its objection to the unreasonable length of time it took Thompson to sell the property (*see* *Matter of Billmyer*, 142 AD3d at 1002 ; *Matter of Carbone*, 101 AD3d at 869).

Thompson also challenges her removal as the administrator of the estate. SCPA 711 (2) permits the removal of a fiduciary **[*10]** where he or she is shown to be unfit for the execution of the office by reason of having wasted or improvidently managed the assets of an estate. Similarly, SCPA 711 (8) permits removal "[w]here [the fiduciary] does not possess the qualifications required of a fiduciary by reason of . . . improvidence . . . or who is otherwise unfit for the execution of the office." As

discussed above, Thompson's delay and dilatory conduct in selling the real property caused a dissipation of the assets that would have been available to respondent absent such delay. Accordingly, we discern no abuse of discretion in the determination of Surrogate's Court to remove Thompson as the administrator of the estate under SCPA 711 (2) and (8) (*cf.* *Matter of Witherill*, 37 AD3d 879, 881 [2007]) 4 . For the same reasons, we find no abuse of discretion in the determination of Surrogate's Court to deny Thompson statutory commissions (*see* *Matter of Witherill*, 37 AD3d at 881 ; *Matter of Quattrocchi*, 293 AD2d 481, 481 [2002] ; *Matter of Kelly*, 147 AD2d 564, 564 [1989] , *appeal dismissed* 78 NY2d 904 [1991]) .

Further, we discern no abuse of discretion in the determination of Surrogate's Court to deny Thompson reimbursement for all property expenses listed in the account, except for those amounts specifically directed in the March 2009 order entered during the administration of Shambo's estate. Initially, upon a review of the account and **[*11]** the supporting documentation, as well as the testimony given by Thompson at her SCPA 2211 examination, we agree with Surrogate's Court that the account was "woefully inadequate," as Thompson failed - in response to respondent's prima facie showing that the account was inaccurate - to substantiate many of the alleged property expenses. Moreover, Thompson's ongoing but sporadic payment of property expenses during her lengthy delay in selling the property caused a wasteful dissipation of estate assets, while simultaneously benefiting the property that her husband ultimately obtained. Under all of the circumstances, we find no basis upon which to disturb the denial of reimbursement to Thompson for the property expenses alleged in the account. However, we agree with Thompson that she should have been reimbursed for a $1,725 funeral expense that appears to have been overlooked by Surrogate's Court, as well as $625 in court fees (*see* SCPA 103 [22] ; 1811 [1]; *Matter of Jewett*, 145 AD3d 1114, 1119-1120 [2016]) . Thus, as more fully set forth below, we modify the determination of Surrogate's Court by adjusting the surcharge imposed upon Thompson accordingly.

Turning to the issue of surcharges, a surcharge is warranted where the objectant demonstrates that the fiduciary **[*12]** "acted negligently, and with an absence of diligence and prudence which an ordinary [person] would exercise in his [or her] own affairs" (*Matter of Lovell*, 23 AD3d 386, 387 [2005] ; *accord* *Matter of Billmyer*, 142 AD3d at 1002 ; *see Matter of* *[**4]* *Donner*, 82 NY2d at 585). Here, given Thompson's failure to act diligently and prudently in the management of the estate's sole asset, we find no abuse of discretion in the determination of Surrogate's Court to impose a surcharge upon Thompson in an amount aimed at placing respondent in the position that it would have been in had Thompson fulfilled her fiduciary duty and sold the real property at a reasonable price, within a reasonable amount of time (*see* *Matter of Donner*, 82 NY2d at 585-586 ; *Matter of Jewett*, 145 AD3d at 1123-1124 ; *Matter of Braasch*, 140 AD3d 1341, 1342 [2016]) . To that end, we

agree with Surrogate's Court that, under the unique circumstances of this case, July 1, 2013 - more than seven months after Thompson received letters of administration - was a reasonable date by which the real property should have been sold (*see generally* *Matter of Janes*, 90 NY2d 41, 54 [1997] ; *Matter of Donner*, 82 NY2d at 584-585). However, we disagree with Surrogate's Court as to the reasonable price at which the property should have been sold by this date. Because the parties consented to the November 2013 and May 2015 orders authorizing a sale of the property for $110,000, we find that $110,000, rather than $117,500, constituted a reasonable **[*13]** price at which the property should have been sold by July 1, 2013. In view of our determination regarding the reasonable sale price in July 2013, as well as our finding that Thompson should have been reimbursed for an additional funeral expense and certain court fees, the surcharge imposed upon Thompson must be reduced from $14,174.74 to $4,324.74.

Finally, given the minimal, if any, benefit to the estate derived from the years of legal representation provided by Rowlands & LeBrou, and their excessive request, Surrogate's Court did not abuse its discretion when it denied the payment of counsel fees from the estate (*see generally* *Matter of Rodken*, 2 AD3d 1008, 1009 [2003]). To the extent that we have not expressly addressed any of petitioners' arguments, they have been examined and found to be without merit.

Lynch, J.P., Mulvey, Devine and Aarons, JJ., concur.

ORDERED that the order is modified, on the law, without costs, by reducing the surcharge imposed upon petitioner Melissa Thompson from $14,174.74 to $4,324.74, and, as so modified, affirmed.

Footnotes

- 1

  No appeal was taken from the March 2009 order.

- 2

  This Court ultimately resolved the question of priority and determined that the mortgage holder, Wells Fargo Bank, N.A., had priority creditor status (*Matter of Shambo*, 138 AD3d 1215 [2016]). Contrary to petitioners' contention, this priority dispute in no way prevented Thompson from listing and selling the property.

- 3

  Although a notice of appeal was filed only on behalf of Thompson, the issues raised in the "Brief of the Appellant" concern both petitioners and the CPLR 5531 statement filed with the Court classifies both Thompson and Rowlands & LeBrou as appellants. Accordingly, a notice of appeal should have also been filed on behalf of Rowlands & LeBrou. As the parties do not raise this issue and, in the absence of an allegation of prejudice, we will disregard the error and treat the appeal as having been also taken by Rowlands & LeBrou (*see* *Matter of Curcio v Sherwood 370 Mgt. LLC*, 147 AD3d 1186, 1187 n 1 [2017]).

- 4

  In light of our determination, we need not address whether Thompson's removal as administrator was warranted under SCPA 711 (3).

ALEXANDER B.P.

GUARDIANSHIP FEE AWARD

Matter of Alexander B.P. (Hafner), 2018 N.Y. App. Div. LEXIS 6678

Copy Citation

Supreme Court of New York, Appellate Division, Second Department

October 10, 2018, Decided

2016-11267

Reporter

2018 N.Y. App. Div. LEXIS 6678 * | 2018 NY Slip Op 06744 **

[**1] In the Matter of Alexander B.P. (Anonymous), respondent. Long Island Jewish Valley Stream Hospital, etc., petitioner-appellant; Bruce Robert Hafner, etc., nonparty-respondent. (Index No. 31965/16)

Notice:

THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

Core Terms

guardian, compensate, directing, evaluator, seal, incapacitated, substituting, funds, exercise of discretion, property management, entry of the order, render a service, personal needs, good cause, total sum, not-for-profit, proceedings, frivolous, relieving, modified, suitable, appeals, parties, remit

Counsel: [*1] La Salle, La Salle & Dwyer, P.C., Sea Cliff, NY (Lori A. La Salle of counsel), for petitioner-appellant.

Bruce Robert Hafner, Lynbrook, NY, nonparty-respondent, Pro se.

Judges: WILLIAM F. MASTRO, J.P., SANDRA L. SGROI, JOSEPH J. MALTESE, VALERIE BRATHWAITE NELSON, JJ. MASTRO, J.P., SGROI, MALTESE and BRATHWAITE NELSON, JJ., concur.

Opinion

DECISION & ORDER

In a proceeding pursuant to Mental Hygiene Law article 81, the petitioner appeals from an order and judgment (one paper) of the Supreme Court, Nassau County (Daniel R. Palmieri, J.), dated September 4, 2016. The order and judgment, insofar as appealed from, directed the petitioner to compensate the guardian in the sum of $500 per month and to pay the fee of $250 to the court evaluator, and sealed the record of the proceedings.

ORDERED that order and judgment is modified, on the facts and in the exercise of discretion, by deleting the provision thereof directing the petitioner to compensate the guardian in the sum of $500 per month, and substituting therefor a provision directing that the total sum of $3,000 shall be paid from the funds of Alexander B. P. to Bruce Robert Hafner, Esq., the guardian, for his services rendered on behalf of Alexander B. P. to date; as so modified, the [*2] order and judgment is affirmed insofar as appealed from, without costs or disbursements; and it is further,

ORDERED that the matter is remitted to the Supreme Court, Nassau County, for the entry of an order relieving Bruce Robert Hafner, Esq., as guardian, and substituting in his stead a suitable not-for-profit guardian for Alexander B. P.

The petitioner, Long Island Jewish Valley Stream Hospital, by Catherine Hottendorf, in her capacity as its Executive Director, filed a petition pursuant to Mental Hygiene Law article 81 alleging that then patient, Alexander B. P., was in need of a guardian in order to provide for his personal needs and property management. After a hearing, the Supreme Court, in an order and

judgment dated September 4, 2016, granted the petition and appointed an independent guardian, Bruce Robert Hafner, Esq., to manage Alexander B. P.'s person and property. Additionally, the court directed the petitioner to compensate the guardian in the sum of $500 per month and to pay the fee of $250 to the court evaluator, and sealed the record of the proceedings. The petitioner appeals.

Pursuant to Mental Hygiene Law § 81.28(a), the court shall establish a plan for the reasonable compensation of a guardian. The only requirement is that **[*3]** the court "must take into account the specific authority of the guardian or guardians to provide for the personal needs and/or [**2] property management for the incapacitated person, and the services provided to the incapacitated person by such guardian" (*see* *Matter of Goldstein v Zabel*, 146 AD3d 624, 629, 45 N.Y.S.3d 432). Thus, the Legislature did not specifically provide that the guardian's compensation must come from any particular source.

The Legislature provided that the court may direct the petitioner to compensate a court evaluator and/or legal counsel in a guardianship proceeding only when the petition is *denied or dismissed*, or the alleged incapacitated person dies before a determination is made in the proceeding (*see* Mental Hygiene Law §§ 81.09[f]; 81.10[f]; *Matter of Buttiglieri [Ferrel J.B.]*, 158 A.D.3d 1166, 70 N.Y.S.3d 639). "[T]he Legislature was clearly cautioning those who would bring a frivolous petition, or one motivated by avarice, that they might very well have to bear the financial burden of the proceeding" (*Matter of Lyles*, 250 AD2d 488, 489, 673 N.Y.S.2d 122). In contrast, the issue of the source of compensation for a guardian only arises when a petition is granted and thus is not frivolous. Therefore, although Mental Hygiene Law § 81.28(a) does not explicitly prohibit a court from directing a petitioner to compensate a guardian, given that the petitioner was successful and there was no evidence that the **[*4]** proceeding was commenced in bad faith, the Supreme Court's directive that the petitioner compensate the guardian constituted an improvident exercise of discretion (*see generally* *Matter of Lyles*, 250 AD2d 488, 673 N.Y.S.2d 122). Rather, the guardian must be compensated from the funds of Alexander B. P.

