

Elder and Special Needs Law Journal



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Inside

- Planning for the Special Needs Young Adult
- 529 Plans and the Individual with Disabilities
- Hearing Assistance
- New York's Amended Decanting Statute
- Concussions in Children and Adolescents
- Planning Essentials as Your Developmentally Child Turns 18
- Why Elder Law?
- Tips for Serving as an Article 81 Guardian
- Advance Directives: The View from Cuba
- Ethics Committee Poll
- Recent New York Cases
- Supplemental Needs Trusts in Special Education Litigation

Table of Contents

	Page
Message from the Chair	4
<i>Anthony J. Enea</i>	
Message from the Co-Editors in Chief	5
<i>Adrienne Arkontaky and David Kronenberg</i>	
Putting the Pieces of the Puzzle Together: Special Needs Planning for the Special Needs Young Adult. . .	6
<i>Lauren I. Mechaly</i>	
Qualified Tuition Programs / 529 Plans and the Individual with Disabilities.....	11
<i>Mordecai Y. Simha and Elana M. Krupka Simha</i>	
Hearing Assistance That People Love and Will Use.	15
<i>David G. Myers</i>	
New York City Recipients of Community-Based Long Term Care Begin Transition to Managed Long Term Care	18
<i>Rosanna Roizin</i>	
Special Needs Planning and New York’s Amended Decanting Statute	20
<i>Elizabeth C. Briand and Sarah C. Moskowitz</i>	
The Importance of the Express Provisions of the IEP for Students with Disabilities and the Impact of <i>R.E. v. N.Y.C. Dep’t of Educ.</i>	24
<i>Maria C. McGinley</i>	
Concussions in Children and Adolescents: A Shifting Medical and Legal Landscape	27
<i>Paul B. Yellin, M.D. and Susan Yellin</i>	
The Role of Counsel.	31
<i>Elizabeth Valentin and Robert Kruger</i>	
Ten Planning Essentials as Your Developmentally Disabled Child Turns 18	34
<i>Susan W. Morris</i>	
Why Elder Law? A Recent Graduate’s Perspective	35
<i>Malya Levin, Deirdre Lok and Joy Solomon</i>	
Ten Tips for Serving as an Article 81 Guardian.....	38
<i>Christine Mooney and Leslie Nydick</i>	
Advance Directives: A Step Back Into the Fifties, the View from Cuba	42
<i>Ellen G. Makofsky</i>	
Elder Law Section Ethics Committee Poll #5.....	44
<i>Judith B. Raskin, Chair, and Natalie J. Kaplan, Vice Chair</i>	
Recent New York Cases.....	46
<i>Judith B. Raskin</i>	
Using a Supplemental Needs Trusts in Special Education Litigation	48
<i>Adrienne Arkontaky and Robert P. Mascali</i>	
Committee News	
What’s Happening in Our Committees.....	52
Spotlight on the Special Needs Planning Committee	53
Scenes from the Elder Law Section Annual Meeting	54

The Role of Counsel

By Elizabeth Valentin and Robert Kruger

Introduction

I

The role of counsel to an Alleged Incapacitated Person (AIP) is a difficult one in an Article 81 Guardianship proceeding, because of the tension between the best interests of the AIP and the rights of the AIP. Recently, Elizabeth was attorney for Petitioner and Bob was counsel for the AIP in a proceeding that offers a glimpse into the ambiguities of counsel's role.

Because the proceeding starts with a filing by petitioner's counsel, we start with Elizabeth.

II

Arlene and her sister, Rosalind, are the agents under a power of attorney for their aunt, Harriet, who is 79 and blind. They received a letter from an attorney announcing that Harriet had revoked her power of attorney and requested an accounting of all financial transactions undertaken on Harriet's behalf over the course of the last five years. Enclosed with this letter was a Notice of Revocation signed by Harriet.

Rosalind is Harriet's health care proxy; Arlene is the alternate. Both are co-trustees of the Testamentary Supplemental Needs Trust created for Harriet under her late husband's will; he died in 2007.

The trustees had been paying all of Harriet's monthly bills and providing for her care for five (5) years. When the trust had approximately six (6) to eight (8) months principal remaining, the trustees became concerned about being able to provide for her future care, and had discussed the possibility of moving Harriet to an assisted living facility near Arlene (in eastern Pennsylvania).

Harriet, who presents well, nevertheless suffers from dementia, depression, chronic colitis and is legally blind. She also has difficulty ambulating and often uses a wheelchair. She requires assistance with all of her activities of daily living. Her physician strongly recommended residence in an assisted living facility and/or nursing facility. To avoid placement years earlier, the trustees hired a home attendant to assist Harriet round the clock. The home attendant, Malanie,¹ had served as Harriet's housekeeper for many years.



