

Matter of Jaar-Marzouka (C.W.)

Supreme Court of New York, Dutchess County

May 26, 2016, Decided

1051/2016

Reporter

2016 N.Y. Misc. LEXIS 1934 *; 2016 NY Slip Op 50824(U) **; 51 Misc. 3d 1226(A); 41 N.Y.S.3d 449; 2016 WL 3044209
Corbally, Gartland & Rappleyea, LLP, Poughkeepsie, New York.

[1]** In the Matter of the Application of Sabrina Jaar-Marzouka, Commissioner, Dutchess County Department of Community and Family Services, Petitioner, For C.W., a Person Alleged to be Incapacitated.

For T.C.S.: KYLE A. STELLAR, ESQ., McCABE & MACK, LLP, Poughkeepsie, New York.

For Court Examiner: JILL M. KARN, ESQ., Pleasant Valley, New York; C.W., A Person in Need of a Guardian.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Judges: HON. JAMES D. PAGONES, A.J.S.C.

PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

Opinion by: JAMES D. PAGONES

Subsequent History: As Corrected June 1, 2016.

Opinion

Core Terms

James D. Pagones, J.

incapacitated, specify, appointment, Guardian, allegations

Petitioner, by order to show cause, sought the appointment of a Guardian for C.W., a person alleged to be incapacitated ("AIP"). Additionally, petitioner requested the appointment of a Temporary Guardian. The Court, pursuant to MHL §81.10(c)(5), appointed Jeffery Rothschild, Esq. as attorney for Ms. W. The matter was placed on the Court's calendar for a preliminary hearing on May 24, 2016 to determine whether or not an appointment of a Temporary Guardian would be authorized pursuant to MHL §81.23. The petition contained numerous disturbing allegations concerning interactions between **[*2]** the AIP and an individual named T.C.S. Mr. S is alleged to be the "caregiver" for Ms. W. They reside together at Ms. W's residence. This individual is not a member of Ms. W's family, rather he is the son of a friend of Ms. W. Ms. W had an open adult protective services case in Putnam County from July 17, 2012 through August 3, 2013. The petition alleges that Ms. W has been known to Adult Protective Services of Dutchess County ("APS") since December 29, 2014, with her most recent referral being March 11, 2016. It is alleged that Ms. W has substantial assets totaling One Million Three Hundred Thirty-Six

Headnotes/Summary

Headnotes

Incapacitated and Mentally Disabled Persons—Guardian for Personal Needs or Property Management—Order of Protection.

Counsel: **[*1]** For Petitioner: JANET V. TULLO, ESQ., Bureau Chief, Dutchess County Department of Community and Family Services, Poughkeepsie, New York.

For Guardian: HUGH B. EHRENZWEIG, ESQ., Poughquag, New York.

For C.W.: JEFFREY ROTHSCHILD, ESQ., Cappillino & Rothschild, LLP, Pawling, New York.

For Court Evaluator: WILLIAM F. BOGLE, JR., ESQ.,

Thousand Nine Hundred Twenty-Two Dollars and Ninety Cents (\$1,336,922.90). Mr. S is both her power of attorney (dated August 30, 2013) and her health care proxy (dated September 4, 2013). APS reported that since Ms. W's referral of March 11, 2016, nine (9) home visits have been made. Ms. W has reported being afraid of Mr. S. She has reported instances of physical abuse by Mr. S, such as Mr. S shaking her, kicking her and shoving her. Mr. S has also allegedly been mentally abusive indicating that if she was to say anything to the case manager she would be put in an "insane asylum". Arrangements [*3] for emergency respite were made for Ms. W, but she refused to leave her home. She has indicated that she is afraid of change and does not want to leave. APS reports numerous disturbances within the house involving police interaction with Mr. S and his girlfriend and Mr. S and his mother. During a visit on May 10, 2016, Ms. W reported that Mr. S is spending her money. She indicated that he has access to her checkbook. The petition details a series of bank accounts and withdrawals therefrom, which the petitioner alleges prove that Mr. S is not fulfilling his fiduciary obligations or acting in the best interest of Ms. W. Mr. S has not filed a response to the factual allegations contained in the petition.

A criminal history check was ordered for Mr. S pursuant to MHL §81.19(g)(1)(i). The report indicates that Mr. S was recently arrested on May 9, 2016 for allegedly committing the crimes of Criminal Contempt in the 2nd Degree (PL 215.50), a Class A Misdemeanor and Criminal Mischief in the Fourth Degree (PL 145.00), a Class A Misdemeanor. A copy of Mr. S's criminal history record was provided to his attorney pursuant to MHL §81.19(g)(4) prior to the §81.23 hearing.

The following parties were present on the hearing date: Attorney Janet Tullo with a [*4] representative of the petitioner, Attorney Rothschild with C.W., Attorney William Bogle, Jr., Court Evaluator, T.S. with his retained counsel Kyle Stellar, Esq.

Ms. W consented to the guardianship at that time after an allocution from the Court. Her attorney then urged termination of the Power of Attorney and Healthcare Proxy granted to T.S. Additionally, Mr. Rothschild requested an order of protection on behalf of his client to protect her from Mr. S. After engaging Mr. Rothschild, counsel for the petitioner, and the Court Evaluator in a lengthy, comprehensive colloquy regarding the very serious nature of the allegations and facts which support them, the Court vacated the Power of Attorney and Health Care Proxy by order dated May 24, 2016.

Further, the Court via the same order appointed attorney Hugh B. Ehrenzweig, Esq., from the Part 36 List, as Temporary Guardian of the Person and Property of Ms. W. The Court was then faced with the task of producing an order of protection, pursuant to MHL §81.23. After researching the issue at length, the Court did not find a "standard" form Order of Protection in the context of an Article 81 proceeding. Accordingly, the Court finds it necessary to create [*5] a form in an effort to fill the void. However, prior to doing so, a discussion of Article 81 is necessary.

