An Evening with the Guardianship Bench 2023

With the NCBA Elder Law Committee

CLE Packet

Evening's Agenda:

5:30 pm – Reception & Networking
6:30 pm – Welcome & Sponsor Recognition
Panel Discussion with Guardianship Judges
8:25 pm – Closing Remarks

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Panel Judges*

1. Hon. Wyatt N. Gibbons, Queens County
2. Hon. David J. Gugerty, Nassau County
3. Hon. Chris Ann Kelley, Suffolk County
4. Hon. Gary F. Knobel, Nassau County
5. Hon. Katherine A. Levine, Kings County
6. Hon. Lee A. Mayersohn, Queens County
7. Hon. Bernice D. Siegal, Queens County
8. Hon. Marian R. Tinari, Suffolk County
9. Hon. Charles M. Troia, Richmond County

*See Biographies on following pages

We want to wish our guardianship Judges, Honorable Cheree A. Buggs and Honorable Lisa Ottley Congratulations; as they both, along with their fellow members of the Appellate Term, Second Department, 2nd, 11th, and 13th JD, will be receiving the William Goodstein Memorial Award for Distinguished Service to the Court at the Association of Law Secretaries Annual Dinner at The View at Battery Park tonight.

Judge Biographies

Honorable Wyatt N. Gibbons

Bronx HS of Science 1981

SUNY- Binghamton 1985

St. John's University School of Law 1988

Ass't DA - Queens DA's Office 1988-1991

Ass't AG - US Virgin Islands Office of the Attorney General - St. Thomas – Criminal Division 1991-1992

Associate – Wolinsky and Wolinsky 1992-1995

Private practice from 1995 to 2019 concentrating on criminal defense and Article 81 Guardianships

Elected to Supreme Court in 2019 and took bench January, 2020 – hearing Gship cases since approximately August of 2020 and began presiding full time in one of four Queens guardianship parts in January 2021.

Resident of Queens County for most of my life

Honorable David J. Gugerty

Justice of the Supreme Court, Nassau County
100 Supreme Court Drive
Mineola, NY 11501
(516) 493-3192 dgugerty@nycourts.gov
Elected 2019 in the 10th Judicial District
Concentrating primarily in Guardianship and Assisted Outpatient Therapy
Member, Equal Justice in the Courts Committee, Public Outreach subcommittee

Admitted in 2d Department, February 1988
Admitted in US District Court - Eastern and Southern District, 1993
SUNY Buffalo Law School, JD, 1987

SUNY Binghamton, BA Law & Society, 1984

The Legal Aid Society of the City of New York
Criminal Defense Division – Trial attorney 1987-1993

Davis & Gugerty
Forest Hills, NY 1993-2005
Criminal defense, landlord-tenant, civil rights litigation, plaintiff's personal injury

Incorporated Village of Bayville, NY
Elected Trustee, two terms, 1993-2001
Bayville Environmental Conservation Commission, Chairperson 2014-2019

Nassau County Civil Service Commission -Commissioner 2001-2005

Nassau County Legislature
Majority Counsel, Minority Counsel and Minority Chief of Staff
2005-2007 and 2009-2014

Office of the Nassau County Public Administrator
Public Administrator 2007-2008

Nassau County Board of Elections
Democratic Commissioner 2015-2019

VOLUNTEER/PERSONAL ACTIVITIES

Island Harvest, Uniondale, New York
Food deliveries weekly to Faith Mission Inc. soup kitchen in Mineola

Grenville Baker Boys & Girls Club and Oak Neck Athletic Council, Locust Valley and Bayville, New York
Volunteer youth basketball coach

Co-founder of KIN, Kids In Nature, 2019
Facilitating nature hikes for children, particularly those from underserved communities

Avid triathlete and boater

Honorable Chris Ann Kelley

Judge Chris Ann Kelley (she/her/hers/herself) was appointed to the Court of Claims by former New York State Governor Andrew Cuomo in June 2018 and presently serves as an Acting Justice of the New York State Supreme Court assigned to the Suffolk County Supreme Court Guardianship Part.

Judge Kelley was first elected a Suffolk County District Court Judge in 2007 and was re-elected in 2013. During her tenure as a District Court Judge and Acting County Court Judge, Judge Kelley served in a Criminal Court Trial Part, the Domestic Violence Part, and the dedicated Driving While Intoxicated Part. After her appointment to the Court of Claims, Judge Kelley sat in Suffolk County Family Court for two years handling a myriad of cases involving children and families. Between 2020 and 2022, Judge Kelley presided in the Felony Sex Offense Part. Since January 2022 Judge Kelley has presided in the Guardianship Part of Suffolk County Supreme Court.

Judge Kelley began her legal career in 1985 as an Assistant District Attorney in Suffolk County, working in the District Court Bureau, Grand Jury Bureau, Family Crime Bureau and East End Bureau. After leaving the District Attorney's Office, she worked in private practice for 14 years, handling civil and criminal litigation and representing parents and children in Family Court proceedings. Judge Kelley also represented indigent adults in Criminal Court and Family Court as a member of the Assigned Counsel Defender Plan. Between 2002 and 2007, Judge Kelley served as a Court Attorney-Referee in the Suffolk County Supreme Court Integrated Domestic Violence Part and in the Suffolk County Family Court.

Judge Kelley graduated cum laude with a B.A. in English literature from SUNY Stony Brook (1981) and earned her J.D. degree from Western New England College School of Law (1984). Judge Kelley also attended the Institute on International and Comparative Law in Dublin, Ireland in the summer of 1984, studying International Human Rights. She is a member of the Suffolk County Bar Association where she presently serves on the Board of Directors and is co-chair of the LGBTQ Law Committee. Judge Kelley is also a member of the Suffolk County Women's Bar Association, the Suffolk County Criminal Bar Association, the New York State Bar Association and she is a member and former co-chair of the Suffolk County Women in the Court's Committee. Judge Kelley is also a member of the International Association of LGBTQ+ Judges and is a member of the NYS Failla Commission, currently serving as chair of the Failla Commission Education and Training Committee and as a member of the Judicial Mentoring Committee. Judge Kelley was an Adjunct Professor of Law at Touro Law Center where she has taught a course in "Selected Topics in Criminal Justice."

Judge Kelley resides in Port Jefferson with her wife and children.

Honorable Gary F. Knobel

The Hon. Gary F. Knobel was elected to the Supreme Court of New York in November, 2020, and was immediately assigned to the Guardianship Part based upon his experience of presiding over the majority of guardianship cases pending in Supreme Court, Nassau County, between 2013 and 2017 as an Acting County Court Judge. Justice Knobel served as a District Court Judge of Nassau County between 2005 and 2017, adjudicating hundreds of civil and criminal cases. Justice Knobel was the principal law clerk to the Hon. Antonio I. Brandveen in Supreme Court, Nassau County, from 2017 to 2019; prior to his ascension to the District Court bench Justice Knobel served as a law clerk for in Supreme Court, Nassau County, for Justices George Murphy and Anthony Parga between 1986-2004.

Justice Knobel recently began his 20th year teaching New York Civil Practice at Hofstra University School of Law. He has served as an instructor at the Judicial Institute for newly elected and appointed judges. Justice Knobel also served as President of the NYS District Court Judges Association, and was a member of the state-wide Special Commission on Fiduciary Matters. He is a former Chair of the Judicial Section of the Nassau County Bar Association and currently the Chairman of the Board of the Jewish Lawyers Association of Nassau County. Prior to the Covid -19 pandemic, Justice Knobel delivered food weekly to seniors for 25 years on behalf of Island Harvest and LI Cares. Justice Knobel is married to Ilene Fern, Principal Law Clerk to Supreme Court Justice Lee Mayersohn in Queens County. Justice Knobel and Ilene have two children – Laurence, a former bat boy for the NY Mets who is now employed by a national bank, and Lily, an honor student and junior in Oceanside High School.

Honorable Katherine A. Levine

Justice Levine is a Justice of the Kings County Supreme Court, Civil Term in the Second Judicial District of New York. She was elected to the Supreme Court bench in 2017. Previously, Justice Levine served as a judge for the Civil Court of the City of New York in Kings County after being elected to the seat in 2008.

Justice Levine received her B.S. from the Cornell University School of Industrial & Labor Relations and her J.D. from the University of Maryland Law School.

Justice Levine began her career in 1979 as an attorney for the National Labor Relations Board's Office of Appeals. She then worked as assistant corporation counsel for the New York City Law Department from 1981 to 1984. Beginning in 1984, she worked as senior counsel for the New York State United Teachers AFL-CIO. She joined the civil court in 2008 and also serves as an arbitrator in the Brooklyn Small Claim's Court.

Honorable Lee A. Mayersohn

EDUCATION: ***HOFSTRA UNIVERSITY SCHOOL OF LAW,*** J.D. May 1981
Hempstead, New York

QUEENS COLLEGE, B.A. June 1978
Flushing, New York

EXPERIENCE: Admitted to the New York State Bar, Appellate Division, Second Judicial Department, December 1981

SUPREME COURT, QUEENS COUNTY, January 2009 - Present
88-11 Sutphin Boulevard, Jamaica, New York
Justice of the Supreme Court: Currently presiding over Article 81 Guardianship matters, including Petitions for the Appointment of Personal Needs and Property Management Guardians; Review of all Annual Accounts, Final Accounts, Reports, Motions and ExParte applications related to Article 81 proceedings. Preside over foreclosure actions. Research and draft legal opinions relating to all cases in Part 22 and Part 22G.

CIVIL COURT, QUEENS COUNTY January 2005 - December 2008
89-17 Sutphin Boulevard, Jamaica, New York
Judge of the Civil Court: Presided over bench trials and jury trials. Presided over various motion and trial assignment parts. Research and writing of legal opinions relating to all types of actions within the jurisdiction of the court.

NEW YORK CITY TAX COMMISSION, July 1989 - December 2004
936 Municipal Building, New York, New York
Commissioner: Conducted hearings and made determinations on petitions for reductions of assessments on New York City commercial and residential property. Also reviewed applications for real property tax exemptions for charitable organizations and other not-for-profit entities.

THE LAW FIRM OF EIBER & MAYERSOHN, May 1987-December 2004
Partner: Areas of practice included primarily real estate, matrimonial, wills, trusts and estates and commercial litigation.
NEW YORK STATE ASSEMBLY, January 1982 - June 1989
Associate Speaker's Counsel: Duties included drafting and review of proposed

legislation submitted to the New York State Assembly Committees on Agriculture,
Environmental Conservation and Health. Did research and prepared memorandum on relevant issues.
AFFILIATIONS: Association of Supreme Court Justices of the State of New York;
Association of Supreme Court Justices of Queens County; Queens County Bar
Association; Board of Directors of the Brandeis Association; Scholarship Chairperson,
Brandeis Scholarship Fund.

Honorable Bernice D. Siegal

Bernice Daun Siegal, a certificated Justice of the New York State Supreme Court, 11th Judicial District, has long dedicated herself to public service and social justice. She has presided over complex cases, heard appeals in the Appellate Term and for the past eight years, has presided over her Guardianship Part. As an expert in guardianship matters, she was appointed to the Appellate Division Second Department Guardianship Task Force to update the Second Department "Best Practices." She also sits on the Pattern Jury Instruction Committee of the Association of Justices of the Supreme Court of the State of New York. While serving on the New York State Continuing Legal Education Board, she actively participated in the deliberations and revision of the CLE Rules, which now include mandatory "Diversity, Inclusion and Elimination of Bias" CLE trainings. In her previous position as Supervising Judge of the Queens Civil Court, she implemented programs to assist pro se litigants in consumer transaction litigation to ensure the fair administration of justice, for which she received special recognition.

Complementing her service to the legal community, Justice Siegal served on the Board of Directors of the Workers Circle, and currently serves on the board of Judges and Lawyers Breast Cancer Alert.

In 2021, Justice Siegal was awarded the Judith S. Kaye Access to Justice Award (WBASNY), in recognition of her core values of equal access to justice, service, good will and professionalism. Also, in 2021 Justice Siegal was awarded the Friend of the Section Award for the New York State Bar Association's Elder Law and Special Needs Section. Justice Siegal received the 2019 Hon. Harold J. Baer Diversity Award from the Network of Bar Leaders recognizing her efforts to make the legal profession and judiciary more diverse, which she believes is essential for equal access to justice and the fair administration of the rule of law.
Justice Siegal has also been recognized by the South Asian Indo Caribbean Bar Association of Queens (2019) for her support and the Columbian Lawyers (2008) for her contributions to the bench and bar. In 2019, she, along with the founders of the CLARO (Civil Legal Advice and Resource Office) in Queens Civil Court, received recognition from the Feerick Center for Social Justice of Fordham Law School.

