

**Matter of Rivera**

2013 NY Slip Op 34220(U)

March 7, 2013

Supreme Court, Bronx County

Docket Number: 91676/13

Judge: Jr., Alexander W. Hunter

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART IA23A

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In the Matter of the Application for the Appointment of  
a Guardian for

Index No.: 91676/13

ERNESTINA RIVERA,

A Person Alleged To Be Incapacitated.

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HON. ALEXANDER W. HUNTER, JR.:

A petition has been filed for the appointment of a guardian of the person and property of Ernestina Rivera, an alleged incapacitated person (hereinafter known as "the person"). This court is satisfied that the person was served with the order to show cause and petition by personal delivery at least fourteen days prior to the return date and that all other necessary interested persons required to be served under Mental Hygiene Law §81.07 were timely served with the order to show cause and petition. Mental Hygiene Legal Service ("MHLS") was appointed to serve as the court evaluator.

The hearing was held on March 7, 2013. The person was not present at the hearing. It was determined that she would not be able to meaningfully participate in the proceedings. Accordingly, her presence was waived. Carmen Rivera, petitioner and the person's daughter, and Naomi Weinstein, Esq., of MHLS, the court evaluator, testified at the hearing.

**FINDINGS OF FACT**

It is determined that the following findings of fact were established by clear and convincing proof upon the documentary evidence submitted and the testimony adduced:

1. The person is 86 years of age. The person presently resides at Beth Abraham Health Services Nursing Home, 612 Allerton Avenue, Bronx, New York 10467. Prior to her admission to the nursing home, she used to live in the community in an apartment, located at 2732

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Bainbridge Avenue, Apt. 1J, Bronx, New York 10458.

2. The person was admitted to the nursing home on January 11, 2011. On December 11, 2010, the person suffered a slip and fall accident on the stairs outside her apartment building. Prior to her accident, the person lived independently and was able to perform her activities of daily living.

Since the accident, the person is disoriented, confused, and has memory deficits. She requires assistance with all her activities of daily living and is non-ambulatory.

3. The person is widowed and has three children, Carmen Rivera, Hector Rivera, and John Rivera, Jr.

4. The person receives social security income which is sent directly to the nursing home. She has a life insurance policy with Metropolitan Life Insurance to cover the cost of her funeral.

5. The person does not have any advance directives. She does not have a Last Will and Testament.

6. Petitioner Carmen Rivera wishes to be appointed the guardian of the person and property of her mother. Petitioner visits her mother everyday at the nursing home. She stated that, "I'm the one who is always there for her."

She stated that due to her mother's memory and cognitive impairments, the person is unable to make any decisions regarding her personal needs or property management. She is also interested in commencing a personal injury action on her mother's behalf.

Petitioner is 66 years of age and receives social security income. She has never declared bankruptcy and has never been convicted of any crimes. Petitioner further stated that she is willing to complete the education requirements and to complete and file annual accountings if

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she was appointed as her mother's guardian.

7. The court evaluator visited the person at the nursing home on February 27, 2013. Ms. Weinstein stated that it was unclear as to whether or not the person understood the sum and substance of their conversation. However, the person was able to state that her daughter helps her and that she visits her. The person indicated that she had only been in the nursing home for four weeks and that her husband resides at a Tinton Avenue address.

The court evaluator stated that the person has serious functional limitations and she is unable to appreciate and understand the limitations thereof. Based upon her functional limitations, the court evaluator stated that the person will likely suffer harm without the appointment of a guardian of the person and property for an indefinite period of time. She recommended petitioner's appointment as her mother's guardian. She also recommended that a bond should be waived unless significant assets are discovered or until assets are received as a result of the potential personal injury action.

#### CONCLUSIONS OF LAW

1. After examination of the documents submitted, the testimony adduced at the hearing, and the court evaluator's recommendation, the application for the appointment of a guardian of the person and property is hereby granted. Petitioner Carmen Rivera is hereby appointed the guardian of the person and property for an indefinite period of time.

2. The guardian of the person is granted those powers listed under Mental Hygiene Law §81.22 which are necessary and sufficient to provide for the personal needs of the person. These powers include the following:

- a) to determine who should provide personal care or assistance;

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- b) to make decisions regarding the social environment and other social aspects of the life of the person.
- c) to choose the place of abode for the person, including, but not limited to nursing home or community residence;
- d) to apply for government and private benefits on behalf of the person;
- e) to authorize access to or release of confidential records;
- f) to consent to or refuse generally accepted routine or major medical or dental treatment subject to the provisions of subdivision (e) of section 81.29 of this article dealing with life sustaining treatment; the guardian shall make treatment decisions consistent with the findings herein pursuant to Mental Hygiene Law §81.15 and in accordance with the person's wishes, including the person's religious and moral beliefs, or if the person's wishes are not known, and cannot be ascertained with reasonable diligence, in accordance with the person's best interests, including a consideration of the dignity and uniqueness of every person, the possibility and extent of preserving the person's life, the preservation, improvement or restoration of the person's health or functioning, the relief of the person's suffering, the adverse side effects associated with the treatment, any less intrusive alternative treatments, and such other concerns and values as a reasonable person in the person's circumstances would wish to consider;
- g) determine whether the person should travel;
- h) defend or maintain any civil judicial proceeding.

3. The guardian of the property is granted the powers listed under Mental Hygiene Law

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§81.21 which are necessary and sufficient to provide for the management of the person's assets.

Those powers include the following:

- a) the guardian shall be allowed to make reasonable expenditures from the person's assets, for the purpose of providing support of the person in the event the annual income is insufficient to meet the person's needs;
- b) to marshal and invest the person's assets in investments eligible by law for investment of trust funds and to dispose of investments so made and reinvest the proceeds as so authorized;
- c) to pay any existing debts or claims which have been proven to the satisfaction of the guardian as being properly due and owing;
- d) to preserve, protect and account for such property faithfully; to retain or employ attorneys, accountants or other professionals to assist in the performance of the duties of the guardian. However, payments of fees to such persons shall only be paid with prior approval of the Court;
- e) the guardian of the property may not alienate, mortgage, lease or otherwise dispose of real property without the specific direction of the Court obtained upon proceedings taken for that purpose as prescribed in Article 17 of the Real Property Actions and Proceedings Law, provided however, that without instituting such proceedings, the guardian of the property may, without the authorization of the Court, lease any real property for a term not exceeding five years;
- f) pay funeral expenses.

4. These powers constitute the least restrictive form of intervention consistent with the

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person's functional limitations.

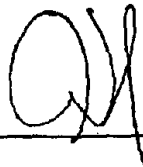
5. The bond which is normally required pursuant to Mental Hygiene Law §81.25 is hereby waived. However, in the event the personal injury action filed on behalf of the person is successful, the guardian shall return to this court for the setting of a bond.

6. The guardian shall receive as compensation for performing her duties that compensation as is provided under Mental Hygiene Law §81.28.

7. The guardian shall file an interim report and annual report, in accordance with Mental Hygiene Law §§81.30 and 81.31, with the Guardianship Department of Bronx County, 851 Grand Concourse, Bronx, New York. Failure to file said reports may result in the removal of the guardian.

8. Petitioner is directed to submit an order and judgment on notice, with a copy of this decision, in accordance with Mental Hygiene Law §81.16(c) and the guardian is directed to file her designation in accordance with Mental Hygiene Law §81.26. Said order and judgment should be filed in a timely fashion due to the exigency of these proceedings.

Date: March 7, 2013

  
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J.S.C.

**ALEXANDER W. HUNTER JD**