

Matter of Alissa D. R.
2021 NY Slip Op 32747(U)
December 16, 2021
Surrogate's Court, Bronx County
Docket Number: File No. 2008-1455/B
Judge: Nelida Malave-Gonzalez
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SURROGATE'S COURT, BRONX COUNTY

December 16, 2021

IN THE MATTER OF THE GUARDIANSHIP OF

ALISSA D. R.

Pursuant to SCPA Article 17-A

File No.: 2008-1455/B

In this proceeding, the respondent's mother, who was appointed guardian of the respondent's person by decree dated November 5, 2008 and granted additional property powers pursuant to an order dated August 16, 2019, filed an order to show cause and petition seeking authority to gift the respondent's one-eighth interest in the cooperative apartment in which they reside (the co-op) to the petitioner, who possesses the remaining seven-eighths interest. The respondent and petitioner were bequeathed the co-op as tenants in common by the respondent's grandfather who died in November, 2018. Jurisdiction was obtained over OLA/NYC Medicaid (DSS) and the respondent, and there was no appearance in opposition by DSS on the virtual hearing date, nor was any opposition to the application received by the court to date. The court appointed a guardian ad litem for the respondent. As requested by the court, the petitioner, who was then

represented by counsel, consented to pay her attorney's fees and the award to the guardian ad litem herein from her own funds and also deposit \$3,500 with her attorney to guarantee payment of the guardian ad litem award. Thereafter, the petitioner filed a consent to change attorneys and proceed pro se, and former counsel confirms that it continues to hold the escrow funds pending further order of the court.

The 31 year old respondent, who was previously determined to be intellectually disabled, resides in the co-op with her primary care giver, the petitioner, and a sister who is the alternate standby guardian. The standby guardian, another sister, resides in an adjacent apartment. The respondent's father is deceased. The respondent is non-verbal and non-mobile, has serious health issues requiring many daily medications, and receives daily Medicaid home care services. The petitioner and the alternate standby guardian assist the home care attendant throughout the day, and the petitioner provides all of the respondent's care in the evenings.

In support of the application, the petitioner states that the respondent's yearly income consists of \$18,000 in Social Security disability benefits, the fair market value of the co-op is \$500,000 and the respondent's one-eighth interest in the co-op approximates \$62,500. The petitioner opines that, although she may be financially able to do so, buying the respondent's interest in the co-op is not practical, because the respondent has received Medicaid benefits for at least 26 years and the proceeds would not only be recouped by DSS but would trigger a Medicaid disqualification

period. However, even if the funds could be deposited into a supplemental needs trust (SNT) for the respondent's benefit, DSS might require repayment of any outstanding Medicaid claims. The petitioner continues that the respondent is in precarious health and has been hospitalized several times in the past year. If the respondent predeceases the petitioner, her one-eighth interest in the co-op will be an asset of her estate, and DSS will likely claim recoupment. In that event, the petitioner's interest in the co-op, where she resides, will be jeopardized if she is unable to repay the substantial Medicaid claims.

Former counsel for the petitioner previously affirmed that the respondent's inheriting an interest in the co-op, where she continues to reside, does not affect her Medicaid eligibility since the asset is her primary residence. However, upon her death, the interest in the co-op will pass through her intestate estate and would be subject to a Medicaid claim. If the respondent's ownership interest in the co-op is "gifted" to the petitioner, there is a Medicaid disqualification "look back" period for asset transfers that is presently 30 months, but that period is subject to change. Although the respondent is permitted to have up to \$15,750 in resources in order to continue her Medicaid eligibility, she received extensive Medicaid benefits for many years, and the estimated \$62,500 proceeds from a potential purchase of her one-eighth interest in the co-op exceeds this asset limitation. Counsel continues that placing the proceeds directly into a SNT is not possible, because the unsatisfied Medicaid claims have to be satisfied up-front, and

no matter where the proceeds are deposited, paying fair market value for the transfer will not benefit the respondent.

The guardian ad litem, who has significant reservations about the application, reports that, in actuality, it is probable that the proposed change in title will constitute an “uncompensated transfer” causing DSS to assess a penalty period and suspend the respondent’s community Medicaid benefits. She was informed that former counsel did not seek DSS’s approval of the transfer or ascertain its impact upon the respondent’s Medicaid eligibility. The guardian ad litem opines that it is possible that DSS might approve a transfer for full consideration if the proceeds were deposited into a payback supplemental needs trust for the respondent’s sole use and benefit. Accordingly, although the guardian ad litem is cognizant of the love and care that the guardian has bestowed upon the respondent, she is constrained to object to the application, as it is not in her ward’s best interests.