Prior to ascending the bench, Justice Siegal was a community activist, working with tenants, homeowners, and small businesses. She helped to shepherd in the first women's store front in Queens County- All the Queens Women, and a lay advocacy organization for tenants- the Queens League of United Tenants. In the public sector, Justice Siegal was Counsel to a member of New York City Council. With extensive knowledge of zoning and land use, educational issues, housing matters and the legislative process, she crafted legislation and strategies to win significant legal and political battles. Prior to law school, she received her master's degree in public administration from New York University and worked as an administrator at the Albert Einstein College of Medicine and as Assistant Director at Lincoln Medical Center.

Justice Siegal holds a Juris Doctorate from New York Law School, where she graduated Magna Cum Laude and was a proud member of the Law Review, National Barristers and the National Lawyers Guild. She earned her bachelor's with honors from Queens College, City University of New York.

Judge Siegal has previously been recognized for her contributions to seniors by Services Now for Adult Persons and for her work to improve lives of people of the State of New York by the New York State Assembly, the Borough Presidents of Manhattan and Queens, as well as various political and community groups.

Honorable Marian R. Tinari

***Judicial Positions*:**

Justice Tinari has been a Supreme Court Justice since January 2018 and presently presides over matrimonial actions and guardianship proceedings. She began her career on the bench on March 3, 2015, when the Suffolk County Legislature unanimously approved a resolution appointing her a District Court Judge. In that capacity she presided over a criminal part which included Penal Law misdemeanor offenses as well as violations of the New York State Vehicle and Traffic Law and parole violations. In January 2016 she began a six-year term upon her election as District Court Judge.

Prior Positions and Responsibilities:

Justice Tinari, as an attorney with the Suffolk County District Administrative Judge's office, was a member of a team which oversaw the daily administration and operation of the Suffolk County Court system comprising approximately 1,000 members including judges, attorneys, court clerks, and security personnel. Justice Tinari was involved in virtually all decisions made by the District Administrative Judge providing insight obtained by regular communication with Supervising Judges, Chief Clerks, security supervisors, and other judicial and non-judicial staff.

In her role as counsel to the District Administrative Judge, Justice Tinari was responsible for communicating with various representatives and agencies which interact with the Suffolk County courts on an ongoing basis. Justice Tinari was an integral part of virtually all administrative decisions made in connection with the court system including resource allocation, media management, personnel assignments, launching pilot programs, continuing legal education programs, and collaborations with other judicial districts statewide. Many of those programs and initiatives required communication with outside agencies and organizations and Justice Tinari was often tasked with the responsibility of preparing memoranda to those entities to ensure that the recipients were fully informed.

Justice Tinari was the Public Information Officer for the Suffolk County Courts. In that capacity she interacted daily with local, national, and international media outlets on stories and programs centered around court cases and issues. Such interaction is often time sensitive requiring prompt and comprehensive responses to reporters. It also required a complete understanding of court operations and ethical parameters for dissemination of information.

Justice Tinari served as Outreach Coordinator for the Suffolk Courts for numerous court centric events during the course of the year, many of which involved interaction with statewide counterparts including the first annual Suffolk County Court's Law Day event in cooperation with Judge Fern Fisher and the New York State Access to Justice Program. In her present position, Justice Tinari continues her role as director of the Suffolk County Courts internship program. This program, which annually includes approximately fifty participants, involves court observation and provides students with a unique opportunity to engage with various agencies which serve the court. This position required regular communication with law school deans

within New York State and across the country. This year, for the first time, the program will be conducted virtually.

In addition to her duties within the court system, Justice Tinari worked with academic institutions throughout the country to ensure that Suffolk County attracts the highest caliber entrants to the court system in a number of related fields. She was also responsible for incubating, in collaboration with institutions within and outside the court system, ideas for more efficient use of court services.

As a court-attorney referee, Justice Tinari presided over hearings on a range of topics including tax assessment review and various Surrogate issues. She also served as a hearing officer on personnel matters across New York State. (2011- 2015)

Prior to her role in the administration of the courts, Justice Tinari served as Principal Law Clerk to Suffolk County Surrogate Court Judge John M. Czygier, Jr. In that capacity she was responsible for drafting decisions and preparing presentations for a Surrogate Judge who is nationally recognized for his in-depth of knowledge in the field of Trusts and Estates law. Because there is a single Surrogate Judge in Suffolk County, Justice Tinari worked alongside the Chief Clerk of the Surrogate's Court and the Surrogate Court Judge on all administrative tasks related to the Court including personnel and other facility related issues. The duties of Principal Law Clerk require utilization of highly developed research and writing skills as well as extensive involvement in complex negotiations to resolve disputes relating to high-value estates. While serving in the Surrogate's Court, Justice Tinari frequently lectured on topics relevant to Trust and Estate matters to members of the Bar. (2002-2009)

After working with Judge Czygier, Justice Tinari worked in the Suffolk County Supreme Court Law Department. In that capacity she drafted memorandum decisions for several Supreme Court Justices, several of which were featured as front-page news in the New York Law Journal. **(**2010-2011)

Justice Tinari joined the court system as a Law Clerk to New York State Court of Claims Judge Michael F. Mullen. Judge Mullen presided over many high-profile criminal and civil cases including a landmark capital case (*People v LaValle).* Justice Tinari was also responsible for ongoing administrative matters while serving as Clerk to Judge Mullen during his term as Supervising Judge of the Criminal Courts. As his Law Clerk, Justice Tinari was tasked with communicating with the Judges of the Criminal Courts to ensure all administrative responsibilities were executed efficiently and collaboratively. (1987-2002)

Prior to her tenure with the courts, Justice Tinari served as an Assistant District Attorney in the Suffolk County District Attorney's Office. There she served in the District Court, Grand Jury, and Major Crimes Bureaus and successfully prosecuted misdemeanor and felony matters from investigation to trial. Justice Tinari was selected to head a newly formed Bias Crimes Unit. This Unit was a prototype for many others later established throughout the country**.** In that capacity, Justice Tinari worked with the District Attorney, members of law enforcement, and defense attorneys to create a new Bureau designed to track and prosecute hate crimes. (1984-1987**)**

Justice Tinari began her career at Chase Manhattan Bank where she was responsible for crafting appropriate investment strategies for high net worth clients while adhering to the legal requirements for trust accounts. While at Chase, she was promoted several times, ultimately serving as an officer and direct contact and strategist for select client groups. This position required the utilization of leadership skills particularly in connection with addressing the concerns of direct reports including Chief Officers within the Bank. (1981-1984)

Professional Associations and Organizations:

Justice Tinari is currently Co-Chair of the Suffolk County Women in the Courts Committee Mental Health sub-committee, Co-Chair of the Suffolk County Courts Children's Center Advisory Board, and member of the Suffolk County Bar Association's Bench Bar Committee. She is a past President of the Suffolk County Brehon Society and past Co-Chair of the Suffolk County Bar Association's Surrogate Court Committee. She served as President of the Suffolk County Brehon Society, Chair of the Suffolk County District Administrative Judge's TASK force on the Supreme Court, and Co-Chair of the District Administrative Judge's Women in the Courts Committee. Justice Tinari served on the New York State Court System's Foreclosure Program and the Board of Managers of the Suffolk County Bar Association Pro Bono Foundation. She is a past member of the Suffolk County Bar Association's Military and Veterans Affairs Committee. She has also served on the Lawyer Assistance Foundation of the Suffolk County Bar Association. Justice Tinari is a recipient of the Rosemary Nelson award from the Suffolk County Brehon Society. Justice Tinari and her husband have presented as Pre-Cana instructors for over 15 years.

Educational Background:

Justice Tinari is a graduate of the College of William and Mary and Capital University Law School where she was an editor on the Law Review. While working in the Trust and Estate Management Division at Chase Manhattan Bank's New York headquarters, she was awarded a certification in Trust and Estate Law from the National Bankers Association's program at Northwestern University.

Personal Information:

Justice Tinari has lived in Huntington, New York for many years and has three adult children. She has been married to her husband, Frank, an attorney, for over 33 years.

Honorable Charles M. Troia

Judge Troia was designated an Acting Justice of the Supreme Court by Chief Administrative Judge A. Gail Prudenti in January, 2013. He presently presides over a Guardianship Part, a Civil Case Management Part, a Civil Mental Hygiene Part and a Medical Malpractice Part in Richmond County. He serves as Chairman of the Guardianship Roundtable for the 1st and 2nd Departments, Co-Chair of the Guardianship Task Force for the Second Department and is a member of 18-b Advisory Panel (all appointees of the Presiding Justice of the Appellate Division of the Second Department). He lectures extensively on guardianships and mental health. He has lectured before the New York State Bar Association, the Bar Association of the City of New York, New York County Lawyers, Richmond County Bar Association, Columbian Lawyers and the Kings County Bar Association.

Judge Troia was first appointed to the bench in September of 2010 by Mayor Michael Bloomberg. He served in the Criminal Courts in both Richmond and Kings Counties, prior to his designation to the Supreme Court. He was appointed a Judge of the Court of Claims in July, 2020.

Judge Troia received his B.S. magna cum laude from St. John's University and attended St. John's University School of Law on a full academic scholarship where he received his Juris Doctor. Upon graduation from law school, he served as an Assistant Corporation Counsel for the New York City Law Department and thereafter served as a senior trial attorney for the law firm of Kral, Clerkin, Redmond Ryan Perry and Girvan. In 1996 he was appointed principal law clerk to the Honorable Peter P. Cusick in the Supreme Court, Richmond County. In 2000 he was appointed principal law clerk to the Honorable John M. Leventhal in both the Supreme Court, Kings County and the Appellate Division Second Department. In 2009 he was appointed principal court attorney to the Honorable Barry Kamins, Administrative Judge for Criminal Matters for the Second Judicial District. Judge Troia resides in Staten Island and is a second-generation native Staten Islander.

2023 Proposed Questions for Guardianship
Judges Panel

Court Evaluator

- What information do you want included in the Court Evaluator Report?
- Should the Court Evaluator always ask before disseminating the Court Evaluator Report to the other interested parties?
- What is the best way for a Court Evaluator to submit personal and private information regarding the AIP for the court's review without disclosing such information to all parties? How can a Court Evaluator then use that information in making a recommendation without disclosing such information?

Attorney for the AIP

- How do you perceive the role to be of the Attorney to the AIP?
- Do you ever believe that an attorney should take the Best Interest Standard when an AIP cannot properly direct them?
- How does a Petitioner handle an Attorney for the AIP who takes an aggressive role beyond the scope of how their client is guiding them?

E-File

- How does the Court handle E-file parties who are no longer involved in the case? Is there a specific party who is tasked with removing parties from E-File?
- What information should be redacted when E-Filing my documents?

Hearing

- Can the hearing be conducted outside the presence of the AIP if the AIP refuses to participate?
- How is the Court handling virtual v. in-person appearances? When does the Court decide to change the hearing to in-person?
- If the Court is conducting in-person hearings, have more AIPs in a facility or with mobility issues been appearing remotely?
- How is the Court handling evidence in a virtual appearance?

AIP/PING

- When does the Court feel it's appropriate to deem someone a Person in Need of a Guardian as opposed to an Incapacitated Person?
- Do issues arise with cases where an individual was deemed a Person in Need of a Guardian and the Court accepted his/her consent despite incapacity being a concern?

- When should the Guardian move the Court to change the Person in Need of a Guardian to an incapacitated Person?

Preservation of Assets

- In the context of the Matter of Shannon, what is your view of the duty, if any, of the Guardian to preserve and protect assets of the IP after death?
- Please explain what the Guardian can and cannot do following the death of the IP.

Attorney Fees

- In the Context of Matter of Freeman, what is your view on the Affirmation of Services submitted by attorneys regarding the items listed and do you wish for attorney to argue why they should receive their requested fees with regard to ALL the following:

  > (1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented, (2) the attorney's experience, ability, and reputation, (3) the amount involved and the benefit flowing to the ward as a result of the attorney's services, (4) the fees awarded in similar cases, (5) the contingency or certainty of compensation, (6) the results obtained, and (7) the responsibility involved (Matter of Alice D., at 613-614; see, Matter of Freeman, 34 N.Y.2d 1, 311 N.E.2d 480, 355 N.Y.S.2d 336 [1974]).

Miscellaneous

- Have you seen any new issues arise in your Guardianship cases this year that you would like to share?
- Are there any topics or other information that you want to be certain is shared with the attendees of this evening – perhaps newer procedures in your region?
- Are there any changes to Article 81 that you would like to see and why?
- What have been the implications of the modification of Article 81 at 81.16 to include Peter Falk's Law?

