2017 WL 6615122
Unreported Disposition
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New York Surrogate's Court.

In the Matter of the Guardianship of Michael J. N., Petitioner.

MR-1015
|
Decided on December 27, 2017

Attorneys and Law Firms

DISABILITY RIGHTS NEW YORK

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Guardian ad Litem for John and Margaret N.

Opinion

Barbara Howe, J.

***1** On August 27, 1996, John and Margaret N. filed a petition pursuant to article 17-A of the Surrogate Court's Procedure Act [SCPA] seeking to be appointed guardians of their son Michael [1], who was alleged to be 'mentally retarded' (in the language of the statute in effect at that time, now referred to as 'intellectually disabled' [SCPA 1750, as amended effective July 21, 2016]). A decree was issued by this Court [MATTINA, J] on October 31, 1996, granting the petition and appointing John and Margaret as the article 17-A guardians of Michael's person.

In October of 2014, Michael was placed at a respite care center after he and his parents, John and Margaret (both of whom are now in their mid-eighties), were removed from their home by Erie County Adult Protective Services. That removal was occasioned by both John's and Margaret's health conditions, Michael's neglected health issues (including his teeth and feet), and the dilapidated state of, and unsanitary conditions in, their home.

On February 20, 2015, a petition was filed on behalf of Michael by Christopher Turner, Esq. [hereafter, Turner], an attorney with Disability Rights New York [2] , seeking to remove his guardians. At the time the petition was filed, Michael was residing in a temporary emergency respite care center administered by Suburban Adult Services, Inc. [hereafter, SASI]. [3]

Turner's petition alleged that John and Margaret were no longer able to act as Michael's guardians 'due to their advanced age and frailty associated with their ongoing physical, mental, and medical condition.' Turner's affirmation went on to state that '[t]here is no doubt that [Michael] is disabled and that he cannot care for his person or support himself due to this disability'. Despite Michael's disability, the petition alleged that his parents' deteriorated health precluded them from acting as his guardians, and that, 'although [Michael] faces many difficulties as a result of his disability, he can make choices, recognizing what was wrong with the situations with his guardians'.

Process on Turner's petition was served on both John and Margaret. This Court appointed Sharon L. Wick, Esq., as guardian ad litem for Michael, and Jennifer Flannery, Esq., as guardian ad litem for John and Margaret [sometimes collectively referred to hereafter as the GALs]. On April 3, 2015, this Court authorized Flannery to commence a Mental Hygiene Law article 81 guardianship proceeding on behalf of her wards. That proceeding in State Supreme Court [BURNS, JSC] was ultimately dismissed.

On July 26, 2016, Turner filed a motion before me seeking permission to amend his 2015 petition. Turner argued that Michael's article 17-A guardianship should be terminated because Michael is 'capable of managing his affairs and [because] the guardianship violates [Michael's] constitutional rights'. In papers filed in this Court on August 18, 2016, in further support of his motion, Turner

requested, *inter alia*, (1) that this Court find Michael's guardians in default, and (2) that this Court grant summary judgment and declaratory relief.

***2** In this Court's Memorandum and Order dated March 2, 2017, I granted Turner's motion to amend the original pleading, and I denied the request to find the guardians in default, as well as denying the application for summary judgment (because issue was not yet joined and the application was premature). Both GALs then filed verified answers objecting to the relief requested in the petition. The New York State Attorney General's Office was noticed as required pursuant to Executive Law § 71 and CPLR 1012(b)(1), but declined to participate in the proceedings. Erie County Department of Social Services was also noticed but has taken no position on Michael's petition.

Jurisdiction was obtained, and, pursuant to a stipulation by the parties, the issue as to (1) whether Michael's 17-A guardianship should be terminated, was bifurcated from the issue of (2) whether John and Margaret should be Michael's guardians, and if not, who should be appointed Michael's guardian. A hearing on the issue of whether it is in Michael's best interest to have his guardianship terminated was held on October 23, 2017, before the Chief Attorney of this court, appointed by me to do so pursuant to SCPA 506(6)(a). The parties waived a written report by the referee pursuant to SCPA 506(6)(c). All parties have now filed post-hearing legal arguments, I have reviewed the transcript of the hearing, as well as the documentary evidence admitted at the hearing and the parties' memoranda, and I find and decide as follows.