However, we agree with the Supreme Court's determination directing the petitioner to pay the court evaluator's fee. "By stipulation, the parties may shape the facts to be determined at trial and thus circumscribe the relevant issues for the court to the exclusion of disputed matters that otherwise would be available to the parties" (*Deitsch Textiles v New York Prop. Ins. Underwriting Assn.*, 62 N.Y.2d 999, 1002, 468 N.E.2d 669, 479 N.Y.S.2d 487; *see* *Dental Health Assoc. v Zangeneh*, 80 AD3d 724, 724, 915 N.Y.S.2d 311). Here, the petitioner entered into a stipulation providing that it would pay the court evaluator's fee.

Finally, we agree with the Supreme Court's determination granting the guardian's application to seal the record pursuant to Mental Hygiene Law § 81.14(b) (*see* *Matter of Linda E. [Justin B.]*, 55 Misc. 3d 700, 49 N.Y.S.3d 272 [Sup Ct, Tompkins County]). Although the court should have entered the order upon a "written finding of good cause [to seal the record], which shall specify the grounds thereof" (Mental Hygiene Law § 81.14[b]), there was good cause to seal the record in light of Alexander B. P.'s privacy interests and the nature of the incapacity involved.

Accordingly, the guardian should be paid the total sum of $3,000 **[*5]** from the funds of Alexander B. P. for his services rendered on behalf of Alexander B. P. to date. We remit the matter to the Supreme Court, Nassau County, for the entry of an order relieving Bruce Robert Hafner as guardian and substituting a suitable not-for-profit guardian for Alexander B. P.

MASTRO, J.P., SGROI, MALTESE and BRATHWAITE NELSON, JJ., concur.

MATTER OF R.T.

JOINT ACCOUNTS/GUARDIANSHIP/SPOUSAL DUTY

Matter of R.T. (D.C.), 2019 N.Y. Misc. LEXIS 2480

Supreme Court of New York, Broome County

May 15, 2019, Decided

EFCA2018001606

Reporter
2019 N.Y. Misc. LEXIS 2480 * | 2019 NY Slip Op 29147 **

[**1] In the Matter of the Application of R.T., Petitioner, Pursuant to Article 81 of the Mental Hygiene Law For the Appointment of a Guardian of the Person and Property of D.C., Jr., An Incapacitated Person.

Notice:
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Core Terms

withdrawals, parties, Co-Guardians, funds, appointment, spouse, resources, issues, monthly, joint tenancy, incapacitated, reimbursement, marriage, joint account, court finds, requesting, expenses, marital, married, memory, transactions, Guardian, execute, refund, days, cross-petition, proceedings, transferred, settlement, bathroom

Counsel: [*1] Richard N. Aswad, Esq., Attorney for Petitioner, Aswad & Ingraham, LLP, Binghamton, NY.

A. Laura Bevacqua, Esq., Attorney for Alleged Incapacitated Person (AIP), Binghamton, NY.

Kristen K. Luce, Esq., Keegan J. Coughlin, Esq., Attorneys for Cross-Petitioners,

oughlin & Gerhart, LLP, Binghamton, NY.

Judges: David H. Guy, J.

Opinion by: David H. Guy

Opinion

PROCEDURAL HISTORY
This proceeding was commenced on June 14, 2018 by a petition filed by R. T. (hereinafter referred to as Petitioner), requesting to be appointed Guardian of the Person and Property of her husband, D. C., Jr. (hereinafter referred to as AIP), pursuant to Article 81 of Mental Hygiene Law. The Court signed an Order to Show Cause on June 19, 2018, appointing Philip J. Artz, Esq. as Court Evaluator. On July 5, 2018, AIP's son, DCIII, and AIP's daughter, [**2] AB (collectively "Cross-Petitioners") filed a cross-petition requesting their appointment as co-guardians of the person and property of AIP. By Order dated July 10, 2018, the Court appointed Mental Hygiene Legal Service (3rd Dept.), A. Laura Bevacqua, Esq., of counsel, as counsel to represent AIP, in this matter.
The matter was first before the Court on August 21, 2018. Appearing were Petitioner; Richard Aswad, Esq., counsel for Petitioner; [*2] Philip J. Artz, Esq., Court Evaluator; Cross-Petitioners, DCIII and AB; Kristen K. Luce, Esq. and Keegan Coughlin, Esq., counsel for Cross-Petitioners; Mental Hygiene Legal Service (3rd Dept.), A. Laura Bevacqua, Esq., of counsel, for AIP; AIP was also present, with one of the aides who assisted with his care at Petitioner's home. After testifying about his analysis of the situation and recommendations, the letter and reports of Mr. Artz were admitted into evidence.
The parties agreed that they could work together in AIP's best interests on matters affecting his personal needs. The Court made a finding, based on the testimony and reports of Mr. Artz, that AIP has limitations that impact his ability to address his personal and financial needs, and that if arrangements were not either currently in place, or could not be put in place, to address those limitations, he would be at risk of harm and a guardian would have to be considered, and likely appointed. The matter was adjourned to give the parties the opportunity to exchange information and work cooperatively to address AIP's personal and financial needs.

The matter was again before the Court on November 13, 2018. The same parties appeared, [*3] with the exception of AIP, by then residing in Brookdale West, an adult care facility in Vestal, New York. Mr. Artz, the Court Evaluator, did appear, but was excused from this and further proceedings. The day before this appearance, Petitioner filed an Amended Petition, with supporting memorandum of law, requesting authority to utilize AIP's income for her own support. The amended petition requested authority inconsistent with Petitioner's previously requested authority to serve as Guardian of the Property of AIP Following substantial conferencing among the Court, counsel and the parties, Petitioner withdrew the portion of her original petition requesting she be appointed as Guardian of the Property of AIP, and consented to the appointment of the Cross-Petitioners as property Co-Guardians. DCIII and AB both testified, and the Court found them appropriate Co-Guardians of the Property of their father.

The parties negotiated a possible resolution with respect to property issues which would provide for some monthly support of Petitioner from AIP's income. A hearing date was scheduled, with interim settlement conferences to attempt resolution of this matter per the tentative agreement. With [*4] a substantial insurance reimbursement payment to AIP anticipated after December 1, 2018, the Court directed that no withdrawals be made from AIP's account after that date, so that the proper allocation of that refund payment could be made.

The appointment of Cross-Petitioners as Co-Guardians of the Property of AIP was confirmed by Order of the Court dated December 20, 2018.

On December 26, 2018, Cross-Petitioners filed an amended cross-petition seeking a monetary judgment against Petitioner, alleging theft of the AIP's income. The matter was again before the Court on January 17, 2019. The parties agreed to a settlement of most of the open issues, as detailed and memorialized in the Court's January 23, 2019 Amended Order and Judgment. This broad settlement left open only the property claims asserted by Cross-Petitioners against Petitioner in paragraph ten of their amended cross-petition. These remaining property claims were tried before the Court on January 17, 2019 and February 15, 2019. Petitioner, Cross-Petitioners and counsel for AIP all submitted post-hearing written summations.

FINDINGS OF FACT

AIP and Petitioner met and began a romantic relationship in 2008. AIP moved into Petitioner [*5] 's home in the spring of 2011. He put a substantial amount of his own resources into renovating and improving her home. In recognition of AIP's financial contribution to these improvements, Petitioner granted him ownership rights in her home, which was accomplished by the execution of two

deeds. AIP and Petitioner now own the property as tenants in common, with each reserving a life estate.

AIP and Petitioner were each married and divorced twice before their marriage to each other. From the time their romantic relationship began in 2008 until AIP's health would not allow it to continue, they enjoyed an active lifestyle, socializing, traveling, and participating in the events of their respective children and grandchildren. Petitioner attended the Covert family's events. Their home was well maintained. AIP and Petitioner were well dressed and groomed and utilized their respective income in a generally collective way to enjoy life.

AIP's income consists of a lifetime annuity, paying about $4,000 a month, monthly social security of more than $1,200 and a required minimum distribution from an IRA of approximately $270 per month, totaling over $5,500 per month in recent years. AIP's income [*6] was, until this Article 81 proceeding, deposited into a Visions Federal Credit Union (Visions) account.

Petitioner's income consists of Social Security retirement and a required minimum distribution payment from an IRA, totaling between $1,600 and $1,700 per month. Petitioner's income flows to an individual account she maintains at Horizons Federal Credit Union (Horizons). In addition to the Horizons account, Petitioner owns at least one investment account and, until 2017, she owned other real estate.

Petitioner and AIP clearly developed a habit of using all of their combined monthly income to enjoy life, family and each other. AIP's two prior failed marriages impacted him and played a role in his decision to convert a substantial amount of his savings into the lifetime annuity which is the biggest portion of his monthly income. His children were aware of this, and his determination to use his money as he saw fit during his lifetime.

Beginning by at least 2014, AIP was exhibiting memory issues. He received a dementia diagnosis in that year, of which both Petitioner and his children were aware. On March 5, 2014, AIP made Petitioner a joint owner of his Visions account.

Over time, AIP's [*7] memory issues progressed. If he had not already been doing it before, he developed a routine of going to Visions every month and withdrawing all his income in cash. At the same time, Petitioner's control over AIP's finances increased. There were incidents where AIP lost some of the cash he withdrew. This was a concern to both Petitioner and AIP's children.

AIP's family became increasingly concerned about his dementia progression. Petitioner attended training at local nursing homes to assist her in providing the best care possible for AIP. Petitioner and AIP's children held family meetings outside AIP's presence to discuss his memory issues, in both February and

December of 2016. The family discussed potential nursing home placement and in-home health care for AIP.
In August of 2016, Petitioner and AIP met with Jamie Lindsey, Esq., of Levene Gouldin & Thompson about AIP executing a new Power of Attorney naming Petitioner as agent. Attorney Lindsey concluded at that meeting that AIP lacked capacity to execute a Power of Attorney. Later in 2016, Petitioner took AIP to James Mack, Esq. who had represented both [**3] parties before, including in the preparation of the deeds to Petitioner 's house, [*8] to execute a new Power of Attorney. Attorney Mack also indicated that while AIP only needed a "moment of clarity" to execute a Power of Attorney, he did not possess the requisite clarity at the time of that meeting. No Power of Attorney was executed by AIP.
Early in 2017 modifications were made to a bathroom in the couple's house to enhance access and safety. This work was financed through a loan taken out by Petitioner alone.
In March or April of 2017, DCIII was added to AIP's Visions account. DCIII utilized this authority to begin to monitor his father's financial affairs. DCIII took AIP to Visions to make his monthly withdrawals in this time period. Due to concern with AIP's driving, Petitioner also sometimes took him to Visions to make the withdrawals. At some point, apparently in 2017, AIP no longer went to Visions to make the withdrawals; Petitioner started doing that on his behalf. The withdrawn funds were all deposited into Petitioner's individual Horizons checking account, from which she took care of all the couple's bills.
From early on in their romantic relationship, AIP asked Petitioner to marry him on multiple occasions. These requests began before AIP moved into Petitioner's [*9] house and continued throughout their relationship. Petitioner declined multiple proposals, having become, in her own words, "disillusioned" about the institution of marriage, due to her own failed marriages. AIP's children were aware of his multiple proposals, but similarly cautioned him about marrying again, due to his own marital history.
Petitioner traveled from Binghamton to Las Vegas, to visit with family, on June 7, 2017. AIP's children arranged to stay with him in his home, as they and Petitioner believed AIP could not be left home by himself.
On June 28, 2017, AIP left his home to run an errand and became lost. He was ultimately found driving in Minerva, New York, almost four hours north of his home. He was retrieved and brought home safely by DCIII. Within days of this incident, DCIII, with the knowledge and agreement of Petitioner, spoke to his father and took away his car keys, to prevent him from being able to drive. Two days later, AIP called DCIII back to his house to discuss driving privileges. DCIII did not relent, and at the end of the conversation, AIP confided in DCIII that he and Petitioner had obtained a marriage license and were planning to be married

imminently. [*10] This news was not favorably received by DCIII, who confronted Petitioner and, ultimately, their minister, about AIP's capacity to enter a marriage. On July 5, 2017, AIP and Petitioner were married, with no members of AIP's family present.