Recent Guardianship Decisions

Matter of Lane (Michelle R.) Supreme Court of New York, Nassau County December 20, 2022, Decided Index No. 8501-I-2021

Matter of Tanya M. (Josette M.) Supreme Court of New York, Nassau County January 12, 2023, Decided Index No: 850084-i-2022

Matter of Weiss (Agam S.) Supreme Court of New York, Nassau County January 13, 2023, Decided Index No. 132074-I-2016

Matter of Nicole L. (Eleanor D.) Supreme Court of New York, Nassau County January 12, 2023, Decided Index No. 850098/2021

User Name: Gary Knobel

Date and Time: Tuesday, April 25, 2023 2:53:00PM EDT

Job Number: 195723749

Document (1)

1. *Matter of Lane (Michelle R.), 2022 N.Y. Misc. LEXIS 8501*

Client/Matter: -None-

Search Terms: "KNOBEL, j."OR "GARY F. KNOBEL" OR "JUSTICE GARY F. KNOBEL" OR "JUDGE GARY KNOBEL" OR "JUDGE GARY F. KNOBEL"

Search Type: Terms and Connectors

Narrowed by:

Content Type	Narrowed by
Cases	New York

Matter of Lane (Michelle R.)

Supreme Court of New York, Nassau County

December 20, 2022, Decided

Index No. 8501-I-2021

Reporter
2022 N.Y. Misc. LEXIS 8501 *; 2022 NY Slip Op 22401 **; 78 Misc. 3d 268; 184 N.Y.S.3d 521; 2022 WL 18228315

[1]** In the Matter of Emily Lane, Petitioner, for the Appointment of a Guardian for the Personal Needs and Property Management of Michelle R., an Alleged Incapacitated Person.

Notice: THE PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.
THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

discontinuance, guardianship proceeding, incapacitated, evaluator, appointed, parties, appointment of a guardian, responsive pleading, temporary guardian, geriatric, notice, best interest, court order, proceedings

Case Summary

Overview
HOLDINGS: [1]-There was a prima facie showing that the alleged incapacitated person was in need of a guardian, and that the best interests of the alleged incapacitated person required the denial of the application to discontinue the initial guardianship proceeding as the court heard extensive testimony from the court evaluator, the geriatric care manager, and the temporary guardian that it was not in the best interest of the alleged incapacitated person to permit the withdrawal of the petition. Additionally, the court heard sufficient testimony that the alleged incapacitated person continuously put herself in harms way, and that she suffered from physical ailments which made it difficult for her to ambulate and take care of herself.

Outcome
Application to discontinue the proceeding was denied.

LexisNexis® Headnotes

Family Law > Guardians > Appointment

HN1[] **Guardians, Appointment**

Mental Hygiene Law § 81 does not include a provision which sets forth the procedure for discontinuing a guardianship proceeding and the subsequent issue of the payment of fees incurred for professional services rendered. Nevertheless, it is not unusual for a guardianship proceeding to be "withdrawn" or discontinued since the alleged incapacitated person my pass away prior to the hearing. Thus, the voluntary discontinuance of an Article 81 guardianship proceeding is governed by *CPLR 3217 (a)* and *(b)*, which unfortunately has never been amended to integrate any of the provisions of *Article 81* proceedings since the enactment of *Article 81* thirty years ago.

Family Law > Guardians > Appointment

Family Law > Family Protection & Welfare > Children > Proceedings

HN2[] **Guardians, Appointment**

A guardianship proceeding is unlike other actions and special proceedings since the respondent, the individual alleged to be incapacitated, is not accused of wrongdoing or fault.

Civil Procedure > Attorneys > Appointment of

Counsel

Evidence > Burdens of Proof > Clear & Convincing Proof

Family Law > Guardians > Appointment

HN3[] Attorneys, Appointment of Counsel

Regarding a guardianship proceeding, the Mental Hygiene Law presumes that the individual is not incapacitated until it is proven by the highest standard of proof, clear and convincing evidence. Mental Hygiene Law 81.02 [b]. Although the alleged incapacitated person may consent to the appointment of a guardian for her or his personal or property management needs, Mental Hygiene Law § 81.02 (a) [2], the petitioner and the alleged incapacitated person (AIP) cannot simply stipulate to that appointment since Mental Hygiene Law § 81.11 (a) requires that the determination that the appointment of a guardian is necessary for a person alleged to be incapacitated shall be made only after a hearing. In making that determination the court is required to appoint, at the very least, a neutral party, a court evaluator, who is required to report to the court at the hearing regarding whether inter alia the appointment of a guardian is necessary to protect the alleged incapacitated person from harm. Mental Hygiene Law § 81.09. The court can appoint counsel for the alleged incapacitated person or the AIP can retain their own counsel. Mental Hygiene Law § 81. 10 (a), (c) [7]. Thus Mental Hygiene Law § gives an individual the opportunity to fight against and object to the deprivation of their freedom, and their right to make their own decisions and conduct their life the way they see fit.

Family Law > Guardians > Duties & Rights

HN4[] Guardians, Duties & Rights

A guardianship proceeding cannot be discontinued by written stipulation pursuant to CPLR 3217 (a) (2) for two reasons: first, the court must exercise its discretion to determine if the discontinuance is proper and is in the alleged incapacitated person (AIP)'s best interest, and second the court evaluator, an independent person acting to investigate and make recommendations to the court as to whether a guardian should be appointed must be heard before any disposition. Thus, the court evaluator should be considered to be a 'party.' In that manner the court fulfills its duty to protect litigants who may actually be incapacitated but have not been judicially declared such. The enumerated powers of a court evaluator do not include consent to a discontinuance. The court will not add that power by implication because it is incompatible to the court evaluator's role for her to make a binding decision to effect the outcome of the case. Absent a court order, even if the court evaluator were inclined to do so, she may not consent to discontinuance.

Civil Procedure > Pleading & Practice > Pleadings

Governments > Courts > Clerks of Court

HN5[] Pleading & Practice, Pleadings

CPLR 3217 recognizes three distinct time periods during the life of an action where a discontinuance may be sought by the plaintiff, and treats each differently. The first, embodied in CPLR 3217(a)(1), is the time before a responsive pleading is served, or if no responsive pleading is required, within 20 days after service of process and the filing of proof of service with the clerk of the court. At that juncture, a discontinuance may be effected by the mere service of a notice of discontinuance. This procedure is the easiest means of discontinuance, as it recognizes that at such an early stage of an action or proceeding, the court and the parties have invested little time, effort, and expense in connection with the case, so that the service of a mere notice suffices.

Civil Procedure > Dismissal

Civil Procedure > ... > Voluntary Dismissals > Court Order > Terms & Conditions of Dismissal

HN6[] Civil Procedure, Dismissal

The second time frame for a discontinuance is the period between the responsive pleading, CPLR 3217[a][1], and the point just before the case is submitted to a court or a jury for a determination of the facts of the claim. As to that broad time frame, the discontinuance of an action may be effected by the filing of a written stipulation executed by the attorneys of record for all of the parties. Alternatively, between the joinder of issue and the submission of the case to a court or a jury for factual determinations, a discontinuance may be obtained, without a stipulation of the parties, by a court order upon terms and conditions

that the court deems proper. CPLR 3217[b]. The third stage of a litigation, as relevant to a discontinuance, is the period after the case has been submitted to the court or the jury for a determination of the facts.

Civil Procedure > ... > Voluntary Dismissals > Court Order > Terms & Conditions of Dismissal

HN7[] Court Order, Terms & Conditions of Dismissal

Once an action or a proceeding has advanced to the point of deliberation and fact-finding, there can be no discontinuance except by leave of court upon such terms and conditions as the court deems proper and a stipulation of all parties appearing in the action. In other words, at this juncture, the requirements imposed upon the discontinuing party are double-layered.

Civil Procedure > Parties

Civil Procedure > ... > Voluntary Dismissals > Court Order > Terms & Conditions of Dismissal

HN8[] Civil Procedure, Parties

The refusal by a defendant to consent to a discontinuance, for whatever reason, operates as a veto on the issue, as it prevents the court from even reaching its discretionary authority to consider the requested discontinuance. Thus, CPLR 3217, viewed in its entirety, operates like a see-saw, allowing for discontinuances by mere unilateral notice at the earliest stage of a litigation, while imposing incrementally greater requirements upon the party seeking the discontinuance the farther the litigation progresses. The statute is easily applied in cases that go to trial. In such instances, the submission of the case to a jury for its findings of fact, or the submission of the case to a court during a bench trial, operates as a bright line separating the discontinuance that may be sought using the pre-deliberative mechanisms of CPLR 3217(a)(2) and (b) from the mechanism of CPLR 3217(b) which attaches once the deliberative phase begins. Thus, CPLR 3217, viewed in its entirety, operates like a see-saw, allowing for discontinuances by mere unilateral notice at the earliest stage of a litigation, while imposing incrementally greater requirements upon the party seeking the discontinuance the farther the litigation progresses.

Family Law > Guardians > Appointment

HN9[] Guardians, Appointment

CPLR 3217 (a)(2) does not contemplate the discontinuance by the petitioner of a guardianship proceeding before a guardian has been appointed for the alleged incapacitated person; it does however explicitly bar discontinuance by stipulation where an infant, conservatee, or incompetent for whom a committee has been appointed is a party. The legislative intent of CPLR 3217 (a)(2) was to limit the right to discontinue a conservatorship/guardianship proceeding as a means of protecting conservatees, incompetents/ alleged incapacitated individuals from the collusive termination of actions when the true parties' best interests would be better served by continuing the action. In other words, an application by the petitioner to discontinue a guardianship proceeding, other than due to the death of the alleged incapacitated person, should only be granted by court order, regardless of whether the petitioner, or the alleged incapacitated and the court evaluator, stipulate to that relief. Contrary to CPLR 3217 as presently cast a guardianship proceeding crosses the rubicon from its predeliberative stage of CPLR 3217 (a)(1), and cannot be voluntarily discontinued when the court evaluator issues a report and testifies in the proceeding, thus triggering the statutory condition that a discontinuance at that juncture requires both leave of court and a stipulation of all parties.

Headnotes/Summary

Headnotes

Incapacitated and Intellectually or Developmentally Disabled Persons — Guardian for Personal Needs or Property Management — Discontinuance of Guardianship Proceeding

In a proceeding brought by petitioner for the appointment of a guardian for the personal and property management needs of her mother, an alleged incapacitated person (AIP), the application made by petitioner and joined in by the AIP's counsel to discontinue the proceeding pursuant to CPLR 3217 (a)(2) was denied as it was not in the AIP's best interest to permit the withdrawal of the petition. An application by a petitioner to discontinue a guardianship proceeding, other than due to the death of the AIP, should only be

granted by court order, regardless of whether the petitioner, or the AIP and the court evaluator, stipulate to that relief. Before petitioner made the application, which was opposed by the temporary guardian and the court evaluator, a trial had been conducted over several days and petitioner, the temporary guardian, the geriatric care manager, and the court evaluator had all testified for the need for the appointment of a guardian. Petitioner alleged that there was a change in circumstances in that the AIP was now able to ambulate and take care of many of her activities of daily living, including addressing financial problems. However, there was extensive testimony from the court evaluator, the geriatric care manager, and the temporary guardian that it was not in the AIP's best interest to permit the withdrawal of the petition, as she continuously put herself in harm's way, suffered from physical ailments which made it difficult for her to ambulate and take care of herself, and needed assistance in managing her finances.

Counsel: **[*1]** For PING: David Smith, Garden City, NY.

For Court Examiner: James McGahan, Melville NY.

For Court Evaluator: Moriah Adamo, Lake Success, NY.

For Petitioner's: Andrew Cohen, Judith Powell, Esq. Temporary Guardian, Jericho NY.

Judges: HON. ***GARY F. KNOBEL, J***.S.C.

Opinion by: ***GARY F. KNOBEL***

Opinion

Gary F. Knobel, J.

PAPERS CONSIDERED:

Transcripts of the proceeding 1-4

The oral application by the petitioner—daughter during the hearing of the proceeding at bar presented an issue of first impression in contested Article 81 guardianship proceedings: whether the petitioner can discontinue the proceeding with, or without, a court order, pursuant to CPLR § 3217 (a) or (b), after the petitioner rested, and after extensive testimony by the petitioner, the temporary guardian, the geriatric care manager and the court evaluator has been taken in the proceeding for the appointment of a guardian for the personal and property management needs of respondent—mother, an alleged incapacitated person ("AIP").

HN1[↑] Article 81 of the Mental Hygiene Law does not include a provision which sets forth the procedure for discontinuing a guardianship proceeding and the subsequent issue of the payment of fees incurred for professional services rendered.

Nevertheless, it is not unusual for a guardianship proceeding **[*2]** to be "withdrawn" or discontinued since the alleged incapacitated person my pass away prior to the hearing. Thus, the *voluntary* discontinuance of an Article 81 guardianship proceeding is governed by CPLR 3217 (a) and (b), which unfortunately has never been amended to integrate any of the provisions of Article 81 proceedings since the enactment of Article 81 thirty years ago.