(I)

Michael was born in 1974, and was adopted by John and Margaret in 1985. When Michael reached the age of majority, John and Margaret filed their petition to become his article 17-A guardians. The medical proof submitted in support of that petition included the affidavit of Dr. Thomas A. Ryan, who is a certified psychologist, and the affirmation of Dr. Frederick Occhino. Both physicians deemed Michael to be 'mildly mentally retarded' and concluded that he was incapable of managing his affairs because of this.

Testifying at the termination hearing were Dr. Ronald Michelini, Jennifer Blackwell, who is Michael's Medicaid services coordinator, and Michael himself.

Dr. Michelini testified that he has worked in the field of psychology for approximately thirty-four (34) years. He currently is a consultant for SASI, and, in that role, Dr. Michelini regularly performs assessments to determine if a person is in need of an article 17-A guardian. He believes that he has conducted at least a hundred guardianship assessments during his career. The guardianship assessment involves a review of the individual's clinical record, a personal interview, an intellectual assessment, which includes an I.Q. determination, and an adaptive skills assessment, including the individual's ability to make health care and monetary decisions.

On February 17, 2016, Dr. Michelini tested Michael's intellectual and adaptive skills, and he performed a second evaluation on June 6, 2017. Both assessment reports have been admitted into evidence.

The June 2017 assessment reflects that Michael has a full scale I.Q. of 53, and his verbal comprehension index is 66[4]. According to Dr. Michelini, these results indicate that Michael is 'at the upper end of a mild intellectual disability'. With respect to his adaptive skills, Dr. Michelini testified that Michael 'processes very well' and that 'his ability to understand what people are saying to him is significantly greater than his overall skills', meaning that Michael's I.Q. score alone would 'underestimate' how well he understands when a person is talking to him.

***3** *Significantly*, according to Dr. Michelini, Michael can make 'reasoned decisions', and it is Dr. Michelini's opinion that Michael has the capacity to execute a health care proxy.

Based on his assessment of Michael, Dr. Michelini testified that it is his opinion that, if Michael is living in a structured living situation, where he has 'many layers of assistance and many layers of protection', such as his current placement in a group home managed by SASI, he is *not* in need of a guardian. However, due to his disability, if Michael were to be 'living on his own' outside of a structured setting, although he understands his basic needs and he can advocate for

himself, Michael he would *not* be able to make his own doctor appointments, or manage his medication or his money, and a guardian 'would be very much *to his advantage*' (emphasis added). When asked if he believed Michael could live independently, Dr. Michelini testified simply, 'no'.

Michael testified that he is 44 years old,[5] and that he currently resides in a group home which is managed by SASI. Michael is active in the programming offered by his group home, and he works five days a week at a workshop also run by SASI. Michael performs chores, such as sweeping, vacuuming, and washing dishes at the group home, but he does not buy his own clothes or manage his money. The staff at his group home schedules, transports, and accompanies Michael to his medical appointments. Michael testified that the home he was living in with his parents prior to arriving at the group home was 'unsafe' because there was no electricity, no water, the toilets overflowed, and all the food was 'spoiled'. He understands that his parents are now residing in a nursing home in Orchard Park. Michael testified that he does not want a guardian, and that he likes living in the group home where the staff helps him make decisions and assists him with his daily living.

Jennifer Blackwell is employed at the SASI group home where Michael resides and she is his Medicaid services coordinator. Her duties include monitoring Michael's health and well-being, assisting him with financial matters[6], and referring Michael to any other services he may need. At his current placement, Michael receives residential habilitation services, day habilitation services at the workshop, community pre-vocational services, and regular pre-vocational services. He has meaningful participation in the structured activities and clubs that are available at the group home. Michael needs 'some supports on a daily basis', including supervision with his medication and hygiene. Ms. Blackwell testified that, if Michael had no guardian and a health care decision had to be made, the group home would assist him with any decision, or the decision would be referred to a surrogate decision-making committee operated by the Western New York State Office for People with Developmental Disabilities. If Michael decided that he wanted to move out of the group home and he had no guardian, he would be able to do so; but Blackwell was clear that, if SASI were to determine that there were insufficient supports for Michael in an independent living situation, it would involve Erie County Adult Protective Services in his decision to leave the group home.

***4 (II)**

For purposes of SCPA article 17-A, a person is intellectually disabled if he or she:

'is a person who has been certified by one licensed physician and one licensed psychologist, or by two licensed physicians at least one of whom is familiar with or has professional knowledge in the care and treatment of persons with an intellectual disability, having qualifications to make such certification, 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]).