Although there is no express provision in Article 17-A of the SCPA governing guardianships for the intellectually disabled, for the type of relief sought herein. Authority to make gifts on behalf of a ward is expressly conferred by the terms of Article 81 of the Mental Hygiene Law. Notwithstanding the absence of an express provision affording gifting authority in Article 17-A, guardians might nonetheless have such power and, under appropriate circumstances, may be permitted to exercise it (see *Matter of Schulze*, 23 Misc 3d 215 [Sur Ct, NY County 2008]). The limited case law

permits guardians to make gifts from guardianship funds or assets where the wards would not be adversely affected and where the wards would likely make such gifts if they had the capacity to do so (see MHL § 81.21; Matter of Schulze, 23 Misc 3d at 215). Such applications are granted particularly for Medicaid planning purposes (see Matter of Shah, 95 NY2d 148 [2020]; Matter of Lasher [Tinsmon], 63 Misc3d 218 [Sur Ct, Albany County 2018] [permitting the trustees of a supplemental needs trust for the benefit of a 17- A ward to purchase the ward's mother's one-half interest in the realty occupied by them with title conveyed to the trustees]).

On this state of the record, given that, so long as the respondent continues to reside at the co-op, her ownership interest will not disqualify her from receiving Medicaid benefits furnishing her essential services, that there is no showing that the respondent benefits from the proposed gratuitous transfer in any way, and, in fact, it is likely that her Medicaid benefits would be significantly impaired to her detriment, the application is denied in all respects.

The court bears the ultimate responsibility for approving legal fees that are charged to guardianship funds and has the discretion to determine what constitutes reasonable compensation (see SCPA 2110; Matter of Stortecky v Mazzone, 85 NY2d 518 [1995]); Matter of Stellis, 216 AD2d 473 [2d Dept 1995]; Matter of Vitiole, 215 AD2d 765 [2nd Dept 1995]) (also see Matter of Pekorsky v Estate of Cohen, 259 AD2d 702 [2nd Dept 1999]; Matter of Cook, 41 AD2d 907 [1st Dept 1973], affd 33 NY2d 919

[1973]; Matter of Verplanck, 151 AD2d 767 [2d Dept 1989]). There is no hard-and-fast rule to determine what is reasonable compensation in a particular case, and the court is not bound by counsel's summary of the hours expended (see Matter of Vitole, 215 AD2d at 765). In determining reasonable compensation, the court may consider a number of factors, including the time spent, the difficulties involved in the matters in which the services were rendered, the nature of the services and the amount of the fee sought, the professional standing of the counsel, the size of the estate, **and the benefit to the estate (or guardianship) from the services provided** (see Matter of Freeman, 34 NY2d 1 [1974]; Matter of Potts, 213 App Div 59 [4th Dept 1925], affd 241 NY 593 [1925], Matter of Coughlin, 221 AD2d 676 [3rd Dept 1995]).

The court notes that former counsel, who has not yet sought approval for legal fees and disbursements herein, unilaterally terminated representing the petitioner in the midst of the application, citing the closure of its White Plains office, yet continues to maintain offices at other metropolitan area locations, it failed to confirm DSS's consent to the application or suggest viable alternative solutions, and has not demonstrated that its efforts benefitted the petitioner or the respondent. Accordingly, the court will not entertain a future fee request by former counsel concerning this application.

The guardian ad litem's affirmation of services with detailed

time log documents that 8.5 hours were spent reviewing the original and amended petition, extensive communication with DSS and court personnel, appearance at a court conference, researching the possible modalities into which the sale proceeds could be deposited that would benefit the respondent and maintain her Medicaid eligibility, and preparation of her report. Her usual hourly rate for similar matters is \$400. All of those services benefitted the respondent. Accordingly, the guardian ad litem is awarded \$ 3,500.00 for all services performed in this proceeding, including investigation and reporting in compliance with the terms of this decision, which constitutes the order of the court, which is to be paid by former counsel from the escrow funds advanced by the petitioner. Former counsel is to repay any of the directed escrow funds exceeding this amount to the petitioner.

The Chief Clerk shall mail a copy of this decision and order to the pro se petitioner, DSS, former counsel, and the guardian ad litem, who is to settle an order providing for the payment of her services rendered herein from the funds deposited with former counsel.

Settle order.


HON. NELIDA MALAVE-GONZALEZ
SURROGATE