CPLR 3217, entitled "Voluntary discontinuance" reads in pertinent part:

"(a) Without an order. Any party asserting a claim may discontinue it without an order

1. by serving upon all parties to the action a notice of discontinuance at any time before a responsive pleading is served or, if no responsive pleading is required, within twenty days after service of the pleading asserting the claim and filing the notice with proof of service with the clerk of the court; or

2. by filing with the clerk of the court *before the case has been submitted to the court or jury* a stipulation in writing signed by the attorneys of record for all *parties, provided* that no party is an infant, *incompetent* person *for whom a committee has been appointed or conservatee* and no person not a party has an interest in the subject matter of the action [emphasis added];.

(b) By order of court. **[*3]** Except as provided in subdivision (a), an action shall not be discontinued by a party asserting a claim *except upon order of the court and upon terms and conditions, as the court deems proper*. After the cause has been submitted to the court or jury to determine the facts the court *may not order an action discontinued except upon the stipulation of all parties appearing in the action*.[emphasis added]"

Article 81 *proceedings* for the appointment of a guardian for the respondent do not, by their very unique nature, fit neatly within the three chronological phases set forth in CPLR 3217. ***HN2***[↑] A guardianship proceeding is unlike other actions and special proceedings since the

respondent, the individual alleged to be "incapacitated," is not accused of wrongdoing or fault (*see Matter of Spadafora, 54 Misc 2d 123, 125, 281 N.Y.S.2d 923, affd 29 AD2d 742, 288 N.Y.S.2d 588; see generally In re Flight, 296 AD2d 845, 744 N.Y.S.2d 920, 921 [4th Dept. 2002]*). Nevertheless, since the respondent can lose her or his civil liberties guaranteed by the United States and New York State Constitutions, *Article 81 of the Mental Hygiene Law* was designed by the Legislature to be an adversarial process, not a collaborative or mediative one, in an effort to protect the respondent's liberty interests (see, *Mental Hygiene Law § 81.01*). ***HN3***[⬆] The statute presumes that the individual is not incapacitated until it is proven by the highest standard of proof, clear and convincing evidence (see *Mental Hygiene Law 81.02 [b]*). Although the **[*4]** alleged incapacitated person may consent to the appointment of a guardian for her or his personal or property management needs (see *Mental Hygiene Law § 81.02 (a) [2]*), the petitioner and the AIP cannot simply stipulate to that appointment since *Mental Hygiene Law § 81.11 (a)* requires that the "determination that the appointment of a **[**2]** guardian is necessary for a person alleged to be incapacitated shall be made only after a hearing." In making that determination the court is required to appoint, at the very least, a neutral party, a court evaluator, who is required to report to the court at the hearing regarding whether *inter alia* the appointment of a guardian is necessary to protect the alleged incapacitated person from harm (see *Mental Hygiene Law § 81.09*). The court can appoint counsel for the alleged incapacitated person or the AIP can retain their own counsel (see *Mental Hygiene Law § 81.10 (a), (c) [7]*). Thus Article 81 gives an individual the opportunity to fight against and object to the deprivation of their freedom, and their right to make their own decisions and conduct their life the way they see fit (see, *Matter of Caminite (Amelia G.), 57 Misc 3d 720, 721-722, 62 N.Y.S.3d 724, 725-726 [County Court, Nassau Co., 2017]*).

In the proceeding at bar, prior to the continued cross-examination of the court evaluator via Microsoft Teams, this Court denied on the record the oral motion by the petitioner's counsel, joined in by **[*5]** court-appointed counsel for the AIP, to withdraw the entire petition based upon *CPLR 3217 (b)*. Consequently, Michelle R. consented to having, for a one-year period with a specific expiration date, her husband serve as her personal needs guardian, and to have an independent person from the Part 36 fiduciary list be appointed her property management guardian with limited powers.

The denial of the oral motion was never reduced into a written order. Subsequent to the denial of the motion to discontinue, and subsequent to the settlement of the guardianship proceeding for one year, Justice Mark C. Dillon, writing for the Appellate Division, Second Department, panel in *Emigrant Bank v. Solimano, 209 AD3d 153, 175 NYS 3d 299 [2022]*, extensively analyzed *CPLR 3217 (a)* and *(b)*, and the conditions for discontinuing actions and special proceedings within the three chronological phases set forth in the statute. Accordingly, this Court will now *sua sponte* reconsider the issue of whether the initial guardianship proceeding should have been discontinued by this Court pursuant to *CPLR 3217 (a)(2)* in light of the reasoning and holding in *Emigrant Bank*, and possibly obviate the need for the scheduled hearing on whether the one-year guardianship proceeding should be renewed or terminated.

From its commencement, **[*6]** the guardianship proceeding at bar was beset with difficulties, revealing a dysfunctional family and uncooperative AIP with impaired judgment. An extraordinary amount of time was required to be performed by the court appointees. It was a complex quagmire for the court appointees to navigate, especially since Michelle R. always insisted that she did not need a guardian. However, there were reports made to this court that Michelle R. was not being appropriately cared for and that she was not taking proper care of herself, e.g., that she would drink alcohol excessively, and resided on the second floor of her house even though she was incapable of walking down a spiral staircase. Moreover, this Court conducted several emergency hearings and conferences, regardless of time or day, because Michelle R.'s health and safety were in peril. Michelle R. needed to go to the emergency room frequently to be treated for a panic attack and sepsis shock. Furthermore, there were allegations of financial mismanagement of Michelle R.'s property as well as a pending divorce proceeding against her husband. The actions and intervention by the team of court appointees - the temporary guardian, the geriatric **[*7]** care manager, the court evaluator, and court appointed counsel for Michelle R. - during situations where Michelle R's health was precarious - were exemplary and were instrumental in saving Michelle R.'s life.

Eventually this Court conducted a trial over several days on the issue on the issue of whether a guardian should be appointed for the personal and property management needs of **[**3]** Michelle R. The petitioner, the temporary guardian, the geriatric care manager, and

the court evaluator had all testified for the need for the appointment of a guardian for Michelle R. However, prior to the continuation of the cross-examination of the court evaluator, the petitioner orally made an application on the record, joined in by counsel for the alleged incapacitated person, to discontinue the proceeding pursuant to CPLR 3217 (a) (2). Counsel for petitioner argued that even though the allegations made at the time petitioner verified the petition were true, now there was a change in the circumstances: that Michelle R. was now able to ambulate, and take care of many of her activities of daily living, including addressing financial problems. Court appointed counsel for Michelle R. did not object to the discontinuance, **[*8]** maintaining that client's position was that there was no merit to the guardianship proceeding *ab initio*.

The temporary guardian and the court evaluator both opposed the application. The court evaluator argued that the geriatric care manager's report did not reveal any evidence that Michelle R. could independently manage her activities of daily living nor her financials, nor any evidence that Ms. R. is aware of the nature and circumstances of her functional limitations and was able to meaningfully engage in a resolution of her circumstances without assistance. The court evaluator also argued that there was no evidence submitted that Michelle R was able to independently manage her finances.

This Court denied on the record the application to discontinue pursuant to CPLR 3217 (b), that the movants could not simply invoke CPLR 3217 (a) (2) at this point in the proceeding, that the petitioner - despite her change of heart - had made a *prima facie* showing that a guardian was needed for Michelle R., and that in view of the geriatric care manager's report and the testimony of the temporary guardian and court evaluator, the best interests of the AIP required that the proceeding continue until its conclusion.

In reaching its **[*9]** decision, this Court also cited the only two reported cases pertaining to discontinuing a guardianship proceeding, Matter of Chachkers (Shirley W.), 159 Misc 2d 912, 606 NYS2d 959 [Sup. Ct., NY County (1993)], and *Matter of Bloom (Spear), 1 Misc 3d 910[A], 781 NYS2d 622, 2004 NY Slip Op 50014[U] [Sup.Ct. Suffolk County, 2004]*). Both proceedings were permitted to be discontinued prior to an evidentiary hearing. In doing so Justice Lewis R. Friedman in Matter of Chachkers made several significant interpretations of Article 81, CPLR 3217 and in particular the role of the court evaluator as set forth in Mental Hygiene Law §81.09. HN4[↑] Justice Friedman explained that a guardianship proceeding cannot be discontinued by written stipulation pursuant to CPLR 3217 (a) (2) for two reasons:

> first, "[t]he court must exercise its discretion to determine if the discontinuance is proper and is in the AIP's best interest," and second "[t]he court evaluator, an independent person acting to investigate and [make] recommendations to the court [as to whether a guardian should be appointed] must be heard before any disposition. Thus [the court evaluator] should be considered to be a 'party.' In that manner the court fulfills its "duty" to protect litigants who may actually be incapacitated but have not been judicially declared such [citations omitted] .The enumerated powers of a court evaluator do not include consent to a discontinuance. The court will not add that power by implication because **[*10]** it is incompatible to the court evaluator's role for her to make a binding decision to effect the outcome of the case. Absent a court order, even if the court evaluator were inclined to do so, she may not consent to discontinuance

Therefore, the only manner of discontinuance permissible is by court order pursuant to CPLR 3217[b]"

[4]** (In re Chachkers, 159 Misc 2d 912, 913-915, 606 NYS2d 959, 960-961 [Sup. Ct. NY County 1993).

Unfortunately, although the recent Second Department decision in Emigrant Bank did discuss in *dicta* that special proceedings are discontinued in the same manner as actions in accordance with CPLR 3217's formula, the court did not discuss (nor was there any basis to discuss) the conundrum of the "parties" in an Article 81 special proceeding stipulating, pursuant to CPLR 3217 (a)(2) or CPLR 3217 (b), to discontinue the guardianship proceeding before the court would begin deliberations on the issue of whether a guardian should be appointed for the alleged incapacitated person.

Justice Dillon, writing for the Court, stated that CPLR 3217

HN5[↑] "recognizes three distinct time periods during the life of an action where a discontinuance may be sought by the plaintiff, and treats each differently. The first, embodied in CPLR 3217(a)(1), is the time before a responsive pleading is served, or if no responsive pleading is required, within 20 days **[*11]** after service

of process and the filing of proof of service with the clerk of the court. At that juncture, a discontinuance may be effected by the mere service of a notice of discontinuance [citation omitted]. This procedure is the "easiest" means of discontinuance, as it recognizes that at such an early stage of an action or proceeding, the court and the parties have invested little time, effort, and expense in connection with the case, so that the service of a mere notice suffices.

HN6[↑] The second time frame for a discontinuance is the period between the responsive pleading (*see CPLR 3217[a][1]*) *and the point just before the case is submitted to a court or a jury for a determination of the facts of the claim. As to that broad* time frame, as relevant herein, the discontinuance of an action may be effected by the filing of a written stipulation executed by the attorneys of record for all of the parties [citations omitted. Alternatively, between the joinder of issue and the submission of the case to a court or a jury for factual determinations, a discontinuance may be obtained, without a stipulation of the parties, by a court order upon terms and conditions that the court deems proper (*see CPLR 3217[b]*; [citations **[*12]** omitted].

> The third stage of a litigation, as relevant to a discontinuance, is the period after the case has been submitted to the court or the jury for a determination of the facts. ***HN7***[↑] Once an action or a proceeding has advanced to the point of deliberation and fact-finding, there can be no discontinuance except by leave of court upon such terms and conditions as the court deems proper *and a stipulation of all parties appearing in the action* [citations omitted]. In other words, at this juncture, the requirements imposed upon the discontinuing party are double-layered. ***HN8***[↑] The refusal by a defendant to consent to a discontinuance, for whatever reason, operates as a veto on the issue, as it prevents the court from even reaching its discretionary authority to consider the requested discontinuance. Thus, *CPLR 3217*, viewed in its entirety, operates like a see-saw, allowing for discontinuances by mere unilateral notice at the earliest stage of a litigation, while imposing incrementally greater requirements upon the party seeking the discontinuance the farther the litigation progresses.
>
> The statute is easily applied in cases that go to trial. In such instances, the submission of the case to a jury for its **[*13]** findings of fact, or the submission of the case to a court during a bench trial, operates as a bright line separating the discontinuance that may be sought **[**5]** using the pre-deliberative mechanisms of *CPLR 3217(a)(2)* and *(b)* from the mechanism of *CPLR 3217(b)* which attaches once the deliberative phase begins
>
> Thus, *CPLR 3217*, viewed in its entirety, operates like a see-saw, allowing for discontinuances by mere unilateral notice at the earliest stage of a litigation, while imposing incrementally greater requirements upon the party seeking the discontinuance the farther the litigation progresses."

(*Emigrant Bank v. Solimano, 209 AD3d 153, 158-160, 175 N.Y.S.3d 299, 305-306 [2nd Dept. 2022]*).