There is no dispute that Michael is an 'intellectually disabled' person. As testified to by Dr. Michelini, Michael's diagnosis of mild intellectual disability, as well as his adaptive deficits, qualify and place Michael 'very much in the range of being appropriate for a guardian' under the current 17-A statute. The issue then before this Court is whether it is in Michael's best interest that his 17-A guardianship be terminated, or whether it should remain in place.

Michael bears the burden of establishing, to the satisfaction of this Court, that the 17-A guardianship is *not* in his best interests. The determination of what is in Michael's best interests is committed to this Court's discretion (see SCPA 1751 and SCPA 1750-A; *see also Matter of Sean O.*, NYLJ, October 24, 2016, at 27, col 1).

Dr. Michelini testified that 'Michael said a number of times he was okay to have a guardian, but there's nobody in his life he wants as a guardian'. Whether Michael believes that he is in need of a guardian is not a consideration in a best interest determination. Michael's guardian ad litem states in her report that it is her role to ensure that Michael's best interests are represented, and she concludes that, based on Michael's diagnosis and the proof presented, Michael has not met his burden of proof that the guardianship is not in his best interest.

The guardian ad litem for John and Margaret also argues that Michael has failed to meet his burden of proof that the guardianship is no longer in his best

interests. She distinguishes this case -- where Michael's diagnosis as intellectually disabled is not disputed -- from proceedings where the guardianship was terminated because the ward's medical condition improved (*see, e.g.*, *Matter of Guglielmo,* 2006 NY Misc LEXIS 4804). She argues that Michael's diagnosis, not his preference to no longer have a guardian, dictates whether the guardianship should remain in place.

(III)

The imposition of an SCPA article 17-A guardianship is plenary, and, under the provisions of the statute, results in the total deprivation of the individual's liberties (*Matter of Chaim A.K.*, 26 Misc 3d 837 [2009]; *Matter of D.D.*, 50 Misc 3d 666 [2015]; *Matter of Michelle M.*, 52 Misc 3d 1211A [2016]). However, this Court, in determining whether the termination of this guardianship is in Michael's best interest, may consider whether the guardianship is the least restrictive means to preserve and protect Michael's rights. Although SCPA article 17-A does not itself *expressly* provide for the tailoring of the powers of a guardian -- as does a guardianship established pursuant to article 81 of the Mental Hygiene Law -- various recent decisions of other Surrogate Judges 'have allowed tailored guardianships (*see Yvette A.*, 27 Misc 3d 950; *Matter of Kevin Z.*, 105 AD3d 1269; *Matter of Schultze*, 23 Misc 3d 215)' (*Matter of Sean O.*, *supra*).

***5** The record before me establishes that, although Michael's intellectual assessment qualifies him for an article 17-A guardianship, his adaptive skills, as supported by his placement in a group home, enable him to make health care decisions and to perform his daily living tasks without the need of a guardian. I find that Michael *has* met his burden of establishing that the imposition of an article 17-A guardianship is not appropriately tailored to address his needs and that the guardianship presently in place is *not* in his best interests (see, *Matter of Hytham MG*, 52 Misc 3d 1211A [2016] [holding that a best interest determination *must* include an assessment of the individual's functional capacity and what an individual can or cannot do in managing her or his daily affairs]).

Accordingly, the decree issued by this Court [MATTINA, J] on October 31, 1996 is hereby vacated, the SCPA article 17-A guardianship over Michael is hereby terminated, and the letters of guardianship issued to John and Margaret are hereby revoked.

This decision shall constitute the Order of this Court and no other or further order shall be required.

DATED: BUFFALO, NEW YORK

December 27, 2017

HON. BARBARA HOWE

Surrogate Judge

All Citations

Slip Copy, 2017 WL 6615122 (Table), 2017 N.Y. Slip Op. 51925(U)

Footnotes

1 Michael was born in 1974.

2 Disability Right New York (DRNY) is the Protection & Advocacy System and Client Assistance Program (P & A/CAP) for persons with disabilities in New York. As the P & A/CAP for New York, DRNY advocates for the civil and legal rights for New Yorkers with disabilities (*see* www.drny.com).

3 SASI is licensed by the New York State Office of People with Developmental Disabilities (OPWDD).

4 According to Dr. Michelini, Michael's I.Q. score of 53 places him below the first percent of the population, meaning 99% of people who take the same test score above Michael's score, and Michael's score of 66 on the verbal component is below two percent of the population.

5 Michael's birthday is in 1974, so his actual age at the time of the hearing was 43.

6 Michael receives Social Security Income, and SASI is his representative payee.