New York Law Journal

Trusts&Estates

WWW.NYLJ.COM

An ALM Publication

MONDAY, JANUARY 25, 2010

PERSPECTIVE

'John D.': Appointing Monitor Not in Keeping With Legislative Intent of **Article 81**

BY TERENCE E. SMOLEV
AND MARY E. MONGIOI

The Cortland County Supreme Court, in presiding over a guardianship proceeding, recently ruled that even though an Alleged Incapacitated Person (AIP) was competent, that a monitor of assets must be appointed based upon the court's concern that a relapse of the AIP's penchant for uncontrolled spending and uninhibited speculation in various businesses and loans had a 30 percent chance of reoccurrence. In so doing, the court indicated that it was making the appointment with the consent of the AIP.

However, it is the belief of the authors that even with said consent, the decision is clearly not in keeping with the legislative intent of Article 81 of the Mental Hygiene Law, and is the first step onto the slippery slope of invasion of the personal property rights of an AIP wrought solely in an attempt to assist in the enforcement of a distributive award granted to an ex-spouse.

In *Matter of John D.*, the court appointed a special guardian to monitor the financial activities of the AIP whose net worth was in excess of $3 million and was divorced. His ex-wife (the party requesting guardianship), was entitled to a distributive award which the AIP was responsible to pay. Post divorce the AIP had suffered from severe depression, and was provided therapy in the form of 22 electroshock treatments. Testimony revealed that as a result of such treatment, the AIP suffered from hypomania resulting in a period of "excessive and irrational" spending.

TERENCE E. SMOLEV *is partner in charge of the tax, trusts and estates department of Forchelli, Curto, Deegan, Schwartz, Mineo, Cohn & Terrana, in Uniondale.* MARY E. MONGIOI *is counsel to the firm.* JOSEPH DiPALMA, *a law clerk at the firm and a third-year student at St. John's University School of Law, assisted in the preparation of this article.*

Among other items, he loaned $130,000 to a friend for his restaurant business. The restaurant has gone out of business. He also loaned $5,000 to $10,000 to three individuals he just met which has not been repaid. He also purchased motorcycles, farm equipment and many gifts and appliances. In total, he estimates spending about $500,000 since February 2008. This includes $120,000 for lakefront property and $70,000 for the Scott Hotel which needs extensive renovation. He testified he does not expect to make a profit from the Scott Hotel transaction, but rather to renovate it and then enter into a lease purchase with some other friends.[1]

Boiled down to its barest essence, this decision potentially permits any **judgment creditor** to preserve another party's assets for collection purposes through the potential **misuse** of Mental Hygiene Law Article 81.

Despite all of the foregoing, the court after trial found that the AIP was presently competent pursuant to the Mental Hygiene Law. Upon making such a finding the petition in its entirety should have been dismissed in accordance with the statute which simply states that "[i]f the person alleged to be incapacitated...is found not to be incapacitated, the court shall dismiss the petition."[2] Yet, with the consent of the AIP (a matter on which the Decision is silent), a special guardian was appointed for the period of one-year[3] solely on the basis of the Court's concern that there was a 30 percent chance that the AIP could suffer a relapse of his hypomania such that a return to uncontrolled spending would affect the ex-spouse's ability to collect her distributive award.

Statute and Decision

Article 81 of New York's Mental Hygiene Law is intended "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."[4] [emphasis added].

In *Matter of John D.*, however, the court, after specifically finding that the AIP was not presently incapacitated, appointed a special guardian to monitor the transactions entered into by a non-incapacitated respondent.[5] This decision is controversial in that a fully competent person is being carefully monitored by a court appointee, and not able to use assets as he deems necessary.[6]

In rendering its decision, the court relied solely on a decision rendered by the Supreme Court, Suffolk County wherein a special guardian was appointed to assist a non-incapacitated respondent in the preparation of any forms, documents or other papers necessary to implement any property management decisions.[7] Applying this holding, the court dwelled on the fact that there was a 30 percent chance of relapse and the potential negative impact on the ex-wife's equitable distribution[8]: the court balanced those rights against those of the AIP and rendered a decision which is clearly violative of the constitutional rights of the AIP and certainly not in keeping with the legislative intent of Article 81.