The marriage led to a cooling of the relationship between Petitioner and AIP's children. Within days of the wedding, DCIII received a letter dated July 3, 2017, from Visions advising that he had been removed from AIP's account.

Petitioner continued to manage AIP's and her own funds independently from July of 2017 forward. She retained counsel to commence this Article 81 proceeding in February of 2018. In April of 2018 Petitioner facilitated the transfer of AIP's Volkswagen to herself.

AIP's continuing deterioration necessitated the hiring of an in-home health care aide in January of 2018. An aide remained in place to assist in the home until September of 2018, when AIP was transferred to Brookdale West, a memory care facility in Vestal, New York. AIP moved to Vestal Park, a skilled nursing facility, in early December of 2018, where he remains a resident.

AIP is the owner of a long-term care insurance policy issued by GE Capital Life [**4] Insurance Company [*11] of New York. The policy was issued January 18, 2000 and covers services ranging from home care to institutionalized skilled nursing. AIP is past his elimination period, so the policy is currently paying or reimbursing all or a portion of his Vestal Park care costs. The understanding of the parties is that this is a New York "Partnership Plan," meaning that upon the expiration of benefits payable by the policy, AIP will automatically qualify for **Medicaid** coverage, without any asset spend-down requirement.

LAW AND ANALYSIS

Per the parties' settlement, the only issues left for Court determination are those set forth in paragraph ten (10) of the Cross-Petitioners' Amended Petition filed on December 26, 2018. Cross-Petitioners seek a judgment on behalf of AIP against Petitioner in an amount exceeding $124,000. They allege AIP lacked capacity to manage his own affairs as of January 1, 2017, and the requested amount represents his gross income received in 2017 and 2018, reduced by Cross-Petitioners' calculation of AIP's half share of the expenses of the parties' joint household.

Cross-Petitioners argue that the evidence allows the Court to establish a date by which AIP was incapacitated, after [*12] which they request the Court apply the provisions of Mental Hygiene Law §81.29(d). That section allows the Court to "modify, amend, or revoke any previously executed contract, conveyance, or disposition, *made by the incapacitated person* prior to the appointment of the

guardian if the court finds that the previously executed transaction was made while the person was incapacitated." MHL §81.29(d). (emphasis added). Assuming incapacity, AIP would be without the ability to consent to Petitioner's use of his funds via their joint account. The explicit language of this provision allows the Court to reverse transactions made by *the incapacitated person* but is silent as to reversing transactions made by a spouse or joint bank account holder. Therefore, the Court finds that the provisions of Mental Hygiene Law §81.29(d) are not directly applicable for providing the relief requested by the Cross-Petitioners.

Cross-Petitioners ask the Court to find the joint tenancy in regard to the joint Visions account was terminated in 2017 when Petitioner began taking all of the money from the joint account. *Mullen v Linnane*, 268 AD2d 313, 314 (1st Dept 2000). Cross-Petitioners argue that once Petitioner took control of AIP's joint account, her withdrawal of all the funds in that account terminated the joint tenancy and rendered [*13] Petitioner subject to a claim for recovery of one-half of the amount in the account. *Id; In re Mullen*, 268 AD2d 313 (1st Dept 2000). Cross-Petitioners correctly state the legal impact of Petitioner's excess withdrawals. However, the analysis does not end there; in any claim for a recovery of excess withdrawals, the withdrawing tenant may avoid surcharge by proving, by clear and convincing evidence, that the withdrawals were for the other tenant's benefit or with his consent. *Matter of Giacalone*, 143 AD2d 749 (2d Dept 1988); *Matter of Byrnes*, 85 AD2d 601 (2d Dept 1981).

The testimony at the hearing established that all of AIP's needs were being met while he was under the care of Petitioner. That continues at Vestal Park, where he now resides. Atypically, he is also the owner of a long-term care policy, the terms of which not only provide for his current care, but also ensure his ultimate qualification for **Medicaid**, if necessary, without impacting his assets.

While it is not clear from the record before the Court how Petitioner and AIP handled the mechanics of bill paying and expense management, it is clear that their total income was used for individual and collective needs and desires, including their home, clothing, travel and entertainment. As Petitioner testified, she and AIP did not plan for accumulation but spent [*14] all their income. She stated that AIP "likes things nice and was very generous." DCIII similarly testified that his father "spent his money."

As AIP's memory issues became more serious, he began to "cash out" the joint Visions account into which his monthly income flowed, giving the cash to Petitioner to use in taking care of their bills. DCIII accompanied his father to the bank twice for these withdrawals, so the family was all aware of the new protocol: Petitioner handling the couple's bills and finances. Over time, the process further evolved to where Petitioner was handling the joint account withdrawals herself,

then transferring the funds into her individual Horizons account, from which they were expended.

The consent of the joint tenant need not be express but can be implied. *Kleinberg v Heller*, 38 NY2d 836 (1976). Factors to determine implied consent include the nature, duration and closeness of the relationship between the joint tenants; the presence or absence of a habit of freely commingling their funds; testamentary dispositions for the excess withdrawer; prior generosity toward the excess withdrawer; the pattern, purpose and amounts of the withdrawals; the age and physical condition of the joint tenant when the [*15] excess withdrawals were made; the source of the funds in the joint account; and the tenant's knowledge of the withdrawals. *Id.* at 843-844; *In re Miller*, 1996 NYLJ LEXIS 7940, *1 (Sur Ct, Nassau County 1996).

Here, the joint tenancy in the Visions account was created six years after the parties' relationship began, but three years before they were married. AIP was clearly generous to Petitioner and himself when he had capacity, and actively participated in their pattern of freely spending. The parties elected to own the marital residence as tenants in common, with reciprocal life uses, rather than as joint tenants. AIP made no provision for Petitioner in his will, though he did make her the beneficiary of one of his retirement accounts.

In addition to the examination as to whether Petitioner had AIP's implied consent, as a joint account holder, to use all the income in the account, there is a related question: does a spouse have a duty to use marital funds solely for the financial support of an incapacitated spouse prior to the commencement of an Article 81 proceeding? This appears to be a question of first impression and would impose on a spouse a fiduciary duty to conserve all marital funds once the other spouse suffers diminished capacity. Cross-Petitioners are [*16] essentially asking the Court to find there is an additional responsibility on a spouse to preserve jointly held funds when the other spouse is suffering from diminishing capacity. Historically, at common law, a husband had a duty to support his wife and provide for her necessary expenses, including food, shelter, and medical care, while a wife had a reciprocal duty to provide domestic services for the well-being of her family. *Medical Business Assoc. v Steiner*, 183 AD2d 86, 90 (2d Dept 1992). This "doctrine of necessaries" was utilized to impose liability on the husband to third parties who provided essential goods and services to his wife and children. *Id.* The Appellate Division affirmed the essential principals of the doctrine and also held it applies equally to both spouses, under the New York Constitution's Equal Protection Clause. *Id* at 91 (citing *Garlock v Garlock*, 279 NY 337 [1939]). New York courts have also found that spouses have a fiduciary duty to each other in the context of executing separation agreements, which can be

set aside upon a finding of fraud, duress, or mistake. *Manes v Manes*, [**5] 277 AD2d 359, 361 (2d Dept 2000).

The Court finds that AIP's continued intellectual deterioration ultimately rendered the lifestyle and spending habits of AIP and Petitioner impossible to maintain. As AIP continued to suffer the impacts of dementia, [*17] Petitioner knew or should have known that she had a duty, as a spouse, to not spend AIP's income in a manner inconsistent with his established pattern of support for her, him, and them.

Reviewing these factors, the Court finds that certain transactions by Petitioner, starting as of January 1, 2017, and continuing through 2018, were in breach of her duty to act consistently with their previous expenditure pattern; AIP by then lacked the capacity to affirmatively consent to her use of his income; and some expenditures were not made with AIP's implied consent.

Therefore, the following transactions must be reversed:

1. Real Property Owned Solely by Petitioner

• In 2017, when all of AIP's income was being transferred from the joint Visions account to Petitioner's Horizons account, and his share of household and care expenses did not exceed or even approach the amount of his monthly income, Petitioner made multiple payments of bills relating to her own real estate, other than the joint marital residence. These totaled $6,969. Sale proceeds on both parcels were received by Petitioner in 2017, far in excess in this amount, and not placed in her Horizons account. Petitioner is directed to repay [*18] $6,969 to AIP via payment to his Property Co-Guardians.

2. Payments to or for Stephen

• Petitioner paid $445 in identifiable dental expenses for her son, Stephen. Other payments are alleged to have been made by her for Stephen's benefit, but cannot be proven by the evidence before the Court. In 2018, Petitioner made gifts to Stephen in the total amount of $3,840. The total of these transactions, $4,285, is reimbursable to AIP, via payment by Petitioner to AIP's Property Co-Guardians.

3. AIP's Volkswagen

• In April of 2018, Petitioner effectuated a transfer of AIP's Volkswagen to herself. Although older and of modest value, its transfer to Petitioner without any indication of her need for it, or use of it, given her clear understanding of her husband's incapacity at that time, must be reversed. Rather than directing the retransfer of the vehicle, the Court directs Petitioner to pay AIP, through his Property Co-Guardians, the sum of $1,700, the lower end of the documented range of value, and modestly below the testified value of the vehicle.

4. Petitioner's Legal Fees

• Petitioner paid $4,812.50 to her counsel in this matter between February 8, 2018 and October 17, 2018, from her Horizon's [*19] account, so arguably from the income of AIP then being transferred to that account. It is in the Court's discretion to set the fees to be paid to petitioner's counsel from the assets of the Alleged Incapacitated Person, when a petition is granted, or as the Court otherwise deems appropriate. MHL §81.16(f). Petitioner's petition was not granted, and from the perspective of the Court she misunderstood that a primary purpose of an Article 81 petition is the preservation and use of an incapacitated person's resources for that person's benefit, as her amended petition sought monthly financial support from AIP This case is not one where the Court deems it appropriate for the petitioner's fees to be paid from AIP's resources.
• After September 17, 2018, when AIP was admitted to Brookdale, his multi-care costs [**6] clearly exceeded his income. Thus, any payments made by Petitioner from the Horizons account after that date, even though all of AIP's income was flowing into it, were in fact not coming from AIP's income. For that reason, the $1,000 payment to her counsel on October 17, 2018, will not be reversed. Petitioner is directed to reimburse $3,800 to AIP through payment to his Property Co-Guardians.
5. Care [*20] Expense Reimbursements
• In late November of 2018, during the pendency of the proceedings, AIP received a reimbursement payment from Genworth, in the amount of $10,649.50, as well as a refund from Brookdale Senior Living, where he had been previously residing, in the amount of $1,471.14. Despite the direct discussion of the potential refund at a Court proceeding earlier in November of 2018, and the Court's Order dated November 13, 2018 expressly prohibiting withdrawals from the joint Visions account, Petitioner withdrew those sums for her own benefit. She is strictly correct the Court's Order set a date of December 1, 2018 to "freeze the account," but she is held to understand that date was used because there was no expectation the refunds would come before December 1, 2018. Petitioner clearly had a sense she should not have withdrawn these funds; she ultimately disclosed that she retained them in cash, in her home. These refunds of expenses made, or deemed to be made, from AIP's income, totaling $12,120.64, are to be returned to AIP, through his Property Co-Guardians.
6. Bathroom Remodel Loan
• Cross-Petitioners also seek to hold Petitioner fully liable for a loan taken out to remodel [*21] a bathroom in the marital residence. This loan financed an improvement to an asset owned jointly by Petitioner and AIP. It is not disputed that the modification of the bathroom was done to assist AIP. The Court finds that payments made on the loan by Petitioner through November 30, 2018, from whatever source, are appropriate and consistent with Petitioner and AIP's joint

ownership of the home and spending pattern in support of each other. The payment of that loan from December 1, 2018 until it is paid off will remain the equal responsibility (50% each) of AIP and Petitioner. The parties' counsel are directed to facilitate a mechanism for ensuring equal payment by their respective clients until the loan is paid.