The omission by the Legislature to address voluntary discontinuances in guardianship proceedings when *Article 81* was enacted 30 years ago, and the failure by the Legislature to amend *CPLR 3217 (a)(2)* and *Article 81* to consider the ramifications of voluntarily discontinuing a guardianship proceeding by stipulation during the "broad time frame.... between the responsive pleading and the point just before the case is submitted to a court or jury for a determination of the facts of the claim," has created a very problematic scenario for a guardianship trial court, the equivalent of putting a square peg into a round hole.

HN9[↑] *CPLR 3217 (a)(2)* does not contemplate the discontinuance by the petitioner **[*14]** of a guardianship proceeding before a guardian has been appointed for the alleged incapacitated person; it does however "explicitly bar discontinuance by stipulation where an infant, conservatee, or incompetent for whom a committee has been appointed is a party" (7 Weinstein-Korn-Miller, *NY Civ Prac P 3217.05*). It is clear to this Court that the legislative intent of *CPLR 3217 (a)(2)* was to limit the right to discontinue a conservatorship/guardianship proceeding as a means of protecting "conservatees," "incompetents" / alleged incapacitated individuals "from the collusive termination of actions when the true parties' best interests would be better served by continuing the action" (Id.). In other words, an application by the petitioner to discontinue a guardianship proceeding , other than due to the death of the alleged incapacitated person, should only be granted by court order, regardless of whether the petitioner, or the alleged incapacitated and the court evaluator (who in the view of this Court are deemed to be parties to the proceeding), stipulate to that relief. Contrary to *CPLR 3217* as presently cast, and the clear explanation of the statute in *Emigrant Bank*, a

guardianship proceeding "crosse[s] the rubicon from its predeliberative **[*15]** stage of *CPLR 3217 (a)(1)*," and cannot be voluntarily discontinued, in the opinion of this Court, when the court evaluator issues a report and testifies in the proceeding, thus "triggering the statutory condition that a discontinuance at that juncture requires both leave of court *and* a stipulation of all parties" (*Emigrant Bank v. Soliman, supra at 162*).

Based upon the foregoing principles, this Court adheres to its original decision to deny the application by the petitioner and the alleged incapacitated person, Michelle R., to discontinue this proceeding. The Court has heard extensive testimony from the court evaluator, the geriatric care manager and the temporary guardian that it was not in the best interest of the alleged incapacitated person to permit the withdrawal of the petition. The Court heard sufficient testimony that Michelle R. continuously put herself in harms way, and that she suffers from physical ailments which make it difficult for her to ambulate and take care of herself. Similarly, the Court heard credible testimony that Michelle R. needed assistance in managing her finances. For all these reasons, the Court finds that there was a *prima facie* showing that the alleged incapacitated **[*16]** person was in need of a guardian, and that the best interests of Michelle R. require the denial of the application to discontinue the initial guardianship proceeding.

The foregoing constitutes the decision and order of this Court.

Dated: December 20, 2022

HON. ***GARY F. KNOBEL, J***.S.C.

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Document (1)

1. *Matter of Newman (Steven S.), 2022 N.Y. Misc. LEXIS 8913*

Client/Matter: -None-

Search Terms: "KNOBEL, j."OR "GARY F. KNOBEL" OR "JUSTICE GARY F. KNOBEL" OR "JUDGE GARY KNOBEL" OR "JUDGE GARY F. KNOBEL"

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Matter of Newman (Steven S.)

Supreme Court of New York, Nassau County

December 23, 2022, Decided

Index No. 8501-I-2021

Reporter
2022 N.Y. Misc. LEXIS 8913 *; 2022 NY Slip Op 51330(U) **; 77 Misc. 3d 1229(A); 181 N.Y.S.3d 442

[1]** In the Matter of the Application of John Newman, Esq., As Temporary Guardian of the Person and Property of Steven S., An Alleged Incapacitated Person, For the Appointment of a Temporary Receiver

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

PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

Core Terms

appointment, hotel, temporary receiver, temporary guardian, cross-petitioner, evaluator, business interests, documents, clear and convincing evidence, property management, real property, incapacitated, allegations, transferred, fiduciary, monetary, PAPERS, camera, dream, plans

Headnotes/Summary

Headnotes

Incapacitated and Intellectually or Developmentally Disabled Persons — Guardian for Personal Needs or Property Management — Temporary Receiver — Immediate appointment of temporary receiver, rather than property guardian, was warranted to protect alleged incapacitated person's substantial monetary and real property assets from misappropriation.

Judges: [*1] HON. ***GARY F. KNOBEL, J***.S.C.

Opinion by: *GARY F. KNOBEL*

Opinion

Gary F. Knobel, J.

PAPERS CONSIDERED:

Order to show cause and petition 1-2

Interim court Evaluator Report in support[in camera] 3-4

Affirmation in support 5

Affirmation in opposition 6

Upon the forgoing papers, and after oral argument, the motion by the temporary guardian of the personal and property management needs of Steven S., an alleged incapacitated person, for an order pursuant to *CPLR 6401*, appointing a temporary receiver for all of Steven S.'s business interests in 52 West Associates LLC, Arbah Hotel Corp. d/b/a Meadowlands View Hotel, a/k/a The View Hotel, Inc., Silverberg Management, Inc., and any other business interest Steven S. may have, is granted.

This contested special proceeding was commenced by petitioner Corrine S., pursuant to Article 81 of the Mental Hygiene Law, for the appointment of a guardian for the personal and property management needs of her 78 year-old father, Steven S., who petitioner alleges is an incapacitated person ("AIP") as a result of a stroke and an accident. In view of the very serious allegations set forth in the petition of possible financial improprieties and poor business judgment committed by cross-petitioner Mark Wysocki, a business associate of Steven **[*2]** S. who is seeking to become the permanent guardian of Steven S., the court appointed a temporary guardian, a court evaluator, counsel for Steven S., and suspended the power of attorney executed by Steven S. in favor of Mark Wysocki Shortly thereafter, after a conference on the record with all the parties, this court appointed special labor counsel to the temporary guardian to represent Steven S.'s interest in

Arbah Corp. in federal court in New Jersey, where Mr. Wysocki was held in contempt for non-payment of wages to hotel employees. The hotel is not operational and is in need of significant repairs; according to Mr. Wysocki's counsel, there are plans submitted by Wysocki waiting to be approved by the planning board where the hotel is located to renovate the hotel and build a retractable roof. If these grandiose plans are granted, it appears that significant monetary assets of Steven S. would be utilized to help Wysocki realize his dream for the hotel.

Those dreams appear to be fueled by the sale engineered by cross-petitioner Wysocki in June, 2022, to sell real property owned by 52 West Associates LLC. for over $33,000,000.00 on **[**2]** West 52nd street in Manhattan. However, Wysocki has **[*3]** yet to comply with the temporary guardian and court evaluator's requests for documentation *inter alia* confirming the location of the proceeds of the sale, documents pertaining to the fees and commissions purportedly paid, and why the sale was executed even though the original premise underlying the sale was for an IRC 1031 exchange that never took place, but would have resulted in a tax savings of millions of dollars.

Two years prior to the sale of this valuable property, on May 20, 2022, Steven S. transferred or gifted to Wysocki 15 per cent of his 100 per cent interest in Arbah Corp. and 52 West Associates LLC. However, both the court evaluator and the temporary guardian, based upon evidence reviewed *in camera* by the Court, contend that Steven S. may not have had capacity when he executed the documents transferring his interests in those corporations.

"'A party moving for the appointment of a temporary receiver must submit 'clear and convincing evidence of irreparable loss or waste to the subject property and that a temporary receiver is needed to protect [that party's] interests' (*Board of Mgrs. of Nob Hill Condominium Section II v Board of Mgrs. of Nob Hill Condominium Section I, 100 AD3d 673, 673, 954 N.Y.S.2d 145*, quoting *Natoli v Milazzo, 65 AD3d 1309, 1310, 886 N.Y.S.2d 205*; *see Suissa v Baron, 107 AD3d 689, 968 N.Y.S.2d 508*)" (*Rozenberg v. Perlstein, 200 AD3d 915, 920, 158 AD3d 233, 239 [2nd Dept. 2021]*).

This court is cognizant that the appointment of a temporary receiver is not only **[*4]** an extraordinary provisional remedy (see, e.g., *HSBC Bank USA, N.A. v. Rubin, 210 AD3d 73, 80, 176 N.Y.S.3d 649 [2nd Dept. 2022]*, it does not appear that there is a reported decision for the appointment of a temporary receiver in a guardianship proceeding. Here, however, both the temporary guardian and the court evaluator have made a clear evidentiary showing that the immediate appointment of a temporary receiver is warranted to protect the substantial monetary and real property assets of Steven S from cross-petitioner Mark Wysocki, which appear to have been misappropriated and mismanaged by Wysocki (*see, Meagher v. Doscher, 157 AD3d 880, 884, 69 N.Y.S.3d 708 [2nd Dept. 2018]*). Furthermore, clear and convincing evidence has been submitted to the Court that there is a likelihood that Steven S. was the victim of elder abuse in the form of financial exploitation by cross-petitioner Wysocki.

Accordingly, the Court appoints Anthony F. Marano, Esq., fiduciary number 133615 to be the temporary receiver over all of Steven S.'s business interests, and Thomas J. McNamara Esq., fiduciary number 121059, as counsel to the receiver.

See also long form order dated December 23, 2022.

The foregoing constitutes the decision and order of this Court.

ENTER

DATED: December 23, 2022

HON. ***GARY F. KNOBEL, J***.S.C.

End of Document

User Name: Gary Knobel

Date and Time: Tuesday, April 25, 2023 2:48:00PM EDT

Job Number: 195723198

Document (1)

1. *Matter of Nicole L. (Eleanor D.), 2023 N.Y. Misc. LEXIS 132*

Client/Matter: -None-

Search Terms: "KNOBEL, j."OR "GARY F. KNOBEL" OR "JUSTICE GARY F. KNOBEL" OR "JUDGE GARY KNOBEL" OR "JUDGE GARY F. KNOBEL"

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Cases	New York

Matter of Nicole L. (Eleanor D.)

Supreme Court of New York, Nassau County

January 12, 2023, Decided

Index No. 850098/2021

Reporter
2023 N.Y. Misc. LEXIS 132 *; 2023 NY Slip Op 23014 **; 78 Misc. 3d 389

[1]** In the Matter of the Application of Nicole L. FOR THE APPOINTMENT OF A GUARDIAN OF THE PERSON AND PROPERTY OF Eleanor D., AN ALLEGED INCAPACITATED PERSON

Notice: THE 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 PRINTED OFFICIAL REPORTS.

Core Terms

discontinuance, evaluator, guardianship proceeding, incapacitated, parties, confidential, Guardianship, appointed

Case Summary

Overview

HOLDINGS: [1]-In a guardianship proceeding where the court was presented with issues of first impression pertaining to the handling of a court evaluator's report which was not in evidence, the court permitted discontinuance of the Article 81 proceeding pursuant to *C.P.L.R. § 3217*, because petitioner had not completed her presentation of proof in support of her petition to become her mother's guardian, the court evaluator had no formal opposition to the discontinuance, and both parties were in agreement to discontinue the proceeding; [2]-Because an ethical and professional violation appeared to have occurred when the court evaluator's report containing personal medical information was submitted as an exhibit in a family court proceeding, the matter was referred to the Grievance Committee to determine if sanctions were appropriate.

Outcome
Proceeding discontinued, and matter referred to the Grievance Committee.

LexisNexis® Headnotes

Civil Procedure > Pretrial Matters > Continuances

Civil Procedure > Special Proceedings

Civil Procedure > Dismissal

HN1 **Pretrial Matters, Continuances**

C.P.L.R. § 3217 applies to special proceedings as well as actions, and permits a discontinuance at three separate stages of the proceeding. The first time period is prior to the time a responsive pleading is served, or if no responsive is required, within twenty (20) days after the service of process and the filing of proof of service with the court clerk. *C.P.L.R. § 3217[a][1]*. The second stage is the broad time period between the responsive pleading and before the case is submitted to a court or jury for determination of the facts; this period requires the filing of a written stipulation executed by all parties. *C.P.L.R. § 3217[a][2]*. However, the Court can also grant a discontinuance of the action during this time period by court order upon terms and conditions the court deems proper. *C.P.L.R. § 3217[b]*. The final stage is after the case has been submitted to the court or jury, the court can order a discontinuance of the action pursuant to a stipulation of all parties and upon terms and conditions the court deems proper. Thus, *CPLR 3217*, viewed in its entirety, operates like a see-saw, allowing for discontinuances by mere unilateral notice at the earliest stage of a litigation, while imposing incrementally greater requirements upon the party

seeking the discontinuance the farther the litigation progresses.