Boiled down to its barest essence, this decision potentially permits any judgment creditor to preserve another party's assets for collection purposes through the potential misuse of Mental Hygiene Law Article 81. This imposition of a guardianship upon a person adjudicated competent flies in the face of the legislative intent to impose guardianship only upon those found to be incapacitated. The law quite clearly states that a court shall dismiss a case if it is found that the person alleged to be incapacitated actually has the requisite capacity to make the decisions on when and how to spend and utilize his own assets. This proposition [until now] has continuously been upheld by New York courts.[9]

Article 81 codifies the principle that courts should apply the least restrictive form of intervention when determining whether the appointment of a guardian is necessary. This "means that the powers granted by the court to the guardian with respect to the incapacitated person represent only those powers which are necessary to provide for that person's personal needs and/or property management and which are consistent with affording that person the greatest amount of independence and self-determination in light of that person's understanding and appreciation of the nature and consequences of his or her functional limitations."[10]

It is important to note that the statute specifically refers to the party in question as an "incapacitated person," and there must first be a finding of current incapacity prior to the application of the statute. There was no such finding in the case examined. Moreover, there was insufficient evidence to show that the AIP was presently incapable of making sound decisions regarding management of his property. Property management is defined as "taking actions to obtain, administer, protect, and dispose of real and personal property, intangible property, business property, benefits, and income and to deal with financial affairs."[11]

While the AIP's ex-wife introduced evidence of former decisions made by the AIP which called into question his ability to manage his finances at the time of those decisions, there was no showing that he was presently unable to do so, and yet a special guardian was appointed to oversee his future decisions. By way of analogy, New York law provides that a testator has the ability to create a valid will even while suffering from a mental illness as long as such will was created during a lucid interval.[12] In other words, New York allows even an incompetent person to dispose of his assets as he deems fit during a moment of lucidity. If one follows this reasoning it would seem completely illogical to require a person adjudicated to be competent to be monitored by a court-appointed special guardian when spending his money.

Under the **new law**, if a covered expatriate has significantly appreciated assets, the **exit tax** will result in an immediate tax bill unless deferral elections are made. However, if a **covered expatriate** has only minimally appreciated assets, the exit tax may not be overly burdensome.

Looking to the Future

In the end, what are we to take away from this decision and how are we to reconcile it with the statutory provisions routinely enforced and upheld by the various courts of this state? It appears from the language of the decision that the court ignored statutory provisions and gave more weight to the concerns of the AIP's former spouse than to the AIP himself. At first blush, some practitioners interested in judgment enforcement may have been given a valuable collection tool if other courts follow suit. Upon closer examination, however, it is without question that the statute was not enacted to be used as an enforcement mechanism for distributive awards or by any other judgment creditor who may be in a position analogous to that of the AIP's ex wife.

We must ask ourselves, if courts are willing to loosely apply Article 81 and appoint guardians to those who are not incapacitated, what will prevent them from appointing a guardian to any individual? This particular AIP had a 30 percent chance of relapse, yet every single one of us has the potential to make foolish financial decisions at some point. No one would argue that Article 81 was intended to prevent us from doing so. This statute was meant to be used sparingly, only as a last resort when an individual actually lacks capacity and not in an effort to prevent misjudgment, and most certainly not as a judgment enforcement mechanism for preservation of assets for an ex-spouse or other creditor. The court erred on the side of guardianship when no such order was warranted.

1. *Matter of John D.*, 25 Misc.3d 940, 885 N.Y.S.2d 194 (2009).
2. N.Y. MENTAL HYG. LAW §81.16(b) (1996).
3. See *Matter of John D.*, 25 Misc.3d at 943.
4. N.Y. MENTAL HYG. LAW §81.01(b) (1996).
5. See *Matter of John D.*, 25 Misc.3d at 943.
6. See Id.
7. See *Matter of Lambrigger*, NYLJ, May 31, 1994, at 37, col. 1) (stating that the client suffered from a stroke and was incapacitated at one point but was no longer so at trial).
8. See *Matter of John D.*, 25 Misc.3d at 943.
9. See *1234 Broadway LLC v. Feng Chai Lin*, 25 Misc.3d 476, 469, 883 N.Y.S.2d 864, 869 (N.Y. City Civ. Ct. 2009) (stating that the state should only take away the liberties of a litigant and place them in the hands of a guardian only when the court determine such litigant to be judicially incompetent); see also *In re Joseph V.*, 307 A.D.2d 469, 762 N.Y.S.2d 669 (3d Dept. 2003) (holding that even when a person is incapacitated, the appointment of a guardian should be a last resort).
10. N.Y. MENTAL HYG. LAW §81.03(d) (1996).
11. N.Y. MENTAL HYG. LAW §81.03(g) (1996).
12. See *Estate of Hirschorn*, 21 Misc.3d 1113(A), 873 N.Y.S.2d 512 (N.Y. Sur. 2009).