LEGAL FEES

Counsel for Cross-Petitioners submitted an affirmation requesting that the Court set their fees, to be paid from the assets of AIP. The Court has the discretion in an Article 81 proceeding to award legal fees for a successful petitioner, payable from the AIP's resources. MHL §81.16(f). Here, Cross-Petitioners successfully petitioned for their appointment as Co-Guardians of the Property, and Co-Guardians of the Person with Petitioner.

The total compensation payable to counsel from [*22] Cross-Petitioners is based on their retainer agreement, which is a binding contract between Cross-Petitioners and their attorneys. The Court's only responsibility is to set the reasonable and appropriate portion of that fee payable from AIP's resources. *Matter of Ruth S. (Sharon S.)*, 125 AD3d 978, 980 (2d Dept 2015).

This was a complicated and contentious matter. There were five days of Court proceedings, substantial discovery, and negotiations. But for the efforts of counsel and the parties to settle the bulk of the disputed issues, the proceedings could easily have been [**7] substantially longer and more expensive.

At the same time, the Court needs to be mindful that preservation of AIP's resources, from which Cross-Petitioners now seek payment, was the very basis for their Amended Cross-Petition. Whatever portion of their fees are now deemed payable from AIP's current resources, the balance will be reimbursed to them through their inheritance from his estate.

The Court finds that the sum of $10,000 of the fees payable to counsel for Cross-Petitioners is appropriately payable currently from AIP's resources.

Therefore, it is hereby

ORDERED, that AIP is entitled to recovery from Petitioner in the amount of $27,175. Judgment against Petitioner in that amount [*23] may be entered by AIP, through his Co-Guardians of the Property, against Petitioner, unless payment, or an acceptable arrangement, is made within 30 days of the date of this Order; and it is further

ORDERED, that the sum of $10,000 of legal fees incurred by Cross-Petitioners may be currently paid by the Co-Guardians of the Property of AIP from guardianship resources.

This Decision constitutes the Order of the Court.

Date: May 15, 2019
Hon. David H. Guy
Acting Justice Supreme Court 6JD

Footnotes

- A copy of the policy was admitted as Cross-Petitioners' Exhibit 1. Apparently, through name change or acquisition, the issuing entity is now known as Genworth. All the parties refer to this as the "Genworth" policy.

Matter of R.T. (D.C.), 2019 N.Y. Misc. LEXIS 2480, 2019 NY Slip Op 29147

MATTER OF A.B.D.

INCOME PAYMENT TO ABLE ACCOUNT

In this Article 17-A case the developmentally disabled person was participating in a paid internship through OPWDD. So as not to jeopardize the individuals SSI and Medicaid benefits the court authorized the transfer of the earnings to an ABLE account.

Matter of A.B.D. (L.J.A.), 2019 N.Y. Misc. LEXIS 3237

Surrogate's Court of New York, Nassau County

June 13, 2019, Decided

2016-388351/A

Reporter
2019 N.Y. Misc. LEXIS 3237 * | 2019 NY Slip Op 29182 **

[**1] In the Matter of the Petition of A.B.D. and K.A.A, as Co-Guardians of L.J.A., A Developmentally Disabled Person Pursuant to SCPA 17-A for Leave to Further Lift Restraints, Transfer Assets.

Notice:
THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

Core Terms

disability, individuals, expenses, developmental disability, beneficiary, annual, savings account, entitlement, internship, jeopardize, earnings, families, services, deposit, funding, lifted, saving, blind

Counsel: [*1] Andrew Cohen, Esq., Garden City, New York.

Judges: HON. MARGARET C. REILLY, Judge of the Surrogate's Court.

Opinion by: MARGARET C. REILLY

Opinion

Margaret C. Reilly, J.
The following papers were considered in the preparation of this decision:
Before the court is a petition by A.B.D. and K.A.A.(petitioners), to establish a 529A account, commonly referred to as an ABLE account, for their daughter, L.J.A., a developmentally disabled adult. The petitioners are the co-guardians of L.J.A.'s person and property. The petition also seeks an order lifting the restraints on their letters of guardianship and authorization to deposit L.J.A.'s income from a paid internship into the 529A account.
Internal Revenue Code 529A (26 USC 529A) allows for the establishment of tax advantaged savings accounts for individuals with disabilities and their families pursuant to programs "established and maintained by a State, or agency or instrumentality thereof" (26 USC 529A [b][1]). New York enacted the New York Able Act, also called "New York achieving a better

life experience (NY ABLE) savings account act" effective April 1, 2016 (**Mental Hygiene** Law 84.01). The legislative intent is "to encourage and assist individuals and families in saving private funds for the purpose of supporting individuals with developmental disabilities [*2] to maintain health, independence and quality of life; and to provide secure funding for disability related expenses on behalf of designated beneficiaries with intellectual or developmental disabilities that will supplement, but not supplant, benefits provided through existing sources" (L. 2015, ch. 576, § 2). The account may be established for an individual who is blind or "has a medically determinable physical or **mental** impairment, which results in marked and severe functional limitations" and such "blindness or disability occurred before the date on which the individual attained the age 26" (26 USC 529A [e][2][A][i][I] and [II]). The account may be used to pay for qualified disability expenses which include "education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses" (26 USC 529A [e][5]). The aggregate amount that may be contributed to the account annually cannot exceed the annual gift tax [**2] exclusion (26 USC 529A [b][2][B][I]) plus, in the case of a contribution by the beneficiary, the lesser of the compensation included in the beneficiary's [*3] gross income for the taxable year or an amount equal to the poverty line for a one-person household (26 USC 529A [b][2][B][ii][I] and [II]). The account must be subject to repayment to the State upon the death of the beneficiary of all amounts in the account remaining, "not in excess of the amount equal to the total medical assistance paid" (26 USC 529A [f]). The account will not jeopardize the individual's entitlement to SSI or Medicaid as long as the account does not exceed $100,000.00 and the maximum annual contribution is not

exceeded (New York State Office of the State Comptroller, www.osc.state.ny.us/savings/able [last accessed May 15, 2019]).

The petitioners allege that L.J.A. is participating in a paid internship through the Office for Persons with Developmental Disabilities (OPWDD). Through this program, L.J.A. will hopefully transition into future paid employment. According to the petitioners, L.J.A.'s present and possible future earnings will jeopardize her entitlement to government benefits if her earnings are not deposited into the 529A account. The petition is therefore **GRANTED** and the restraints are lifted so that the petitioners can establish the account. A copy of the account should be filed with the court. [*4]

This constitutes the decision and order of the Court.

Dated: June 13, 2019
Mineola, New York
HON. MARGARET C. REILLY
Judge of the Surrogate's Court

Matter of A.B.D. (L.J.A.), 2019 N.Y. Misc. LEXIS 3237, 2019 NY Slip Op 29182

MATTER OF BEDNAREK

DEFINES PERSONS SUBJECT TO GUARDIANSHIP

Matter of Bednarek v Ingersoll, 2019 N.Y. Misc. LEXIS 411

Copy Citation

Supreme Court of New York, Chemung County

February 4, 2019, Decided

2018-2295

Reporter

2019 N.Y. Misc. LEXIS 411 * | 2019 NY Slip Op 50142(U) **

[**1] In the Matter of the Petition of Suzanne Bednarek, Petitioner, against Elizabeth Ingersoll, Power of Attorney, Respondent.

Notice:

THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

legal fees, reimburse, joint account, notice, guardianship, transactions, funds, motion to dismiss, portions, accounting, parties, vacate, participating, appointment, non-party, withdrawn, guardian, caption, days, law law law, misapprehended, procedurally, proceedings, re-argument, Appearance, attorney's, injunctive, questioned, modified, carries

Counsel: **[*1]** Douglas J. Mahr , Esq., of Scolaro Fetter Grizanti & McGough , attorneys for Petitioner.

Denice A. Hamm, Esq., of Hamm & Roe, LLP , attorneys for Respondent.

Robert L. Halpin , Esq., attorney for Elizabeth K.

Judges: Hon. David H. Guy , Acting Supreme Court Justice.

Opinion by: David H. Guy

Opinion

David H. Guy , J.

This proceeding is a petition filed by Suzanne Bednarek, seeking an accounting by Elizabeth Ingersoll, as agent under a power of attorney (POA) for their mother, Elizabeth K. The petition also seeks the revocation of the power of attorney from Elizabeth K to Elizabeth Ingersoll, and enforcement of certain provisions of the June 15, 2018 Decision and Order of this Court in a related matter: Ms. Bednarek's petition for the appointment of an Article 81 guardian for Elizabeth K.

The parties entered into a Stipulation setting forth the timing of Ms. Ingersoll's delivery of her POA accounting. The timing of the accounting has been modified by subsequent stipulations entered into by the parties.

On or about December 26, 2018, Ms. Ingersoll filed a motion requesting an Order striking portions of the Court's June 15, 2018 Decision in the related guardianship matter.1 The [**2] Court set a return date on the motion of January 28, **[*2]** 2019, on submission. The motion is supported by an affidavit dated December 20, 2018 of Denice Hamm, Esq., counsel for Ms. Ingersoll. Ms. Bednarek submitted papers in opposition to the motion on January 15, 2019, including an affirmation from her counsel, Douglas J. Mahr , Esq. and a memorandum of law. Ms. Hamm filed a reply on January 28, 2019.

This motion seeks to vacate certain portions of the Court's June 15, 2018 Decision and Order in the related guardianship matter. Arguably, the motion is procedurally defective for that reason and could be dismissed. The Court will instead address the substance of the motion.

Even if this motion is considered as having been filed in the related guardianship action, it is procedurally defective and would be dismissed as a motion for reconsideration or re-argument. A motion for re-argument must be identified specifically as such, be based upon matters of fact or law allegedly overlooked or misapprehended by the Court and shall be made within 30 days of service of the order. CPLR 2221(d) . A motion to reargue shall also be identified specifically as such, shall be based upon new facts not offered in the prior motion that would change the prior determination, and **[*3]** contain reasonable justification for a failure to present such facts. CPLR 2221(e)(3) . This motion satisfies none of the statutory requirements for either a motion to renew or reargue.

In her reply to the response to this motion, Ms. Ingersoll clarifies an alternative basis for the granting of her motion: it should be treated as a motion to vacate under CPLR 5015(a)(4) . Ms. Ingersoll argues that since she was "a person on notice" of the guardianship proceeding, rather than a "party," the Court lacked jurisdiction to order her to reimburse funds to her mother. Ms. Ingersoll misapprehends both her own status in the Article 81 proceeding and the Court's jurisdiction and authority in that proceeding.

