

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D20825
O/kmg

_____AD3d_____

Argued - October 2, 2008

STEVEN W. FISHER, J.P.
JOSEPH COVELLO
WILLIAM E. McCARTHY
JOHN M. LEVENTHAL, JJ.

2007-07908

DECISION & ORDER

In the Matter of Joseph D. (Anonymous).
Adriana D. (Anonymous), et al., respondents;
Frank D. (Anonymous), nonparty-appellant.

(Index No. 12891/06)

Bryan Ha, New York, N.Y., for appellant.

Robert Kruger, New York, N.Y., guardian for the property of Joseph D.

In a proceeding pursuant to Mental Hygiene Law article 81 to appoint a guardian for the person and property of Joseph D., an alleged incapacitated person, nonparty Frank D., the son of Joseph D., appeals from an order and judgment (one paper) of the Supreme Court, Queens County (Thomas, J.), dated May 7, 2007, which, after a hearing, inter alia, granted the petition and appointed an independent guardian for the property of Joseph D. and a limited guardian for his person.

ORDERED that the order and judgment is affirmed, without costs or disbursements.

Contrary to the appellant's contentions, the Supreme Court properly determined, after a hearing, that the petitioners established, by clear and convincing evidence, that Joseph D. was an incapacitated person (*see* Mental Hygiene Law § 81.02[a][2]; [b]; *Matter of Nellie G.*, 38 AD3d 547, 548-549). Moreover, the Supreme Court providently exercised its discretion in appointing both a limited guardian for the person of Joseph D., and an independent guardian for the management of his property (*see* Mental Hygiene Law § 81.02[a][1]). A limited guardian for the person of Joseph D. was necessary to provide for his personal needs (*see Matter of Bess Z.*, 27 AD3d 568). Under the circumstances of this case, the power of attorney held by the appellant was not a sufficient and reliable available resource for the management of Joseph D.'s property (*see* Mental Hygiene Law

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§ 81.02[a][2]), and the appellant was unsuitable to serve in the capacity of guardian. Accordingly, the Supreme Court properly concluded that an independent guardian was necessary for the management of Joseph D.'s property (*see Matter of Ardelia R.*, 28 AD3d 485).

The parties' remaining contentions are without merit.

FISHER, J.P., COVELLO, McCARTHY and LEVENTHAL, JJ., concur.

2007-07908

DECISION & ORDER ON MOTION

In the Matter of Joseph D. (Anonymous).
Adriana D. (Anonymous), et al., respondents;
Frank D. (Anonymous), appellant.

(Index No. 12891/06)

Motion by the guardian for the property of Joseph D. on an appeal from an order and judgment (one paper) of the Supreme Court, Queens County, dated May 7, 2007, to strike portions of the appellant's reply brief. By decision and order on motion dated September 25, 2008, the motion was held in abeyance and referred to the Justices hearing the appeal for determination upon the argument or submission of the appeal.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, and upon the argument of the appeal, it is

ORDERED that the branch of the motion which was to strike the fourth and fifth complete sentences on page 14 of the appellant's reply brief is granted, and those sentences have not been considered in the determination of the appeal; and it is further,

ORDERED that the motion is otherwise denied.

FISHER, J.P., COVELLO, McCARTHY and LEVENTHAL, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court