In response to the letter of revocation, Elizabeth attempted to persuade the attorney-draftsman that the revocation was not in Harriet's best interests. He stated his belief that Harriet was not only able to communicate and express her wishes, but that she had no cognitive deficits that would make her unable to provide for her personal needs or financial management. In short, he had no clue.

Concerned that the financial institutions would stop honoring the checks written against Harriet's accounts if notified about the revocation, Elizabeth commenced an Article 81 Guardianship proceeding.

On the first return date, the persons appearing were the petitioners, the Court Evaluator, and the attorney who drafted the revocation, claiming not to represent the AIP but wanting to be heard. The AIP was not present. In Chambers, the attorney, driven more by his ego than by contributing relevant information, informed the Court of his exalted status as an experienced old hand; he also informed the Court that he is a very old family friend and that Harriet is not in need of a guardian. Eventually, the hearing was adjourned for the purpose of serving interested parties not heretofore served.

III

Now Bob reluctantly enters the scene. Bob has a relationship with this attorney's law firm. Bob is approached to represent Harriet. With all the joy one feels contemplating a public shaming, Bob finds no truthful way to avoid this assignment.

Bob knows that he is a stranger to the AIP and that she did not select him. He expects that the Judge presiding will not hesitate to accuse him of chasing a fee and he expects to be summarily ejected from the case. However, his first call is to Elizabeth and the Court Evaluator to determine whether either will object to his initial appearance, but they won't. Then, accompanied by an associate from the old friend's law firm, Bob visits the AIP.

Blending several conversations with the Court Evaluator and the AIP into one narrative, Bob learns that Harriet is a childless widow, aged 79, with one



surviving (and intellectually disabled) sibling, and seven nieces and nephews, none of whom (except Arlene), were willing to serve as guardian should one be appointed.

At this stage, we were a long way from reaching that conclusion. Harriet vehemently opposed the appointment of a guardian. Moreover she vehemently opposed selling her co-op apartment (the only way to replenish her trust) and moving into some form of supportive housing. She also vehemently opposed moving to eastern Pennsylvania, and accused Arlene and Rosalind of stealing her jewelry, stating that the only person she trusted was her companion, Malanie.

While Bob was digesting all of this, despite Harriet's surface sophistication (she worked for many years at the Lighthouse for the Blind in a social work capacity) it was unavoidably clear that she would soon be broke.

Her wishes notwithstanding, she would soon be forced to sell the co-op and move in with Malanie. Therefore, in his first meeting with Harriet, Bob focused on this financial reality. Ultimately, Harriet agreed to sell the apartment. Nevertheless, Bob expected her to renege in court.

IV

In court, the presiding judge is casting a gimlet eye at Bob, who explains how he managed to arrive in this place at this time. There is much discussion about Harriet's capacity to retain counsel and there is some discussion, as well, whether counsel should be appointed. Finally, the court addresses Harriet and asks her if she has an opinion about the selection of counsel. She says yes and nominates Bob, whose jaw, if not firmly attached, would have fallen to the floor. The matter is then adjourned to enable the parties, if possible, to work things out.

V

It was during the period between hearings that many calls were made to the nieces and nephews to ascertain if anyone would step up and serve as guardian, as Arlene was persona non grata, because no one came forward. Elizabeth was arguing that, if not Arlene, who? All were informed that if no relative stepped forward, an attorney from the fiduciary list would be appointed by the Court.

Initially, out of respect for Harriet's relationship with Malanie, we were considering the appointment of a special guardian for the limited purpose of selling the co-op and renting a new apartment for Harriet. The turning point arrived when the doorman in her building reported that Harriet often wanders out of

her apartment in her night garments and that she is left home alone for hours at a time during the day. When asked, Harriet acknowledges that the home attendant is not always present.² Apparently not realizing that she was paying Malanie, Harriet stated that the home attendant needs to work and thus cannot always be there. When the home attendant was confronted, she denied the allegations.³ Obviously, Harriet was very emotionally dependent on Malanie. But the spell was broken: Bob could not countenance employing a liar who abandoned her charge, no matter how attached Harriet was to her.

All of the attorneys reached the conclusion that Malanie, to prevent the loss of her position, was poisoning Harriet's relationship with Arlene.⁴ This was illustrated for us, besides the second job, by "l'affaire jewelry," which had been removed, apparently with Harriet's consent, for safekeeping. Harriet's attitude had morphed into accusations of theft and, though the box of jewelry was returned, her hostility towards Arlene and Rosalind did not diminish.