Ms. Ingersoll was a person entitled to notice of the Article 81 proceeding pursuant to MHL §81.07(g)(1) . Ms. Ingersoll appeared at the initial hearing date on June 6, 2017, without counsel. On August 10, 2017, Denice Hamm, Esq., filed a Notice of Appearance on behalf of Ms. Ingersoll and appeared and participated at all future proceedings in the Article 81 over the next ten months. Ms. Ingersoll submitted her own motion for summary judgment in the Article 81, which was handled in parallel with Mrs. K's motion for dismissal. Ms. Ingersoll's **[*4]** motion papers included a copy of the check register for the joint account from which the disputed checks for payment/reimbursement of Ms. Ingersoll's legal fees were drawn. Ms. Ingersoll appeared, through counsel, at the oral argument on the motions to dismiss on May 30, 2018, where the issue of Ms. Ingersoll's use of the joint account funds for her own legal expenses, though ancillary to the motion to dismiss the Article 81 proceeding, was raised.

Ms. Ingersoll never formally filed a cross-petition to be appointed as guardian for her mother. At the same time, Mrs. K's pleadings included a nomination of Ms. Ingersoll as guardian, should the Court have found an appointment necessary. The Court finds that Ms. Ingeroll's formal appearance through counsel and her active participation in the guardianship proceedings renders her subject to the Court's jurisdiction in the Article 81 proceeding, despite her not being named as petitioner or respondent in that proceeding. *See, e.g., In the Matter of Luisa P.*, 153 AD3d 1262, 1263, 61 N.Y.S.3d 125 (2d Dept 2017) (court affirmed issuance of injunctive relief against non-party individual); *In the Matter of Barbara Hultay v Mei Wu S.*, 140 AD3d 502, 35 N.Y.S.3d 9 (1st Dept 2016) (court had jurisdiction to grant injunctive relief against non-party individual).

The Court's exercise of its jurisdiction over Ms. Ingersoll in the Article 81 includes **[*5]** its ability to make a determination on the amount and source of payment legal fees pursuant to [**3] MHL §81.10(f) . The determination made by the Court in its decision on the motion to dismiss the Article 81 proceeding was that the participating parties pay their own legal fees, and that petitioner and Mrs. K split the expense of the Court Evaluator.

The Court's determination that it had proper jurisdiction over Ms. Ingersoll in the Article 81 proceeding warrants the dismissal of the currently pending motion as a motion for vacatur under CPLR 5015(a)(4) . However, that does not conclude the analysis. Ms. Ingersoll is correct that the

Court's direction that she reimburse funds to the joint account to the extent that her fees were paid from it goes beyond the Court's appropriate determination that the participating parties be responsible for their own legal fees. The issue of Ms. Ingersoll's authority to pay or reimburse her legal fees as a gift from her mother is a distinct issue and was not before the Court on the May 30, 2018 motions to dismiss the Article 81 proceeding. *See, e.g.,* *Matter of Dandridge*, 120 AD3d 1411, 993 N.Y.S.2d 125 (2d Dept 2014) (while clear evidence of incapacity warranted Supreme Court's annulment of marriage, formal application for such relief was not made and non-party spouse was entitled **[*6]** to notice and opportunity to be heard; matter remanded for hearing).

The currently pending action, in which this motion is brought, is for an accounting by Ms. Ingersoll as agent for her mother; a determination as to the propriety of transactions she undertook as agent; and a determination of the continued viability of the power of attorney as an effective resource for Mrs. K. In the context of this proceeding, Ms. Bednarek will have the opportunity to challenge Ms. Ingersoll's authority to make any and all agent transactions, including those which paid or reimbursed Ms. Ingersoll's legal fees in the Article 81 proceeding. Ms. Ingersoll will similarly have the ability to establish her authority with respect to questioned transactions.2

Ms. Ingersoll's motion to vacate those portions of the Court's June 15, 2018 Decision and Order in the related guardianship proceeding, which directed Ms. Ingersoll to reimburse Mrs. K's joint account for any funds withdrawn by Ms. Ingersoll to pay her own attorney's fees, is granted. The validity of those transactions will be determined by the Court in this proceeding.

Therefore, based on the foregoing, it is hereby

ORDERED, that the motion of Elizabeth **[*7]** Ingersoll is GRANTED, and the following portions of the Court's June 15, 2018 Decision and Order shall be stricken:

The following line from Page 14, second full paragraph: "Ms. Ingersoll is directed to reimburse the joint account for any such funds withdrawn by her, within thirty (30) days of the date of this Order, and provide evidence to petitioner's counsel, and the Court, that she has done so."

Third "ORDERED" paragraph on page 16: "**ORDERED**, that Elizabeth Ingersoll is directed to reimburse the joint account she shares with Elizabeth K for any funds withdrawn by her to pay her own attorney's fees to Denice Hamm, Esq., within thirty (30) days of this Order, and to provide evidence of such repayment to all counsel, and the [**4] Court; and it is further"

This Decision constitutes the Order of the Court.

Date: February 4, 2019

Hon. David H. Guy

Acting Supreme Court Justice

Footnotes

- 1

  The notice prepared and filed with this motion carries the caption of the related Article 81 proceeding. The affidavit in support of the motion carries the caption of the 2018 power of attorney proceeding and recites that it is in opposition to that petition and in support of the motion to vacate portions of the Court's June 15, 2018 Order. The Court modified the filed notice of motion when the return date was set. The Index Number was corrected on the notice of motion to correspond to the action in which the action was brought; the language of the caption was not changed.

- 2

  Ms. Bednarek's current petition before the Court does not reference the legal fee payments as questioned transactions, presumably because the Court addressed them in its earlier decision in the Article 81 proceeding. Instead, Ms. Bednarek moves to enforce that portion of the earlier Order. The Court recognizes that the petition's allegations that question the transactions undertaken by Ingersoll as Mrs. K's agent implicitly call into question the payment of Ingersoll's legal fees from the joint account and will be part of this case.

FAIR HEARING 7923571Y

PROMISSORY NOTE UPHELD DESPITE NONCOMPLIANT PAYMENTS

STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: March 7, 2019
CASE #: MA61411
AGENCY: Genesee
FH #: 7923571Y

In the Matter of the Appeal of

[redacted]

from a determination by the Genesee County Department of Social Services

DECISION AFTER FAIR HEARING

JURISDICTION

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law) and Part 358 of Title 18 NYCRR (hereinafter Regulations), a fair hearing was held on March 29, 2019, in Albany, before Sara Duncan, Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

Nicholas Proukou, Esq. (via video)

For the Social Services Agency

Denise Vereeckem, Fair Hearing Representative; (via video)
Tina Kasperek-Assistant County Attorney (via video)

ISSUE

Was the Agency's determination to deny the Appellant's application for Medicaid on the grounds of excess resources correct?

Was the Agency's determination that the Appellant is not eligible for nursing facility services for a period of 11 months or May 2019 correct?

Was the Agency's determination that the Appellant was eligible for nursing facility services with a partial penalty for the month of May 2019 correct?

FINDINGS OF FACT

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

1. On December 28, 2017, an application for Medicaid was made by or on behalf of the Appellant. The Appellant is 98 years of age, and has been receiving nursing facility services in a local nursing facility since September 2017.

2. By notice dated January 8, 2019 the Agency determined to deny the Appellant's application on the grounds of excess resources in the amount of $118,088.65. By a separate notice dated January 8, 2019 the Agency determined that the Appellant was not eligible under Medicaid for nursing facility services because the Appellant transferred assets valued at $118,153.61 for less than fair market value.

3. The Agency determined to impose a penalty period of 11 months beginning June 1, 2018 through April 30, 3019 during which the Appellant may not receive Medicaid coverage for the cost of nursing facility services by dividing $118,153.61 the uncompensated value of transferred assets, by $10,078.00 the applicable regional rate. The Agency then determined that there was an additional $7,295.61 that the Appellant would have to contribute toward her cost of nursing facility services for the month of May 2019.

4. On March 7, 2019, the Appellant requested this fair hearing.

APPLICABLE LAW

Sections 360-4.1 and 360-4.8(b) of 18 NYCRR (herein referred to as "the Regulations") provide that all income and resources actually or potentially available to a Medicaid applicant or recipient must be evaluated, but only such income and/or resources as are found to be available may be considered in determining eligibility for Medicaid. A Medicaid applicant or recipient whose available non-exempt resources exceed the resource standards will be ineligible for Medicaid coverage until he or she incurs medical expenses equal to or greater than the excess resources.

Under Section 360-4.4 of the Regulations, "Resources" are defined to include any liquid or easily liquidated resources in the control of an applicant or recipient, or anyone acting on his or behalf, such as a conservator, representative, or committee. Certain resources of a Medicaid-qualifying trust, as described in Section 360-4.5 of the Regulations, may also be counted in evaluating Medicaid eligibility.

Section 366.5(d) of the Social Services Law and Section 360-4.4(c)(2) of the Regulations govern Transfers of Assets made by an applicant or recipient or his or her spouse) on or after August 11, 1993. Section 366.5(e) governs transfers made on or after February 8, 2006.

Generally, in determining the Medicaid eligibility of a person receiving nursing facility services, either as an in-patient in a nursing facility (including an intermediate care facility for the mentally retarded), as an in-patient in a medical facility at a level of care such as is provided in a nursing facility, or as a recipient of care, services, or supplies at home pursuant to a waiver under section 1915(c) of the federal Social Security Act ("waivered services"), any transfer of assets for less than fair market value made by the person or his or her spouse within or after the "look-back period" will render the person ineligible for nursing facility services.

For applications filed on or after August 1, 2006, for Medical Assistance coverage of nursing facility services, the "look-back period" is the period immediately preceding the date that an institutionalized individual is both institutionalized and has applied for Medical Assistance. Beginning February 1, 2009 the look back period will increase from 36 months to 37 months and each month thereafter it will increase by one month until February 1, 2011 when a 60 month look-back period will be in place for all types of transfers of assets. 06 OMM/ADM-5. The uncompensated value of an asset is the fair market value of such asset at the time of transfer less any outstanding loans, mortgages, or other encumbrances on the asset, minus the amount of the compensation received in exchange for the asset. Social Services Law 366.5(e).

Sections 366.5(d) and (e) of the Social Services Law provide that an individual will not be ineligible for Medicaid as a result of a transfer of assets if:

(a) the asset transferred was other than a homestead and was a disregarded or exempt asset under Section 360-4.4(d), 360-4.6, and/or 360-4.7 of the Regulations; or

(b) the asset transferred was a home, and title to the home was transferred to:

(1) the individual's spouse; or

(2) the individual's child, who is blind, disabled, or under the age of 21; or

(3) the individual's sibling, who has an equity interest in the home and was residing in the home for a period of at least one year immediately before the date the person became an institutionalized individual, or

(4) the individual's child, who was residing in the home for a period of at least two years immediately before the date the person became an institutionalized individual, and who provided care to the person which permitted her or him to continue residing at home rather than enter into an institution or facility; or

(c) the asset was transferred:

(i) to the individual's spouse or to another for the sole benefit of the spouse; or

(ii) from the individual's spouse to another for the sole benefit of the spouse; or

(iii) to the individual's child who is blind or disabled, or to a trust established solely for the benefit of such child; or

(iv) to a trust established solely for the benefit of a disabled person under 65 years of age.

(d) a satisfactory showing is made that:

(i) the individual or his or her spouse intended to dispose of the asset either at fair market value, or for other valuable consideration; or

(ii) the asset was transferred exclusively for a purpose other than to qualify for Medicaid; or

(iii) all assets transferred for less than fair market value have been returned to the individual.