Civil Procedure > Dismissal

Estate, Gift & Trust Law > ... > Conservators & Guardians > Conservators > Appointment

Family Law > Guardians > Appointment

HN2[] Civil Procedure, Dismissal

CPLR 3217(a)(2) does not contemplate the discontinuance by the petitioner of a guardianship proceeding before a guardian has been appointed for the alleged incapacitated person; it does however explicitly bar discontinuance by stipulation where an infant, conservatee, or incompetent for whom a committee has been appointed is a party. It is clear to this Court that the legislative intent of C.P.L.R. § 3217(a)(2) was to limit the right to discontinue a conservatorship/guardianship proceeding as a means of protecting conservatees, incompetents/ alleged incapacitated individuals from the collusive termination of actions when the true parties' best interests would be better served by continuing the action In other words, an application by the petitioner to discontinue a guardianship proceeding, other than due to the death of the alleged incapacitated person, should only be granted by court order, regardless of whether the petitioner, or the alleged incapacitated and the court evaluator stipulate to that relief.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Estate, Gift & Trust Law > ... > Conservators & Guardians > Conservators > Appointment

Family Law > Guardians > Appointment

Civil Procedure > Dismissal

HN3[] Judges, Discretionary Powers

When a party moves to discontinue the Article 81 guardianship proceeding, and the discontinuance is stipulated to by the parties, this Court has held that it is the functional equivalent of a dismissal. When a petition to appoint a guardian is denied or dismissed, Mental Hygiene Law § 81.09(f) grants discretion to the court to award reasonable allowance to the court evaluator payable by the petitioner or by the person alleged to be incapacitated, or both in such proportions as the court may deem just.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Estate, Gift & Trust Law > ... > Conservators & Guardians > Conservators > Appointment

HN4[] Judges, Discretionary Powers

When a petition is dismissed the court may direct the petitioner to pay the reasonable compensation for counsel for the Alleged Incapacitated Person. Mental Hygiene Law § 81.10[f]. Furthermore, the court has broad discretion in determining what constitutes reasonable compensation to the Court Evaluator or to counsel for the alleged incapacitated person. When awarding compensation, the court is required to explain and base its decision on the following factors: (1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented, (2) the attorney's experience, ability, and reputation, (3) the amount involved and the benefit flowing to the ward as a result of the attorney's services, (4) the fees awarded in similar cases, (5) the contingency or certainty of compensation, (6) the results obtained, and (7) the responsibility involved.

Evidence > Privileges

Healthcare Law > Medical Treatment > Patient Consent > Consent by Guardians & Parents

HN5[] Evidence, Privileges

C.P.L.R. § 4504(a) details a variety of information that is deemed confidential and privileged. The legislature has enacted several narrow exceptions to this rule for various reasons, one of which being Mental Hygiene Law § 81.09. Mental Hygiene Law § 81.09 details the responsibilities of the Court Evaluator and details what said report will contain.

Evidence > Privileges

Governments > Courts > Court Records

HN6[] **Evidence, Privileges**

The information sought by a Court Evaluator may be so deeply privileged that even the Court Evaluator would need a court order to access that information. *Mental Hygiene Law § 81.09[d]*.

Evidence > ... > Testimony > Examination > Cross-Examinations

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN7[] **Examination, Cross-Examinations**

The Court Evaluator's Report cannot be admitted into evidence unless the Evaluator testifies and is subject to cross examination.

Headnotes/Summary

Headnotes

Guardian and Ward — Appointment of Guardian — Discontinuance of Proceeding

1. In petitioner's Mental Hygiene Law article 81 proceeding seeking appointment as her mother's guardian, Supreme Court permitted discontinuance of the proceeding pursuant to *CPLR 3217 (b)* in the middle of petitioner's cross-examination and before the court evaluator testified about his report. An application by the petitioner to discontinue a guardianship proceeding, other than due to the death of the alleged incapacitated person, should only be granted by court order, regardless of whether the petitioner, or the alleged incapacitated person and the court evaluator, stipulate to that relief. A guardianship proceeding cannot be voluntarily discontinued when the court evaluator issues a report, thus triggering the statutory condition that a discontinuance, at that juncture, requires both leave of court and a stipulation of all parties. Petitioner had not completed her presentation of proof in support of her petition to become her mother's guardian, the court evaluator had no formal opposition to the discontinuance, and both petitioner and respondent were in rare agreement to discontinue the proceeding. Moreover, the Mental Hygiene Law does not specifically grant the court evaluator power to consent to a discontinuance.

Guardian and Ward — Appointment of Guardian — Discontinuance of Proceeding — Counsel Fees

2. In a contested Mental Hygiene Law article 81 proceeding in which petitioner sought appointment as respondent mother's guardian but subsequently moved for, and was granted, discontinuance of the proceeding, Supreme Court directed both parties to pay a portion of the court evaluator's fees and ordered petitioner to pay 50% of respondent's legal fees. When a petition to appoint a guardian is denied or dismissed, *Mental Hygiene Law § 81.09 (f)* grants discretion to the court to award reasonable allowance to the court evaluator payable by the petitioner or by the person alleged to be incapacitated, or both in such proportions as the court may deem just. Moreover, when a petition is dismissed the court may direct the petitioner to pay the reasonable compensation for counsel for the alleged incapacitated person. Petitioner's motives were questionable when commencing the guardianship proceeding. While it may not have been frivolous, the contentiousness between mother and daughter cast a shadow over the proceeding, most telling being a prior jury verdict in favor of respondent mother, the extensive cross-examination by respondent's counsel of petitioner, and the extensive motion practice.

Attorney and Client — Misconduct by Attorney — Disclosure of Court Evaluator's Report in Guardianship Proceeding

3. In petitioner's Mental Hygiene Law article 81 proceeding seeking appointment as guardian of respondent mother, Supreme Court referred the matter to the Grievance Committee, rather than issue sanctions, where petitioner's counsel disclosed the court evaluator's report to the judge presiding over petitioner's Family Court proceeding against respondent mother. While *Mental Hygiene Law § 81.09* on its face does not explicitly state the confidentiality of the court evaluator report, it is clear that this report should not be disseminated without court approval. The court evaluator report necessitates the compilation of information regarding physical and mental prognosis, substance dependency, financial analysis, and other sensitive information. The information sought by a court evaluator may be so deeply privileged that even the court evaluator would need a court order to access that information. There is no case, court rule, or statute which would let a reasonable attorney believe that a court evaluator's report can be freely used in any other

legal proceeding, especially a contested proceeding where the report would be used against the alleged incapacitated person. Clearly, the Legislature intended the court evaluator's report as confidential and not freely disbursed when they granted the court evaluator access to confidential information and required its memorialization.

Counsel: **[*1]** For Petitoner: Steve Zalewski, Huntington Station, NY; Brittany Froning, Zelentiz Shapiro D'Agastino, Forest Hills, NY.

For AIP: Akiva Shapiro, Old Bethpage, NY.

For Evaluator: John Newman, Commack, NY.

Judges: HON. ***GARY F. KNOBEL, J***.S.C.

Opinion by: ***GARY F. KNOBEL***

Opinion

Upon the foregoing papers, the motion by the petitioner to discontinue this Article 81 **[**2]** guardianship proceeding, and the motions by the respondent for an order *inter alia* imposing sanctions upon the petitioner and her former law firm is granted to the extent indicated below.

The motions at bar has presented the Court with issues of apparent first impression in guardianship cases pertaining to the handling of a court evaluator's report which is not in evidence, and the discontinuance of a guardianship proceeding, pursuant to *C.P.L.R. § 3217*, after the hearing has commenced but before the court evaluator has testified.

This has been a contentious guardianship proceeding commenced by the petitioner Nicole L. against her mother Eleanor D., an alleged incapacitated person, for the appointment of Nicole L. as the guardian for Eleanor's personal and property needs based primarily upon events prior to the commencement of this proceeding which allegedly left her incapacitated. **[*2]** Her counsel at the time was the law firm of Zelentiz, Shapiro and D'Agostino P.C. The Court appointed John Newman, Esq. as the court evaluator and counsel for Eleanor D.After a brief hearing by this Court on the issue of whether Eleanor D. independently retained her counsel, Akiva Shapiro, this court found that the respondent could be represented by private counsel of her own choosing. Eleanor D. has vigorously opposed this guardianship proceeding from its inception. At one point there were two proceedings and one action taking place simultaneously: one in Family Court commenced by the petitioner against her mother, this Article 81 proceeding, and an action by Eleanor D. in Supreme Court (eventually determined by a jury in favor of Eleanor) to set aside the transfer of real property and Eleanor's investment account based on the alleged undue influence by Nicole L.

Numerous filing and supplemental filings have been made regarding the instant matter. The issues before the Court can be summarized as: (1) whether to permit discontinuance of the action; (2) the awarding of fees; and (3) what, if any, sanctions or actions should be taken for the disclosure of the court evaluator's report **[*3]** to the judge presiding over the Family Court proceeding.

DISCONTINUANCE

Turning first to the issue of whether this Article 81 proceeding should be discontinued pursuant to *C.P.L.R. § 3217 (b)*, this Court, in *Matter of Lane (Michelle R.), Misc 3d , 2022 NY Slip Op 22401 [Sup. Ct., Nassau County*, ***Knobel, J***.] recently reviewed the Appellate Division Second Department's analysis of *C.P.L.R. § 3217* in *Emigrant Bank v. Solimano, 209 AD3d 153, 159, 175 NYS3d 299 [2nd Dept 2022]* and applied it to a motion to discontinue an Article 81 proceeding after the court evaluator testified, but before the Court made a determination to appoint a guardian for the alleged incapacitated person. Here the issue is whether this Court can, or should permit, an Article 81 guardianship proceeding to be discontinued in the middle of petitioner's cross examination and before the court evaluator has testified.

The quandary is that *C.P.L.R. § 3217* has not been amended to reflect the enactment of Article 81 thirty years ago, and that there is no provision in the Mental Hygiene Law governing the discontinuance of a guardianship proceeding.

HN1[] In *Emigrant Bank* the court stated that *C.P.L.R. § 3217* applies to special proceedings as well as actions, and permits a discontinuance at three separate stages of the proceeding. The first time period is prior to the time a responsive pleading **[*4]** is served, or if no responsive is required, within twenty (20) days after the service of process and the filing of proof of service with the court clerk (see, *C.P.L.R. § 3217[a][1]*). The second stage is the broad time period between the responsive

pleading and before the case is submitted to a court or jury for determination of the **[**3]** facts; this period requires the filing of a written stipulation executed by all parties (*see*, *Emigrant Bank v. Solimano, 209 AD3d 153, 159, 175 NYS3d 299 [2nd Dept 2022]*; *C.P.L.R. § 3217[a][2]*). However, the Court can also grant a discontinuance of the action during this time period by court order upon terms and conditions the court deems proper (*id.*; *C.P.L.R. § 3217[b]*). The final stage is after the case has been submitted to the court or jury, the court can order a discontinuance of the action pursuant to a stipulation of all parties and upon terms and conditions the court deems proper (*id.*) "Thus, *CPLR 3217*, viewed in its entirety, operates like a see-saw, allowing for discontinuances by mere unilateral notice at the earliest stage of a litigation, while imposing incrementally greater requirements upon the party seeking the discontinuance the farther the litigation progresses" (*Emigrant Bank v. Solimano, 209 AD3d 153, 160, 175 N.Y.S.3d 299, 305-306 [2nd Dept. 2022]*).

"*CPLR 3217 (a)(2)* ***HN2***[⬆] does not contemplate the discontinuance by the petitioner of a guardianship proceeding before a guardian has been **[*5]** appointed for the alleged incapacitated person; it does however 'explicitly bar discontinuance by stipulation where an infant, conservatee, or incompetent for whom a committee has been appointed is a party'" (7 Weinstein-Korn-Miller, *NY Civ Prac P 3217.05*). It is clear to this Court that the legislative intent of *C.P.L.R. § 3217 (a)(2)* was to limit the right to discontinue a conservatorship/guardianship proceeding as a means of protecting "conservatees," "incompetents" / alleged incapacitated individuals 'from the collusive termination of actions when the true parties' best interests would be better served by continuing the action (Id.). In other words, an application by the petitioner to discontinue a guardianship proceeding, other than due to the death of the alleged incapacitated person, should only be granted by court order, regardless of whether the petitioner, or the alleged incapacitated and the court evaluator (who in the view of this Court are deemed to be parties to the proceeding), stipulate to that relief. Contrary to *C.P.L.R. § 3217* as presently cast, and the clear explanation of the statute in *Emigrant Bank*, a guardianship proceeding 'crosse[s] the rubicon from its predeliberative stage of *C.P.L.R. § 3217(a)(1)*,' and cannot be voluntarily discontinued, **[*6]** in the opinion of this Court, when the court evaluator issues a report thus 'triggering the statutory condition that a discontinuance at that juncture requires both leave of court *and* a stipulation of all parties (*Emigrant Bank v. Soliman, supra at 162*)" (*Matter of Lane (Michelle R.,) Misc 3d , 2022 NY Slip Op 22401 [Sup. Ct., Nassau County*, ***Knobel, J***.]).