Ultimately, it was the second job that changed the dynamic of Bob's representation of Harriet. It was now apparent that Harriet's judgment and insight were fundamentally flawed, that her allegiance was to the exploiter and her hostility to Arlene and (to a lesser extent) Rosalind was directed at the people who were trying to protect her. Since Arlene was going to be in the picture as Co-Trustee, it made complete sense to consider Arlene for the role as guardian, despite Harriet's opposition.

The decision to appoint Arlene by the Court was far from as easy one. It was by now clear to the Court that Harriet lacked capacity and was in need of a guardian and that the apartment must be sold to continue to pay for Harriet's future care in either an assisted living facility or a nursing facility. It was also clear that Malanie had to go, and that no relative other than Arlene was willing to serve as guardian. There were but two open issues: (1) should the guardian be Arlene or should the guardian come from the fiduciary list, and (2) should Harriet remain in New York or move to Pennsylvania?

VI

Conclusion

The care manager retained by Arlene at Bob's suggestion immediately discharged Malanie. She came to Harriet's apartment with a locksmith when Malanie was working her second job and changed the locks. Also, at her suggestion, Arlene retained a new companion.

The court appointed Arlene, rather than an attorney off the list. Was this suitably respectful of Harriet's wishes? To reach this point, the Court Evaluator, Counsel and Elizabeth had numerous, time-consuming, unproductive calls with Harriet's nieces and nephews. In the ongoing conflict between Harriet's rights and her best interests, we opted for the caring relative over a stranger. Thereafter, the care manager arranged for Harriet to move to supported housing in New York. The co-op is now on the market.

Lastly, there has been no transformation in Harriet's character. The care manager reports that she is oppositional and abusive, and keeping a companion to assist her is difficult.

In the form of old news, Bob is pleased to report that the Second Department reversed the order which surcharged Bob for disbursements he made to protect his ward after the child's father, the sole breadwinner in the household, walked out on the family. Bob's basic argument was that a mistake, if one was made, was not an abuse of discretion. See the business judgment rule and the Prudent Investor Act. Bob suggests that, when considering disbursements that may be challengeable, particularly disbursements that benefit the entire family, not merely the IP, if time permits (1) ask permission of the court (2) bring in the Court Examiner if you can't reach the court; and (3) prepare an *ex parte* order and affidavit.

Otherwise, along with hunting season for deer and bear, you may experience hunting season for attorneys.

Endnotes

1. The spelling is correct.
2. Indeed, when the care manager retained by Arlene visited Harriet, it was Harriet, not Malanie, who let her in.
3. Malanie had the nerve to request a substantial pay increase at this juncture.
4. Also, Harriet's insistence that Malanie be present at all interviews with Harriet certainly insured that Malanie would be current regarding all developments.

Elizabeth Valentin is an attorney with the law firm of Littman Krooks LLP. Her practice focuses on elder law, Medicaid planning, special needs planning, guardianships, asset protection planning, real estate, trust and estate administration, and estate planning. She received her undergraduate degree from the University of Pennsylvania and her Juris Doctor degree from the City University of New York State. Ms. Valentin is admitted to practice in both New York and New Jersey. She is a member of the New York State Bar Association (NYSBA), the Elder Law and Trusts and Estates Law Sections of the NYSBA, the New York County Lawyer's Association and Dominican Bar Association. Ms. Valentin is currently serving on the Executive Committee of the Elder Law Section of the NYSBA as Co-Chair of the Client and Consumer Issues Committee, Co-Chair of the Diversity Committee and as a District Delegate. She is a frequent presenter to consumer and professional groups as well as advocacy organizations addressing the legal, financial and other related issues which affect our senior population. Ms. Valentin speaks fluent Spanish.

Robert Kruger is an author of the chapter on guardianship judgments in *Guardianship Practice in New York State* (NYSBA 1997, Supp. 2004) and Vice President (four years) and a member of the Board of Directors (ten years) for the New York City Alzheimer's Association. He was the Coordinator of the Article 81 Guardianship training course from 1993 through 1997 at the Kings County Bar Association and has experience as a guardian, court evaluator, and court-appointed attorney in guardianship proceedings. Mr. Kruger is a member of the New York State Bar (1964) and the New Jersey Bar (1966). He graduated from the University of Pennsylvania Law School in 1963 and the University of Pennsylvania (Wharton School of Finance (B.S. 1960)).

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