The purchase of a promissory note, loan, or mortgage on or after February 8, 2006 shall be treated as the disposal of an asset for less than fair market value unless such note, loan, or mortgage meets the following criteria:

- **has a repayment term that is actuarially sound;**
- **provides for payments to be made in equal amounts during the term of the loan, with no deferral and no balloon payments made; and**
- **prohibits the cancellation of the balance upon the death of the applicant/recipient.**

Social Services Law 366.5(e), 06 OMM/ADM-5

DISCUSSION

The Appellant is in a nursing home. Her attorney Nicholas Proukou appeared at the hearing on the Appellant's behalf. Attorney Proukou waived the Appellant's right to personally participate in the hearing.

The Assistant County Attorney (ACA) explained that on August 24, 2017 the Appellant withdrew $201,000.00 from her Key Bank account. She transferred $120,000.00 to her son [redacted] and the remaining $81,000.00 was given to [redacted] who signed a Promissory Note whereby he promised to pay the $81,000.00 back to the Appellant with interest commencing September 1, 2017. The ACA contends that because the Promissory Note was not paid back according to the provisions of the Promissory Note, the note is invalid. The Agency determined the Promissory Note was void and therefore the $81,000.00 was an uncompensated transfer. The ACA explained that because the monies were paid back with interest ($82,846.39) the Agency subtracted that amount from the $201,000.00 leaving the total uncompensated transfer amount to be $118,153.61.

The ACA explained that the Agency also determined that the money that was repaid was a resource which rendered the Appellant resource ineligible for Medicaid from the date of application, December 28, 2017, until May 31, 2018 at which time the penalty period for the uncompensated transfers would begin. The ACA explained that after the Agency determined the Promissory Note was not valid, the Agency relied on 06 OMM/ADM-5 page 18, to determine that once the $81,000.00 was paid back to the Appellant it must be treated as though the $81,000.00 was never transferred and thus must be considered a resource as of the date of the application which rendered the Appellant resource ineligible until June 1, 2018. The ACA stated that the penalty period for the uncompensated transfer of $118,153.61 runs from June 1, 2018 through April 30, 2019.

The Agency submitted into evidence an evidentiary packet which contained, among other documents, a copy of the January 8, 2019 notice denying the Appellant's Medicaid application on the grounds of excess resources, a copy of the January 8, 2019 determination that the Appellant is not eligible for nursing facility services for a period of 11 months or until May 2019 and a copy of the Promissory Note.

In response Attorney Proukou argued that the Promissory Note was not invalid and that the Agency erred when it considered the loan proceeds as a resource of the Appellant because the loan was a bona fide loan pursuant to 18 NYCRR Section 352.22. Attorney Proukou stated that the terms of the Promissory Note complies with Social Services Law 366.5 (e), 06 OMM/ADM-6 and the Medicaid Reference Guide. The repayment term is actuarially sound, provides for payments to be made in equal amounts during the term of the loan with no deferral, and no balloon payments and it prohibits the cancellation of the balance upon the death of the Appellant. Attorney Proukou stated that because the Promissory Note is valid, the $81,000.00 is not a resource and the resources the Appellant did have were below the Medicaid eligibility resource threshold as of September 1, 2017, Therefore, the penalty period for the uncompensated transfers should begin on September 1, 2017 not on June 1, 2018 as the Agency contends.

Attorney Proukou referred to Fair Hearing #6248084Y (July 2, 2013) as an analogous case. In that case, on December 30, 2010 the Appellant gave $119,647.00 to her daughter to whom she entered into a ten-month Promissory Note in the amount of $140,715.00, with an interest rate of 3.5% per annum resulting in a monthly repayment of principal and interest of $14,298.22 commencing January 31, 2011. The Promissory Note provided for payments to be

made in equal amounts during the term of the loan with no deferral, no acceleration and no balloon payments. In that case the local Agency argued that the Promissory Note was invalid and therefore treated the entire amount as a resource and denied the Appellant's Medicaid application on the grounds of excess resources. The Commissioner ruled that the Agency erred in including the proceeds of the Promissory Note as an available resource. The decision states:

> *It is noted that under the authority cited above, the validity of the promissory note is determined by its terms and provisions. In this case, the promissory note was paid in full within the ten-month period set forth in the note itself. The fact that the person responsible for making the payments may have paid more or less than the amount due on the required due date during five of the required ten payment periods does not result in the note being invalid or not in compliance with the terms of 06-OMM/ADM-05.*

In response, the ACA stated that FH#7588152H is on point with the instant case. In that case, the Appellant gave his daughter $64,000.00. The daughter executed a Promissory Note to pay the Appellant $64,000.00 with interest at the rate of 2% per annum in 6 monthly installments of $10,728.98 per month on the first day of each month beginning October 1, 2016 through March 1, 2017. The Promissory Note provided for a repayment term of six months, with no deferral, no acceleration, and no balloon payments. The Promissory Note also prohibited the cancellations of any balance of unpaid principal and interest upon the death of the lender and such unpaid amounts due at the death of the lender shall be payable to the lender's estate. The Agency determined that the Promissory Note was invalid on the grounds that the daughter never intended to perform the promises at the time the note was made, and in fact, did not perform. It was undisputed that that none of the required payments under the terms of the note were made, and that as of the date of the Agency's determination as well as the date of the hearing, the entire principal balance plus interest remained outstanding. The Agency argued that the Promissory Note was a sham transaction not only because none of the payments promised were made, but moreover because the Appellant's daughter, as maker of the note, never had any intention of performing the promises to begin with. Therefore, the Agency concluded that based upon this promissory fraud, the Promissory Note in question was invalid and cannot constitute good and valuable consideration for any part of the assets transferred in this case. It was undisputed that the Appellant's daughter did not intend to make any payments on the Promissory Note until the house gifted by the Appellant was sold. In that case, the Commissioner affirmed the Agency's determination to include the $64,000.00 in the uncompensated transfers. The decision states:

> *The otherwise unrefuted evidence on the record supports a finding that at all relevant times, the maker had no genuine intention of honoring the payment terms of the promissory note...the Agency's determination that the Promissory Note was essentially a sham transaction, created solely to justify uncompensated transfers in the broadest sense, was reasonable and amply supported by the evidence on the record.*

Based on the record the Agency's determination that the Promissory Note was invalid and therefore the $81,000.00 must be considered a resource cannot be sustained. A review of the Promissory Note shows that its terms comply with 06 OMM/ADM-5. The Agency's reliance on FH#7588152H is not on point with the instant case. In the instant case, the Appellant's son

[redacted] repaid the loan in full to the Appellant by June 2018. The terms of the Promissory Note were that [redacted] would pay 10 equal monthly installments (from September 1, 2017 through June 2018) of $8,192.13 which represents combined principal and interest payments commencing September 2017 and continuing on the first day of each succeeding months until paid in full in accordance with the amortization schedule which was attached to the note. The following payments were made:

Month	Payment	Date Paid
September 2017	$8,192.13	10/3/2017
October 2017	$8,192.13	10/3/2017
November 2017	$8,192.13	11/22/2017
December 2017	$8,192.13	11/22/2017
January 2018	$8,223.45	02/1/2018
February 2018	$8,223.45	02/1/2018
March 2018	$8,192.13	03/6/2018
April 2018	$8,192.13	3/27/2018
May 2018	$8,192.13	5/23/2018
June 2018	$7,270.83	6/20/2018

A review of the payments show that although the payments were not made in a manner that strictly complied with the terms of the Promissory Note the payments were made on a regular basis and were completed within the 10-month period set forth in the note itself. It is also noted that there was no balloon payment made. It is found that the Promissory Note is valid.

In the case the Agency cited the local Agency argued that the loan and Promissory Note was a sham transaction, created solely to justify uncompensated transfers. The Commissioner found that was a reasonable and persuasive argument based on the specific facts in that case. In the instant case the Assistant County Attorney failed to pursue on cross-examination any line of questioning regarding the intent of the parties to the loan and the circumstances surrounding the loan, instead throughout the hearing the Agency focused solely on the argument that because the payments were not made strictly within the provisions of the Promissory Note, that the note was not valid.

Based on this record, for the reasons set forth above, it is found that the Promissory Note was valid and therefore the Agency erred in considering the $81,000.00 a resource.

DECISION (AND ORDER)

The Agency's determination to deny the Appellant's application for Medicaid on the grounds of excess resources was not correct and is reversed.

The Agency's determination that the Appellant is not eligible for nursing facility services for a period of 11 months or May 2019 is not correct and is reversed.

The Agency is directed to begin the penalty period on September 1, 2017 based on the uncompensated transfers of $118,153.61.

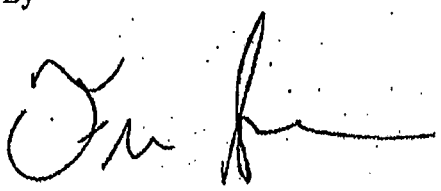
Should the Agency need additional information from the Appellant in order to comply with the above directives, it is directed to notify the Appellant promptly in writing as to what documentation is needed. If such information is requested, the Appellant must provide it to the Agency promptly to facilitate such compliance.

As required by 18 NYCRR 358-6.4, the Agency must comply immediately with the directives set forth above.

DATED: Albany, New York
04/29/2019

NEW YORK STATE OFFICE OF
TEMPORARY AND DISABILITY ASSISTANCE

By



Commissioner's Designee

FAIR HEARING 7393751Z

DENIAL OF 24 HOUR LIVE IN CARE REVERSED

OAH-4482/20 (Rev. 6/10)

From: **New York State Office of Temporary and Disability Assistance**
P.O. Box 1930
Albany, NY 12201 - 1930

TRANSMITTAL OF FAIR HEARING DECISION TO REPRESENTATIVE

Fair Hearing #: **7933751Z**
Hearing Date: **05/16/19**
Decision Date: **05/23/19**
Case #: **00022875275E**
Category/Subcategory: **MA/HOLD**

Agency: **New York City MAP**
Appellant: **CHAYA SHAIN**
1428 41ST STREET 1FL
BROOKLYN, NY 11218

****
*** ***
*** ENCLOSED IS THE DECISION RENDERED ***
*** ON BEHALF OF THE ABOVE APPELLANT ***
*** FOR WHOM YOU SERVED AS REPRESENTATIVE ***
*** ***
****

TO: **KORSINSKY KLEIN, LLP**
MICHAEL KORSINSKY
2926 AVENUE L
BROOKLYN, NY 11210

If the decision is in favor of the Appellant, the local social service department is required to comply with the decision forthwith (as quickly as possible), and is required to notify the Appellant of its compliance. The Appellant has been advised to notify the State Office of Temporary and Disability Assistance if the Agency fails to comply with the decision within 10 days after receipt of the decision. Our address and phone number are:

New York State Office of Temporary and Disability Assistance
Office of Administrative Hearings
Compliance Unit
P. O. Box 1930
Albany NY 12201 - 1930

1-800-342-3334

If the Appellant did not win the hearing, the Appellant may bring a lawsuit in accordance with Article 78 of the Civil Practice Law and Rules against the State agency whose name appears at the top left of the decision. If the Appellant wishes to bring a lawsuit and does not know how, the Appellant should contact the legal resources available to him/her (e.g. - County Bar Association, Legal Aid, Legal Services, etc.). The Appellant must start a lawsuit within 4 months after the date of decision.

A copy of this decision has been mailed to the Appellant.

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STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: March 27, 2019
CASE #: 00022875275E
CENTER #: MAP, SHP
FH #: 7933751Z

In the Matter of the Appeal of Chaya Shain from a determination by HealthFirst - Senior Health Partners	:	**DECISION AFTER FAIR HEARING**

JURISDICTION

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law) and Part 358 of Title 18 NYCRR, (hereinafter Regulations), a fair hearing was held on May 16, 2019, in New York City, before Allyson Sackey, Supervising Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

Tracy Connors, Medicaid Specialist, Korsinsky & Klein, LLP

For the Managed Long Term Care Plan (HealthFirst - Senior Health Partners)

Megan Lasnini, Fair Hearing Representative

ISSUE

Was the determination of the Appellant's Managed Long Term Care Plan, HealthFirst - Senior Health Partners, not to authorize the Appellant for Live-in 24 hour personal care services correct?