Based upon the foregoing principles, this Court permits the discontinuance of this Article 81 guardianship proceeding pursuant to *C.P.L.R. § 3217 (b)*, even though the court evaluator never testified about his report. The petitioner has not completed her presentation of proof in support of her petition to become her mother's guardian, the court evaluator has no formal opposition to the discontinuance, and both the petitioner and the respondent are in rare agreement to discontinue the proceeding. The Court notes that the Mental Hygiene Law does not specifically grant to the court evaluator the power to consent to a discontinuance (*see*, *In re Chachkers, 159 Misc 2d 912, 913-914, 606 NYS2d 959 [NY Sup. Ct. 1993]*).

PAYMENT OF LEGAL FEES

HN3[⬆] When a party moves to discontinue the Article 81 guardianship proceeding, and the discontinuance is stipulated to by the parties, this Court has held that it is the functional equivalent of **[*7]** a dismissal (*Matter of Laurence H [Madeline H.], 51 Misc 3d 834, 836, 28 N.Y.S.3d 271 (Nassau Sup. Ct. 2016)*, citing *Matter of Petty, 256 AD2d 281, 282-4, 682 N.Y.S.2d 183*; see, **[**4]** *Matter of Samuel S. [Helene S.], 96 AD3d 954, 958, 947 N.Y.S.2d 144 [2012]*; *Matter of Kurt T., 64 AD3d 819, 824, 881 N.Y.S.2d 688 [3rd Dept. 2009]*). When a petition to appoint a guardian is denied or dismissed, *Mental Hygiene Law § 81.09(f)* grants discretion to the court to award "reasonable allowance to the [court] evaluator . . . payable by the petitioner or by the person alleged to be incapacitated, or both in such proportions as the court may deem just" (*Petty, at 282-283*; *see also, Matter of Fairley v. Fairley, 136 AD3d 432, 26 N.Y.S.3d 1, 2016 NY Slip Op 00758 [1st Dept 2016]*; *Matter of James A. McG. [Robinson], 68 AD3d 1118, 890 N.Y.S.2d 345 [2009]*; *Matter of Kurt T., supra at 823-824*).

HN4[⬆] When a petition is dismissed the court may direct the petitioner to pay the reasonable compensation for counsel for the Alleged Incapacitated Person (*Mental Hygiene Law § 81.10[f]*). Furthermore, the court has broad discretion in determining what constitutes reasonable compensation to the Court Evaluator or to counsel for the alleged incapacitated person (*see*, *Matter of Zofia L. [Jolanta s. — Bogdan L.], 136 AD3d 818, 26 N.Y.S.3d 95, 2016 NY Slip Op 00974 [2nd Dept. 2016]*; *Matter of Annette B., 56 AD3d 551, 866 N.Y.S.2d*

881 [2008]; *Matter of Theodore T. [Charles T.], 78 AD3d 955, 957, 912 N.Y.S.2d 72 [2010]*). When awarding compensation, the court is required to explain and base its decision on the following factors:

> (1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented, (2) the attorney's experience, ability, and reputation, (3) the amount involved and the benefit flowing to the ward as a result of the attorney's services, (4) the fees awarded in similar cases, (5) the contingency or certainty of compensation, (6) the results obtained, and (7) the **[*8]** responsibility involved (*Matter of Alice D.*, at 613-614; *see*, *Matter of Freeman, 34 NY2d 1, 311 N.E.2d 480, 355 N.Y.S.2d 336 [1974]*).

In the instant matter, the Petitioner's motives were at the very least questionable when commencing this guardianship proceeding. While it may not have been frivolous, the contentiousness between mother and daughter cast a giant shadow over this proceeding; most telling being the jury verdict in favor of the respondent mother, the extensive cross-examination by respondent's counsel of the petitioner, and the extensive motion practice.

As to the court evaluator's fee, the court directs both parties to immediately pay fifty per cent of his fee, which Court deems to be the reasonable total sum of $17,812.50 for 37.75 hours of professional services provided, in view of the fact that *inter alia* the court evaluator is one of the leading guardianship practitioners in Nassau County (*see*, *Matter of Petty, supra at 282-284*; *Matter of Samuel S. [Helen S.], 96 AD3d 954, 958, 947 N.Y.S.2d 144 [2012]*; *Matter of Kurt T., supra at 824*). Counsel for Eleanor D. claims that his client has incurred legal fees in the sum of $104,715.00 at a rate of $650.00 per hour for this proceeding alone. The Court has reviewed Counsel to the Alleged Incapacitated Person's affirmation of legal services and is hereby awarded $56,385.00 for 161.1 hours of legal services rendered fifty percent to be paid by the petitioner **[*9]** and fifty percent to be paid by the Alleged Incapacitated Person. Petitioner is directed to pay the fifty percent awarded within ten (10) days of receipt of this decision and order.

3. SANCTIONS AND CONFIDENTIALITY OF COURT EVALUATOR REPORT

This is a case of first impression regarding the unilateral decision by a party to disseminate, and even introduce, a Court Evaluator Report is a separate judicial proceeding without permission from the guardianship justice presiding over the guardianship proceeding.

HN5[↑] *C.P.L.R. § 4504(a)* details a variety of information that is deemed confidential and privileged. The Legislature has enacted several narrow exceptions to this rule for various reasons, one of which being *Mental Hygiene Law § 81.09*.[1] *Mental Hygiene Law § 81.09* details the responsibilities of the Court Evaluator and details what said report will contain. While *Mental Hygiene Law § 81.09* on its face does not explicitly state the confidentiality of the Court Evaluator Report, it is clear, that this report should not be disseminated without court approval. The Court Evaluator Report necessitates the compilation of information regarding physical and mental prognosis, substance dependency, financial analysis, and other sensitive information. ***HN6***[↑] The information sought by a Court Evaluator may **[*10]** be so deeply privileged that even the Court Evaluator would need a court order to access that information (*Mental Hygiene Law § 81.09[d]*).

The Second Department's Guardianship Task Force Report states that the Court Evaluator's ". . . Report always contains confidential and personal medical and financial information pertaining to the AIP" (Best Practices Guardianship Proceedings Second Judicial Department Guardianship Task Force Report, https://www.nycourts.gov/ip/gfs/pdfs/best-practices-guardianship-proceedings-handbook-ad2-may-2022.pdf (accessed January 4, 2023]). The Task Force Report goes on to state that ". . . Article 81 vests the Guardianship Court with discretion to determine if any portion of the Court Evaluator's Report should even be disclosed to any parties/counsel in the proceeding" (*id.*). The Law Revision Commission Commentary for *Mental Hygiene Law § 81.09* elaborates that ". . . *section 81.09* should alert the court evaluator to the need to consult other laws. It should be noted that neither Article 77 nor 78 addressed the issue of confidentiality of patient records and the study of the practice under the statutes indicated that the medical records were routinely made available (*Mental Hygiene Law § 81.09* [Law Revision Commission Commentary 1993]).

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[1] The confidentiality of this information is paramount in all practice areas except for these narrow legislative exceptions (*see*, *People v. Sinski, 88 NY2d 487, 669 N.E.2d 809, 646 N.Y.S.2d 651 [1996]*).

The Court Evaluator 's report **[*11]** can be analogized to Grand Jury minutes. When the Legislature enacted C.P.L.§ 245.20 they allowed for automatic dissemination to defense, but it did nothing to abrogate the secrecy of a grand jury proceeding (*see*, C.P.L. § 245.20[1][b]; C.P.L. § 190.25[4][a]). The intention to allow individuals involved in the pending action access to information that is necessary to continue forward with the proceeding. The Court allows the parties access to the Court Evaluator's Report under the same premise.

There is no case, court rule, or statute which would let a reasonable attorney believe that a Court Evaluator's Report can be freely used in any other legal proceeding, especially a contested proceeding where the Report would be used against the alleged Incapacitated Person. Clearly, the Legislature intended the Court Evaluator's Report as confidential and not freely disbursed when they granted the Court Evaluator access to confidential information and required its memorialization.

This Court must determine whether it is appropriate to issue sanctions or refer this matter to the Grievance Committee. This was not an inadvertent disclosure by petitioner's prior counsel. This was a strategic disclosure of personal medical information to gain advantage **[*12]** in a contentious Family Court proceeding. Regardless of the intent for disseminating the Court Evaluator's Report, an ethical and professional violation appears to have occurred when the Court Evaluator's Report was submitted as an exhibit in a Family Court proceeding. ***HN7***[↑] This is **[**5]** especially troubling since Court Evaluator's Report cannot be admitted into evidence unless the Evaluator testifies and is subject to cross examination (*Matter of Maher, 207 AD2d 133, 621 N.Y.S.2d 617 [2nd Dept. 1994]*, leave to appeal denied *86 NY2d 703, 631 N.Y.S.2d 607, 655 N.E.2d 704 [1995]*).[2]

In view of the fact that this is a case of first impression, the Court has determined that the appropriate action to take is to refer this matter to the Grievance Committee.

The foregoing constitutes the decision and order of this Court; all other issues contained within the moving papers that have not been explicitly ruled upon are now moot or denied.

ENTER

DATED: January 12, 2023

HON. *GARY F. KNOBEL J*.S.C.

End of Document

[2] It is important to note that these actions were taken by the Petitioner's prior counsel Zelenitz, Shapior & D'Agostino P.C.

User Name: Gary Knobel

Date and Time: Tuesday, April 25, 2023 2:47:00PM EDT

Job Number: 195723050

Document (1)

1. *Matter of Tanya M. (Josette M.), 2023 N.Y. Misc. LEXIS 197*

Client/Matter: -None-

Search Terms: "KNOBEL, j."OR "GARY F. KNOBEL" OR "JUSTICE GARY F. KNOBEL" OR "JUDGE GARY KNOBEL" OR "JUDGE GARY F. KNOBEL"

Search Type: Terms and Connectors

Narrowed by:

Content Type	Narrowed by
Cases	New York

Matter of Tanya M. (Josette M.)

Supreme Court of New York, Nassau County

January 12, 2023, Decided

Index No: 850084-i-2022

Reporter
2023 N.Y. Misc. LEXIS 197 *; 2023 NY Slip Op 50053(U) **; 77 Misc. 3d 1227(A); 181 N.Y.S.3d 459; 2023 WL 328659

[1]** In the Matter of the Application of Tanya M. For the Appointment of a Guardian of the Person and Property of Josette M., an Alleged Incapacitated Person.

Notice: PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

Core Terms

appointed, best interest, incapacitated

Headnotes/Summary

Headnotes

Incapacitated and Intellectually or Developmentally Disabled Persons — Guardian for Personal Needs or Property Management — Dissension between Family Members — Appointment of Co-Guardian.

Counsel: **[*1]** Kylie Najarro — Court Evaluator, Central Islip, NY.

Taniesha Allen — Attorney for AIP, Hempstead, NY.

Elliot Schlissel — Petitioner's Counsel (Pascale M.), Lynbrook, NY.

Pascale M. — Daughter.

Tanya M., Petitioner, Pro se.

Judges: HON. ***GARY F. KNOBEL J***.S.C.

Opinion by: ***GARY F. KNOBEL***

Opinion

Gary F. Knobel, J.

This is a guardianship proceeding for an order appointing petitioner-daughter Tanya M., or cross-petitioner daughter Pascale M., as the guardian for the personal and property needs of Josette M., petitioners' mother. An extensive hearing was intermittingly conducted by this Court over several weeks.

Before a court may appoint a guardian, it must determine: (1) that a guardian is necessary to provide for the personal needs of that person, including food, clothing, shelter, health care, or safety and/or to manage the property and financial affairs of that person; and (2) that the person agrees to the appointment, or that the person is incapacitated within the meaning of the statute (*Mental Hygiene Law §§ 81.02[a][1]*, *[2]*). A person is considered incapacitated when the person is likely to suffer harm because: (1) the person is unable to provide for personal needs and/or property management; and (2) the person cannot adequately understand and appreciate **[*2]** the nature and consequences of such inability (*Mental Hygiene Law § 81.02[b][1]*, *[2]*).

It is undisputed that Josette M., an 88-year-old woman, currently residing at a medical facility after suffering a fall. Josette M. suffers from dementia and memory deficiency impairment and needs the assistance of a guardian as she is unable to provide for her personal needs and property management and cannot adequately understand and appreciate the nature and consequences of such inability. Accordingly, the Court finds that the petitioner and cross-petitioner have established by clear and convincing evidence that Josette M. is an incapacitated person as defined by *Mental Hygiene Law § 81.02*. Thus, the only question which remains is who should be the guardian for Jossette M.?