The legislative intent when enacting Article 81 is encompassed in Article §81.01 which states, in relevant part:

"...it is the purpose of this act to promote the public welfare by establishing a guardianship system which is appropriate to satisfy either personal or property management needs of an incapacitated person in a manner tailored to the individual needs of that person, which takes in account the personal wishes, preferences and desires of the person, and which affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life."

In light of the intent encompassing the passage of Article 81, the legislature further provided MHL §81.23 as a provisional remedy to protect a vulnerable adult who has fallen victim to physical abuse or financial exploitation (see Rose Mary Bailly, Practice Commentaries, McKinney's Cons Laws of NY, Book 34A, MHL 81.23). This also includes emotional abuse. MHL §81.23(b)(1) provides that the Court may:

"...enjoin any person, other than the incapacitated person or the person alleged to be incapacitated from selling, assigning, [*6] or from disposing of property or confessing judgment which may become a lien on property or receiving or arranging for another person to receive property from the incapacitated person or the person alleged to be incapacitated or doing or suffering to be done any act or omission endangering the health, safety or welfare of the incapacitated person or the person alleged to be incapacitated when an application under this article seeks such an injunction and it satisfactorily appears from the application, affidavits, and other proofs that a person has done, has [**2] suffered to be done or omitted to do, or threatens to do or is about to do an act that endangers the health, safety or welfare of the

incapacitated person or the person alleged to be incapacitated or has acquired or is about to acquire any property from the incapacitated person or person alleged to be incapacitated during the time of that person's incapacity or alleged incapacity without adequate consideration."

While the statute mentions an incapacitated person or person alleged to be incapacitated, it is this Court's position that it also applies with equal effect to a person in need of a guardian ("PING") such as Ms. W.

The above [*7] cited statutory authority provides the framework for the Court to craft an order of protection enjoining the actions of an individual so as to safeguard the health, safety or welfare of the affected Article 81 individual and be consistent with the legislative intent of Article 81. While the Court notes that the statute does not specifically use the phrase order of protection, an order of protection is analogous to an injunction (see 2 NY Law of Domestic Violence §6:14 [3d ed.]).

In light of the above, the Court adopts the following order of protection to be used in connection with applications made pursuant to MHL §81.23, wherein injunctive relief is appropriate to protect the safety or welfare of an incapacitated person:

At a Term of the Supreme Court

County of __, State of New York,
__, New York.

PRESENT:

-----X

 [Go to table 1](#)

 [Go to table 2](#)

Guardian of the Person and Property

of

An Alleged Incapacitated Person.

NOTICE: YOUR WILLFUL FAILURE TO OBEY THIS

ORDER MAY SUBJECT YOU TO MANDATORY ARREST AND CRIMINAL PROSECUTION.

THIS ORDER OF PROTECTION WILL REMAIN IN EFFECT EVEN IF THE PROTECTED PARTY HAS, OR CONSENTS TO HAVE, CONTACT OR COMMUNICATION [*8] WITH THE PARTY AGAINST WHOM THE ORDER IS ISSUED. THIS ORDER OF PROTECTION CAN ONLY BE MODIFIED OR TERMINATED BY THE COURT. THE PROTECTED PARTY CANNOT BE HELD TO VIOLATE THIS [3] ORDER NOR BE ARRESTED FOR VIOLATING THIS ORDER.**

A petition under Article 81 of the Mental Hygiene Law, verified on _____, having been filed in this Court in the above-entitled proceeding, and the Court having set the matter down for a hearing for the appointment of a Temporary Guardian, pursuant to MHL §81.23, and thereafter having determined that good cause has been shown for the issuance of this Order, pursuant to MHL §81.23(b)(1),

NOW, THEREFORE, IT IS HEREBY ORDERED that [specify first name, middle initial and last name]: _____ must observe the following conditions of behavior:

(Check Applicable Paragraphs and Subparagraphs):

[1] Stay away from:

[A] [name of protected person]: _____,

and/or from the:

[B] home of: _____,

[C] _____ other [specify location[s]] _____,

[2] Refrain from communication or any other contact or by mail, telephone, email, voice-mail or other electronic or any other means with [name of protected person]: _____;

[3] Refrain from assault, stalking, harassment, aggravated harassment, menacing, reckless endangerment, strangulation, criminal obstruction of breathing or circulation, disorderly [*9] conduct, criminal mischief, sexual abuse, sexual misconduct, forcible touching, intimidation, threats, identity theft, grand larceny, coercion or any criminal offense against [name of protected person]: _____;

[4] Refrain from intentionally injuring or killing without

justification the following companion animal(s) (pet[s])
[specify type(s) and, if available, name(s)]:

_____;

[5] Permit [specify individual]:

_____ to enter the
residence at

[specify]: _____

_____ during [specify
date/time]: _____ with

[specify law enforcement agency, if any]:

_____ to remove personal
belongings not in issue in litigation [specify items]:

_____;

It is further **ORDERED** that this order of protection
shall remain in force until further order of the Court.

Dated:

Justice of the Supreme Court

Check Applicable Box(es):

Party against whom order was issued was present
in Court and advised in Court of issuance and
contents of Order

Order personally served in Court upon party against
whom order was issued

Service directed by other means [specify]:

Based upon the record before this Court, injunctive relief
in the form of an order of protection, pursuant to MHL
§81.23 is appropriate. Accordingly, the Court has signed
contemporaneously herewith an order of
protection [*10] in favor of C.W. against T.S.

The foregoing constitutes the order of this Court.

Dated: May 26, 2016

Poughkeepsie, New York

ENTER

HON. JAMES D. PAGONES, A.J.S.C.