FINDINGS OF FACT

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

1. The Appellant, age 80, who resides with her 84 year old husband, is in receipt of authorization for Medical Assistance, and is enrolled in a Medicaid managed long term care plan operated by HealthFirst - Senior Health Partners (SHP).

2. The Appellant has been in receipt of personal care services in the amount of 49 hours

per week, under a task based plan of care.

3. On January 16, 2019, SHP completed a Uniform Assessment System – Assessment (Comprehensive) Report of the Appellant.

6. On January 16, 2019, SHP completed a UAS Aide Task Service Plan for the Appellant, which determined Appellant required 49.01weekly hours of personal care services.

7. A request for an increase in personal care services was made on the Appellant's behalf.

8. By Initial Adverse Determination dated February 21, 2019, SHP denied the Appellant's request on the grounds it was not medically necessary.

9. The Appellant appealed the February 21, 2019 determination.

10. By Final Adverse Determination dated March 22, 2019, SHP upheld its initial determination.

11. This fair hearing was requested on March 27, 2019.

APPLICABLE LAW

Regulations at 18 NYCRR 358-3.7(a) provide that an appellant has the right to examine the contents of the case record at the fair hearing. At the fair hearing, the agency is required to provide complete copies of its documentary evidence to the hearing officer. In addition, such documents must be provided to the appellant and appellant's authorized representative where such documents were not provided otherwise to the appellant or appellant's authorized representative in accordance with 18 NYCRR 358-3.7. 18 NYCRR 358-4.3(a). In addition, a representative of the agency must appear at the hearing along with the case record and a written summary of the case and be prepared to present evidence in support of its determination. 18 NYCRR 358-4.3(b).

Social Services Law §365-a(2) provides that "Medical assistance" shall mean payment of part or all of the cost of medically necessary medical, dental and remedial care, services and supplies, as authorized in this title or the regulations of the department, which are necessary to prevent, diagnose, correct or cure conditions in the person that cause acute suffering, endanger life, result in illness or infirmity, interfere with such person's capacity for normal activity, or threaten some significant handicap and which are furnished an eligible person in accordance with this title and the regulations of the department.

Social Services Law §365-a(2)(k) provides that such care, services and supplies shall include care and services furnished by an entity offering a comprehensive health services plan, including an entity that has received a certificate of authority pursuant to sections forty-four

hundred three, forty-four hundred three-a or forty-four hundred eight-a of the public health law (as added by chapter six hundred thirty-nine of the laws of nineteen hundred ninety-six) or a health maintenance organization authorized under article forty-three of the insurance law, to eligible individuals residing in the geographic area served by such entity, when such services are furnished in accordance with an agreement approved by the department which meets the requirements of federal law and regulations.

Part 438 of 42 Code of Federal Regulations (CFR) pertains to provision of Medicaid medical care, services and supplies through Managed Care Organizations (MCOs), Prepaid Inpatient Health Plans (PIHPs), Prepaid Ambulatory Health Plans (PAHPs) and Primary Care Case Managers (PCCMs), and the requirements for contracts for services so provided.

Section 438.210 of 42 CFR Subpart D provides, in pertinent part:

(a) Coverage - Each contract with an MCO, PIHP, or PAHP must do the following:

(1) Identify, define, and specify the amount, duration, and scope of each service that the MCO, PIHP, or PAHP is required to offer.

(2) Require that the services identified in paragraph (a)(1) of this section be furnished in an amount, duration, and scope that is no less than the amount, duration, and scope for the same services furnished to beneficiaries under fee-for-service Medicaid, as set forth in Sec. 440.230.

(3) Provide that the MCO, PIHP, or PAHP--

(i) Must ensure that the services are sufficient in amount, duration, or scope to reasonably be expected to achieve the purpose for which the services are furnished.

(ii) May not arbitrarily deny or reduce the amount, duration, or scope of a required service solely because of diagnosis, type of illness, or condition of the beneficiary;

(iii) May place appropriate limits on a service

(A) On the basis of criteria applied under the State plan, such as medical necessity; or

(B) For the purpose of utilization control, provided the services furnished can reasonably be expected to achieve their purpose, as required in paragraph (a)(3)(i) of this section; and

(4) Specify what constitutes "medically necessary services"' in a manner that:

(i) Is no more restrictive than that used in the State Medicaid program as indicated in State statutes and regulations, the State Plan, and other State policy and procedures; and

(ii) Addresses the extent to which the MCO, PIHP, or PAHP is responsible for covering services related to the following:

(A) The prevention, diagnosis, and treatment of health impairments.

(B) The ability to achieve age-appropriate growth and development.

(C) The ability to attain, maintain, or regain functional capacity.

(b) Authorization of services. For the processing of requests for initial and continuing authorizations of services, each contract must require:

(1) That the MCO, PIHP, or PAHP and its subcontractors have in place, and follow, written policies and procedures.

(2) That the MCO, PIHP, or PAHP:

(i) Have in effect mechanisms to ensure consistent application of review criteria for authorization decisions; and

(ii) Consult with the requesting provider when appropriate.

(3) That any decision to deny a service authorization request or to authorize a service in an amount, duration, or scope that is less than requested, be made by a health care professional who has appropriate clinical expertise in treating the enrollee's condition or disease....

Section 438.236 of 42 CFR Subpart D provides, in pertinent part:

(a) Basic rule: The State must ensure, through its contracts, that each MCO and, when applicable, each PIHP and PAHP meets the requirements of this section.

(b) Adoption of practice guidelines. Each MCO and, when applicable, each PIHP and PAHP adopts practice guidelines that meet the following requirements:

(1) Are based on valid and reliable clinical evidence or a consensus of

health care professionals in the particular field.

(2) Consider the needs of the MCO's, PIHP's, or PAHP's enrollees.

(3) Are adopted in consultation with contracting health care professionals.

(4) Are reviewed and updated periodically as appropriate.

(c) Dissemination of guidelines. Each MCO, PIHP, and PAHP disseminates the guidelines to all affected providers and, upon request, to enrollees and potential enrollees.

(d) Application of guidelines. Decisions for utilization management, enrollee education, coverage of services, and other areas to which the guidelines apply are consistent with the guidelines.

Section 438.400 of 42 CFR Subpart F provides in part:

(a) Statutory basis. This subpart is based on sections 1902(a)(3), 1902(a)(4), and 1932(b)(4) of the Act.

(1) Section 1902(a)(3) requires that a State plan provide an opportunity for a fair hearing to any person whose claim for assistance is denied or not acted upon promptly.

(2) Section 1902(a)(4) requires that the State plan provide for methods of administration that the Secretary finds necessary for the proper and efficient operation of the plan.

(3) Section 1932(b)(4) requires Medicaid managed care organizations to establish internal grievance procedures under which Medicaid enrollees, or providers acting on their behalf, may challenge the denial of coverage of, or payment for, medical assistance.

(b) Definitions. As used in this subpart, the following terms have the indicated meanings:

In the case of an MCO or PIHP-"Action" means--

(1) The denial or limited authorization of a requested service, including the type or level of service;

(2) The reduction, suspension, or termination of a previously authorized service;

(3) The denial, in whole or in part, of payment for a service...

42 CFR 438.402 provides, in part, that:

(a)The grievance and appeal system. Each MCO, PIHP, and PAHP must have a grievance and appeal system in place for enrollees. Non-emergency medical transportation PAHPs, as defined in § 438.9, are not subject to this subpart F.

(b)Level of appeals. Each MCO, PIHP, and PAHP may have only one level of appeal for enrollees.

(c)Filing requirements -

(1)Authority to file.

(i) An enrollee may file a grievance and request an appeal with the MCO, PIHP, or PAHP. An enrollee may request a State fair hearing after receiving notice under § 438.408 that the adverse benefit determination is upheld.

(A)Deemed exhaustion of appeals processes. In the case of an MCO, PIHP, or PAHP that fails to adhere to the notice and timing requirements in § 438.408, the enrollee is deemed to have exhausted the MCO's, PIHP's, or PAHP's appeals process. The enrollee may initiate a State fair hearing.

42 CFR 438.408 provides, in part, that:

(f)Requirements for State fair hearings -

(1)Availability. An enrollee may request a State fair hearing only after receiving notice that the MCO, PIHP, or PAIIP is upholding the adverse benefit determination.

(i)Deemed exhaustion of appeals processes. In the case of an MCO, PIHP, or PAIIP that fails to adhere to the notice and timing requirements in § 438.408, the enrollee is deemed to have exhausted the MCO's, PIHP's, or PAHP's appeals process. The enrollee may initiate a State fair hearing.

Section 4403-f of the Public Health Law pertains to Managed Long Term Care Plans.

Article 49 of the Public Health Law pertains to Utilization Review and External Appeal.

Section 505.14(a)(1) of the Regulations defines "Personal Care Services" to mean assistance

with nutritional and environmental support functions and personal care functions, as specified in clauses (5)(i)(a) and (5)(ii)(a) of this subdivision. Such services must be essential to the maintenance of the patient's health and safety in his or her own home, as determined by the social services district in accordance with this section; ordered by the attending physician; based on an assessment of the patient's needs and of the appropriateness and cost-effectiveness of services specified in subparagraph (b)(3)(iv) of this section; provided by a qualified person in accordance with a plan of care; and supervised by a registered professional nurse.

Section 505.14(a) of the Regulations provides:

(2) Continuous personal care services means the provision of uninterrupted care, by more than one personal care aide, for more than 16 hours in a calendar day for a patient who, because of the patient's medical condition, needs assistance during such calendar day with toileting, walking, transferring, turning and positioning, or feeding and needs assistance with such frequency that a live-in 24-hour personal care aide would be unlikely to obtain, on a regular basis, five hours daily of uninterrupted sleep during the aide's eight hour period of sleep.

(3) Personal care services, as defined in this section, can be provided only if the services are medically necessary and the social services district reasonably expects that the patient's health and safety in the home can be maintained by the provision of such services, as determined in accordance with this section.

(4) Live-in 24-hour personal care services means the provision of care by one personal care aide for a patient who, because of the patient's medical condition, needs assistance during a calendar day with toileting, walking, transferring, turning and positioning, or feeding and whose need for assistance is sufficiently infrequent that a live-in 24-hour personal care aide would be likely to obtain, on a regular basis, five hours daily of uninterrupted sleep during the aide's eight hour period of sleep.

(5) Personal care services shall include the following two levels of care, and be provided in accordance with the following standards:
(i) Level I shall be limited to the performance of nutritional and environmental support functions.
(a) Nutritional and environmental support functions include assistance with the following:
(1) making and changing beds;
(2) dusting and vacuuming the rooms which the patient uses;
(3) light cleaning of the kitchen, bedroom and bathroom;
(4) dishwashing;
(5) listing needed supplies;
(6) shopping for the patient if no other arrangements are possible;
(7) patient's laundering, including necessary ironing and mending;
(8) payment of bills and other essential errands; and
(9) preparing meals, including simple modified diets.