When selecting a guardian for an incapacitated person, the primary concern is what is in the best interests of the incapacitated person (*Matter of Marilyn A.I. [Kevin D],*

106 AD3d 821, 822, 964 N.Y.S.2d 640 [2013]). This determination involves the judgement of the facts and discretion of the court (*Matter of Von Bulow, 63 NY2d 221, 224, 470 N.E.2d 866, 481 N.Y.S.2d 67 [1984]*). However, even when the court finds that a guardian is necessary, it is not required to appoint the person proposed by the petitioner (*Matter of Loftman [Mae R.], 123 AD3d 1034, 1035, 999 N.Y.S.2d 166 [2014]*). A stranger should not be appointed as guardian unless it is impossible to find someone qualified within the family circle or their **[*3]** nominees (*In re Naquan S., 2 AD3d 531, 767 N.Y.S.2d 906 [2nd Dept. 2003]* citing *Matter of Dietz, 247 A.D. 366, 287 N.Y.S. 392 [1936]*; *Matter of Klein, 145 AD2d 145, 538 N.Y.S.2d 274 [1989]*; see also *Matter of Gustafson, 308 AD2d 305, 764 N.Y.S.2d 46 [2003]*; *Matter of Robinson, 272 AD2d 176, 709 N.Y.S.2d 170 [2000]*; *Matter of Chase, 264 AD2d 330, 694 N.Y.S.2d 363 [1999]*). However, when there is dissension between family members a court is justified in appointment of a neutral third-party **[**2]** guardian (*Matter of Wynn, 11 AD3d 1014, 1015-1016, 783 N.Y.S.2d 179 [2004]*; cf. *Matter of Weisman, 112 AD2d 871, 872-873, 493 N.Y.S.2d 151 [1985]*; *Matter of Lyon, 52 AD2d 847, 382 N.Y.S.2d 833 [1976]*, affd *41 NY2d 1056, 364 N.E.2d 847, 396 N.Y.S.2d 183 [1977]*). Even when multiple members of a family desire the appointment as sole guardian, and are qualified to do so, it may be in the best interest to appoint one of the siblings and have independent co-guardians additionally appointed to avoid conflicts and advise the court (*see, In re Margaret S., 2006 NY Misc. LEXIS 2833, 236 N.Y.L.J 9 [Sup Ct., Richmond 2003]*).

Here, there are two daughters/sisters who both want to be Josette M.'s guardian, and frankly it is difficult to decide which person should be the guardian since they both merit the appointment. However, they cannot work together as there is dissension between them, which was clear during the hearings and substantiated by the court evaluator in her testimony and report; the court evaluator recommended that an independent person from the Part 36 fiduciary list be appointed guardian. Usually the Court will pick an independent guardian under these circumstances. Josette M. indicated her desire to have her children equally in control. Despite the children wanting the best for their mother, and Josette M.'s wishes that they have equal say, **[*4]** unfortunately it is not in the best interest of Josette M. to have both individuals appointed as co-guardian as it may lead to future contention and disagreements resulting in harm to Josette M.

However, based on the testimony and evidence adduced at the hearing, the Court finds that it is in the best interest of Josette M. to have at least one of the petitioners appointed as guardian along with a neutral third-party co-guardian and to assist in all disputes. In view of the fact that Pascale M. currently pays Josette M.'s bills, does her laundry, and provides her with other necessities, the Court finds that it is in the best interest of Josette M. that cross-petitioner Pascale M. be appointed guardian of the personal needs and property management needs of Josette M., and that Olguine Charleston (Fiduciary No. xxxxxx), West Babylon, New York, be appointed as co-personal needs guardian.

Although Josette M. needs a guardian for an indefinite period of time, the appointment of Pascale M. and Olguine Charleston shall be for a period of one year from the date of the order and judgment; Pasquale M. shall bring an order to show cause at that time to either continue serving as guardian or request **[*5]** that another person serve as guardian, and the appointments herein will be reassessed. The order and judgment to be submitted herein shall provide for the guardians to have all of the powers requested in the cross-petition as authorized under *sections 81.21* and *81.22 of the Mental Hygiene Law*. Any prior advanced directives which may have been executed by Josette M. are revoked. Pascale M. is directed to obtain a bond in the amount of $100,000.00; however, that amount may be adjusted lower or higher after the initial 90 day report in the event there are assets marshalled which are greater than $100,000.00. In the event that Josette M. does not reside with Pascale M., Pascale M. shall visit with Josette M. at least 24 times per year; the co-personal needs guardian shall meet with Josette M. a minimum of 12 times per year. Pascale M. shall be required to complete, at no cost, a training program given online via the internet by the Office of Court Administration in accordance with *section 81.39 of the Mental Hygiene Law*. Pascale M. may request, if she wishes, reasonable compensation for the services she will provide as guardian.

With respect to compensation to the court appointees, the court directs court appointed counsel and the court evaluator to submit, at the time **[*6]** of the submission of the order and **[**3]** judgment, an affidavit or affirmation of the services they provided in this proceeding, and the Court will award reasonable compensation from the guardianship estate. The geriatric care manager, Virginia Belling, shall continue in that capacity and submit her affidavit of the services she provided at the time of the submission of the order and judgment. Counsel for Pascale M. may submit his

affirmation for the professional service he provided to Pascale M. and the court will award reasonable compensation from the guardianship estate.

Based on all of the foregoing, the cross-petition is granted in accordance with the findings as indicated above, and the order and judgment shall be settled on appropriate notice to the petitioner, court appointed counsel, and the court evaluator.

The foregoing constitutes the decision and order of this Court.

January 12, 2023

HON. ***GARY F. KNOBEL J***.S.C.

User Name: Gary Knobel

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Document (1)

1. *Matter of Weiss (Agam S.), 2023 N.Y. Misc. LEXIS 135*

Client/Matter: -None-

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Matter of Weiss (Agam S.)

Supreme Court of New York, Nassau County

January 13, 2023, Decided

Index No. 132074-I-2016

Reporter
2023 N.Y. Misc. LEXIS 135 *; 2023 NY Slip Op 50043(U) **; 77 Misc. 3d 1226(A); 180 N.Y.S.3d 527

[1]** In the Matter of the Application of Janna Weiss, THE MOTHER OF THE INCAPACITATED PERSON FOR AN ORDER OR JUDGMENT GRANTING A CHANGE IN VENUE OF THE GUARDIANSHIP OVER THE PERSON AND PROPERTY OF Agam S. AN INCAPACITATED PERSON

Core Terms

venue, resides, incapacitated, witnesses, guardianship

Headnotes/Summary

Headnotes

Trial — Place of Trial — Demand for Change of Venue — Motion by mother of incapacitated person for order changing venue granted as basis for venue no longer existed.

Counsel: **[*1]** For Guardian: Anthony DeCarolis, Oyster Bay, NY.

For Mother: Jonathan Rosenberg, Brooklyn, NY.

Judges: HON. ***GARY F. KNOBEL, J***.S.C.

Opinion by: ***GARY F. KNOBEL***

Opinion

Gary F. Knobel, J.

Upon the foregoing papers, the motion by the mother of the incapacitated person for an order *inter alia* changing the venue of this action from Nassau County to Kings County is granted for the reasons stated below.

This Court has not only been presented with a repetitive motion by the movant to remove the guardian, but also a vexing, practical issue which occurs frequently in guardianship cases for a variety of reasons: retaining or changing venue when the basis for venue no longer exists.

In 2014 Queens County Family Court placed Agam S.("Agam") with S.C.O Family of Services Robert J. McMahon's Children's Center ("SCO"), located in Nassau County. In 2016, SCO filed a petition in Nassau County Supreme Court for the appointment of a guardian for Agam. The petition was granted and Agam's father was appointed Guardian of the Person and Property. Agam's mother cross-petitioned to be Agam's guardian, but her petition was denied by this Court, and again in 2020 by the Hon. Arthur Diamond. To the Court's knowledge, neither Agam, or his father, **[*2]** or his mother has ever lived or intended to live in Nassau County.

In 2019, Agam reached the maximum age allowed at SCO, and Agam was relocated to King's county to be under the auspices of the Jewish Board of Family and Children's Services ("Jewish Board"). Agam's father resides in Texas but is in regular contact with Agam through video and telephonic communication. Agam's mother resides in Queens County in Ozone Park. Agam has resided in Kings County since his move to Jewish Board in 2019. The current issue presented to the court is whether a change in venue, from Nassau County to Kings County, can and should be granted.

Mental Hygiene Law § 81.05(a) states:

> A proceeding under this Article shall be brought in the Supreme Court within . . . the County Court of the County in which the person alleged to be incapacitated resides, or is physically present . . . . If the Person alleged to be incapacitated is being cared for as a resident in a facility, the residence of that person shall be deemed to be in the County

> where the facility is located and the proceeding shall be brought in that County, *subject to application by an interested party for a change in venue to another county because of the inconvenience of the parties* ***[*3]*** *or witnesses or the condition of the person alleged to be incapacitated*.

There is no question that Nassau County was an appropriate venue when this proceeding was commenced.

The primary focus encompassing all guardianships is to always act in the best interest of the incapacitated person considering their personal wishes, preferences and desires; this is true even when deciding to change venue (*Mental Hygiene Law § 81.01*; *see generally In re Guardianship of Beasley, 234 AD2d 32, 650 N.Y.S.2d 170 [1st Dept. 1996]*).

Subject to an application to change venue by an interested party the court in making a determination will examine the following factors: (1) the inconvenience of the forum as to the parties; (2) the inconvenience of the forum as to witnesses; and (3) the condition of the alleged incapacitated person (*see*, *Mental Hygiene Law § 81.05(a)*; *In re Jewish Ass'n for Services for Aged, 19 Misc 3d 1145[A], 867 N.Y.S.2d 17 [Sup Ct., Queens 2008]*).

Mental Hygiene Law § 81.05 (a) does not specifically address the circumstance when the basis for venue no longer exists. Consequently, the Court turns to Article 5 of the C.P.L.R. and prevailing appellate caselaw for guidance. *C.P.L.R. § 503(a)* states that proper venue *inter alia* is the county in which one of the parties resides at the time the action or proceeding is commenced. *C.P.L.R. § 510* states that venue may be changed where: (1) the county designated for that purpose is not a property county; (2) there is reason to believe that an impartial trail **[*4]** cannot be had in the proper county; or (3) the convenience of material witnesses and the ends of justice will be promoted by the change. It is well settled that the "convenience of material witnesses" pertains to material nonparty witnesses.

There is no provision in Article 5 which pertains to the venue of an action when the basis for that venue no longer exists. Consequently, the appellate courts have created a principle of law as a result of this omission. The Second Department has held that when the underlying basis for venue no longer exists, a change in venue to where one of the parties reside is appropriate (*see, Canaan v. Costco Wholesale Membership, Inc., 49 AD3d 583, 585, 854 N.Y.S.2d 442 [2nd Dept 2008]*; see also *Whelton v. Dayton Beach Park No. 1 Corp., 110 AD3d 987, 988, 973 N.Y.S.2d 577 [2nd Dept. 2013]*; *Messiha v. Staten Is. Univ. Hosp., 77 AD3d 894, 895, 909 N.Y.S.2d 394 [2nd Dept. 2010]*).

Taking into consideration all of the factors cited above, the Court finds that a change of **[**2]** venue to Kings County is appropriate and would be in the best interest of Agam. At the time this proceeding was commenced in Nassau County, there was no indication that Agam ever intended on residing in Nassau County. The only reason Agam ever entered Nassau County was pursuant to an order of the Queens Family Court so that he could reside at a facility with appropriate accommodations for him. Agam no longer resides in the facility and is unable to return based on **[*5]** his age. Although many guardianship justices are conducting hearings virtually for the convenience of the witnesses and the alleged incapacitated person, some justices are conducting contested proceedings in their courtroom. If there is an in-person proceeding with respect to the remaining branches of the mother's motion, the convenience of the material nonparty witnesses in Kings County at the facility where Agam resides is important.

Thus, it is in the best interest of Agam for this matter to be transferred to Kings County Supreme Court, less than seven miles from where Agam currently resides with no foreseeable intention of moving.

The remaining branches of the mother's motion for an order permitting visitation and removing the guardian are held in abeyance and shall be heard and determined by the justice assigned to this proceeding in Supreme Court, Kings County.[1] Upon the service of a copy of this order upon her, the Clerk of Supreme Court, Nassau County, is directed to deliver to the Clerk of the Supreme Court, Kings County, all papers filed in this action and certified copies of all minutes and entries, and the Clerk of Supreme Court, Kings County, or the Guardianship Clerk of **[*6]** Supreme Court Kings County, is respectively directed to assign this matter to a guardianship part.

The foregoing constitutes the decision and order of this Court.

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[1] *See, Rosenblatt v. Sait, 34 AD2d 238, 310 N.Y.S.2d 790 (1st Dept. 1970)* (holding once a special Term decided that venue should be changed to a county outside of this department it should have relegated all motions to the transferee court)

ENTER

DATED: January 13, 2023

/s/ ***Gary F. Knobel***

HON. *GARY F. KNOBEL J*.S.C.

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