(b) The authorization for Level I services shall not exceed eight hours per week.
(ii) Level II shall include the performance of nutritional and environmental support functions specified in clause (i)(a) of this paragraph and personal care functions.
(a) Personal care functions include assistance with the following:
(1) bathing of the patient in the bed, the tub or in the shower;
(2) dressing;
(3) grooming, including care of hair, shaving and ordinary care of nails, teeth and mouth;
(4) toileting; this may include assisting the patient on and off the bedpan, commode or toilet;
(5) walking, beyond that provided by durable medical equipment, within the home and outside the home;
(6) transferring from bed to chair or wheelchair;
(7) turning and positioning;
(8) preparing of meals in accordance with modified diets, including low sugar, low fat, low salt and low residue diets;
(9) feeding;
(10) administration of medication by the patient, including prompting the patient as to time, identifying the medication for the patient, bringing the medication and any necessary supplies or equipment to the patient, opening the container for the patient, positioning the patient for medication and administration, disposing of used supplies and materials and storing the medication properly;
(11) providing routine skin care;
(12) using medical supplies and equipment such as walkers and wheelchairs; and
(13) changing of simple dressings.

GIS 12 MA/026 entitled "Availability of 24-Hour Split-Shift Personal Care Services" provides, in part, the intent of 18 NYCRR 505.14 is to allow the identification of situations in which a person's needs can be met by a live-in aide and still allow the aide to have an uninterrupted five hours for sleeping.

GIS 12 MA/026 provides as follows concerning the availability of 24 hour, split-shift personal care services in connection with the case of Strouchler v. Shah:

It is the Department's policy that 24-hour split-shift care should be authorized only when a person's nighttime needs cannot be met by a live-in aide or through either or both of the following: (1)adaptive or specialized equipment or supplies including, but not limited to, bedside commodes, urinals, walkers, wheelchairs, and insulin pens, when the social services district determines that such equipment or supplies can be provided safely and cost-effectively; and (2) voluntary assistance available from informal caregivers or formal services provided by an entity or agency.

1. With regard to adaptive or specialized equipment (the "efficiencies"), the nursing

assessment shall include a professional evaluation whether such adaptive or specialized equipment or supplies can meet the recipient's need for assistance and whether such equipment or supplies can be provided safely and cost-effectively when compared to the provision of aide services. Such adaptive or specialized equipment or supplies include, but are not limited to, bedside commodes, adult diapers, urinals, walkers and wheelchairs.

General Information System message GIS 97 MA 033 notified local districts as follows:

> The purpose of this GIS is to provide further instructions regarding the Mayer v. Wing court case, which applies to social services districts' reductions or discontinuations of personal care services. [Mayer v. Wing, 922 F. Supp. 902 (S.D.N.Y., 1996)]. The Mayer case is now final, and the Department is issuing these additional instructions to comply with the court's final order in this case.
>
> Districts were first advised of the Mayer case in May, 1996. (Please refer to GIS 96 MA/019, issued May 28, 1996.) As described in that GIS message, the Mayer case prohibits social services districts from using task-based assessment plans ("TBA plans") to reduce the hours of any personal care services recipient whom the district has determined needs 24 hour care, including continuous 24 hour services ("split-shift"), 24 hour live-in services ("live-in") or the equivalent provided by informal or formal supports. This GIS message identifies the policies and procedures districts must follow in order to comply with this particular provision of the Mayer case.
>
> This particular provision of the Mayer case applies only when the district has first determined that the MA recipient is medically eligible for split-shift or live-in services. To determine whether the recipient is medically eligible for split-shift services or live-in services, the district must continue to follow existing Department regulations and policies. As is currently required, the district must assure that the nursing and social assessments fully document and support the determination that the recipient is, or is not, medically eligible for split shift or live-in services.
>
> When the district has determined that the MA recipient is medically eligible for split-shift or live-in services, it must next determine the availability of informal supports such as family members or friends and formal supports such as Protective Services for Adults, a certified home health agency or another agency or entity. This requirement is no different from current practice. And, as under current practice, the district must assure that the nursing and social assessments fully document and support its determination that the recipient does, or does not, have informal or formal supports that are willing and able to provide hours of care.
>
> Remember that the contribution of family members or friends is voluntary and cannot be coerced or required in any manner whatsoever. A district may choose to implement so-called "statements of understanding" to reflect a family member's or friend's voluntary agreement to provide hours of care to a recipient whom the district has determined is medically eligible for split shift or live-in services. (See 95 LCM-76, section III, issued July 18, 1995, for a description of statements of understanding.)

Once the district has determined that the recipient is medically eligible for split-shift or live-in services and determined whether the recipient has informal or formal supports that are willing and able to provide hours of care, the district can assure that it is complying with the Mayer case by following the appropriate guidelines set forth below:

1.Recipient is medically eligible for split-shift services but has no informal or formal supports:

The district should authorize 24 hour split shift services for this recipient if the recipient otherwise meets the fiscal assessment requirements. The district must not use a TBA plan to reduce this recipient's personal care services.

2. Recipient is medically eligible for split-shift services and has informal or formal supports:

The district should authorize services in an amount that is less than 24 hour split-shift services if the recipient otherwise meets the fiscal assessment requirements. The amount that is authorized, when combined with the amount that informal or formal supports are willing and able to provide, would equal 24 hours. The district must not use a TBA plan to reduce this recipient's services because the recipient is receiving the "equivalent" of split-shift services: part of the services are funded by the MA program and part of the services are provided by the informal or formal supports.

3. Recipient is medically eligible for live-in services but has no informal or formal supports:

The district should authorize 24 hour live-in services for this recipient if the recipient otherwise meets the fiscal assessment requirements. The district must not use a TBA plan to reduce this recipient's personal care services.

4. Recipient is medically eligible for live-in services and has formal or informal supports:

The district should authorize services in an amount that is less than 24 hour live-in services if the recipient otherwise meets the fiscal assessment requirements. The amount that is authorized, when combined with the amount that the informal or formal supports are willing and able to provide, would equal 24 hours. The district must not use a TBA plan to reduce this recipient's services because the recipient is receiving the "equivalent" of live-in services: part of the services are funded by the MA program and part of the services are provided by the informal or formal supports.

General Information Service message GIS 97 MA 033 includes a reminder that the contribution of family members or friends (to the care of a Personal Care Services recipient) is voluntary and cannot be coerced or required in any manner whatsoever.

In Rodriguez v. City of New York, 197 F. 3rd 611 (Federal Court of Appeals, 2nd Circuit 1999), cert. denied 531 U.S. 864, the Plaintiffs were Personal Care Services recipients who alleged that they would be in receipt of inadequate service not meeting legal requirements,

without the provision of safety monitoring as an independent task in their Personal Care Services authorizations. The district court had ruled in favor of the Plaintiffs, but the Court of Appeals held that the Agency is not required to provide safety monitoring as an independent Personal Care Services task in evaluating the needs of applicants for and recipients of Personal Care Services. Local Agencies were advised of this decision in GIS message 99/MA/036.

GIS 03 MA/03 was released to clarify and elaborate on the assessment of Personal Care Services pursuant to the Court's ruling in Rodriguez v. Novello and in accordance with existing Department regulations and policies. In relevant portion, this GIS Message states:

> Social services districts should authorize assistance with recognized, medically necessary personal care services tasks. As previously advised, social services districts are **NOT** required to allot time for safety monitoring as a separate task as part of the total personal care services hours authorized (see GIS 99 MA/013, GIS 99 MA/036). However, districts are reminded that a clear and legitimate distinction exists between "safety monitoring" as a non-required independent stand-alone function while no Level II personal care services task is being provided, and the appropriate monitoring of the patient while providing assistance with the performance of a Level II personal care services task, such as transferring, toileting, or walking, to assure the task is being safely completed.

18 NYCRR 358-5.9(a) provides:

At a fair hearing concerning the denial of an application for or the adequacy of public assistance, medical assistance, HEAP, SNAP benefits or services; or an exemption from work activity requirements the appellant must establish that the agency's denial of assistance or benefits or such an exemption was not correct or that the appellant is eligible for a greater amount of assistance or benefits

DISCUSSION

The record establishes that the Appellant is in receipt of authorization for Medical Assistance, and is enrolled in a Medicaid managed long term care plan operated by HealthFirst - Senior Health Partners (SHP). The record further establishes that by Final Adverse determination dated March 22, 2019, SHP upheld its initial February 21, 2019 determination not to authorize an increase in Appellant's personal care services from 49 hours per week.

SHP produced a UAS Aide Task Service Plan for the Appellant, which determined Appellant required 49.01weekly hours of personal care service. However, SHP's own January 16, 2019 Uniform Assessment System Report (UAS) put the plan on notice of Appellant's status as a "Mayer III" patient, such that evaluation of the Appellant's personal care services needs under a task based plan of care was prohibited. Pursuant to General Information System message GIS 97 MA 033, the Appellant should be provided with a personal care services authorization in an amount which, "when combined with the amount that the informal or formal supports are willing and able to provide, would equal 24 hours."

The regulations require that at a fair hearing concerning the denial of an application for or the adequacy of Medical Assistance, the Appellant must establish that the denial of assistance or benefits was not correct or that the Appellant is eligible for a greater amount of assistance or benefits. In this case, the Appellant's representative has done so.

According to testimony and documentation produced by Appellant's representative, the Appellant suffered a stroke in May 2017, and a second stroke in September 2018 resulted in paralysis of the left side of her body. The Appellant has since regained limited mobility in her left leg and has no mobility in her left arm or hand. Appellant's representative stated Appellant receives services from 2:00 p.m. to 9:00 p.m., seven days per week, and Appellant's family has been paying to have an aide with the Appellant for the other 17 hours of the day.

The January 16, 2019 Uniform Assessment System Report (UAS) indicates the Appellant has a primary diagnosis stroke/CVA, with resulting hemiplegia and hemiparesis affecting her left side, insomnia, and urinary incontinence, among other diagnoses. In the UAS, the nurse assessor indicated, "Declined" to the inquiries: "Change in decision making as compared to 90 days ago (or since last assessment)" and "Change in ADL status as compared to 90 days ago, or since last assessment if less than 90 days ago". The UAS indicates Appellant requires "Extensive" assistance with walking, locomotion, and "transfer toilet", while requiring "Maximal" assistance with toilet use.

The credible evidence in the record reflects the Appellant is in need of both daytime and nighttime ambulating and toileting assistance, and thus in need of 24 hour care as a "Mayer III" patient. It is noted that the January 16, 2019 UAS indicated the Appellant had a urinary tract infection at the time of the assessment. Not only does the weight of the evidence fail to support the determination not to increase the Appellant's hours, the Appellant has established eligibility for a greater amount of assistance.

SHP is reminded that GIS 97 MA 033 also advises that the contribution of family members to the care of a Personal Care Services applicant or recipient is voluntary and cannot be coerced or required in any manner whatsoever.

DECISION AND ORDER

The determination of the Appellant's Managed Long Term Care Plan, HealthFirst - Senior Health Partners, not to authorize the Appellant for Live-in 24 hour personal care services was not correct and is reversed. SHP is directed to:

1. Authorize the Appellant for Live-in 24 hour personal care services.

2. Update its records to indicate that the Appellant is a "Mayer III" patient, entitled to 24 hour personal care services in the absence of formal or informal supports.

3. Notify the Appellant in writing upon compliance with this Decision.

Should SHP need additional information from the Appellant in order to comply with the above directives, it is directed to notify the Appellant promptly in writing as to what documentation is needed. If such information is required, the Appellant must provide it to SHP promptly to facilitate such compliance.

As required by Section 358-6.4 of the Regulations, SHP must comply immediately with the directives set forth above.

DATED: Albany, New York
05/23/2019

NEW YORK STATE
DEPARTMENT OF HEALTH

By

Allyson Sackey

Commissioner's Designee