

M E M O R A N D U M

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CHARLES J. THOMAS IAS TERM, PART 20B
Justice

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In the Matter of

INDEX NO.: 6980/05

PATRICIA BIEHL,

DATED: September 30, 2005

An Alleged Incapacitated Person
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Mark Palomino commenced an action by Order to Show Cause for the appointment of a guardian of his aunt, Patricia Biehl, an Alleged Incapacitated Person. The Petition alleges that Mrs. Biehl is unable to provide for her personal needs and property management and can not understand and appreciate the nature and consequences of such inability. The Petition further alleges that Mrs. Biehl has become the subject of gross exploitation by one Brian Loftman including but not limited to the transfer of her home and more than \$250,000.00 in cash.

The court appointed Melvin Salberg, Esq. as Court Evaluator. Petitioner was represented by Anthony J. Lamberti, Esq.; Mrs. Biehl was represented by Howard Angione, Esq.; and Mr. Loftman was represented by Margaret Bomba, Esq. The Petition was returnable on May 26, 2005. After several adjournments, the hearing was commenced on June 28, 2005 and continued on July 21, 2005 and September 8, 2005.

Upon the conclusion of the hearing, based upon the evidence adduced from the testimony, documents, and the report of the Court Evaluator, which were admitted into evidence, the Court finds as follows:

Patricia Biehl is a ninety (90) year old widow, who, up until 2004 was able to function fairly well with the assistance of her family. Upon examination James J. Lynch, M.D. found that Mrs. Biehl suffers from age related dementia and is physically disabled, requiring a wheelchair to move about. Her brother, Fabien Palomino, had always had a good and caring relationship with his sister Patricia.

In 2004, because of his concern for her deteriorating health, Fabien Palomino asked one Brian Loftman, for assistance in the care of his sister. Mr. Palomino was acquainted with Mr. Loftman through Mr. Palomino's daughter, Kate. Mr. Palomino engaged Mr. Loftman to work for Mrs. Biehl as a health care aide assisting her with many of her daily needs. Mr. Loftman had worked in the past as a medical coordinator for Personal Touch, Home Care America and Partners in Care. Mr. Loftman was hired to work part time, three hours a day, four days a week, in order to see if that was enough help or if Mrs. Biehl needed full time assistance with her daily needs, in which case the family would consider placing her in a facility with full time care.

Mr. Loftman started working in July 2004. During that time, Mr. Loftman was compensated at the rate of \$10.00 per hour. After a short period of time Mr. Loftman, who was also employed as an apartment leasing director in Manhattan, convinced Mrs.

Biehl to allow his mother, Mrs. Greenbaum, to come and work for her. Mr. Palomino was never advised of this change in his sister's care. At first Mrs. Greenbaum was paid by Mr. Loftman at \$10.00 per hour. In December, 2004, Mrs. Greenbaum moved in and was "on duty 24 hours a day", seven days a week. By then Mrs. Greenbaum was being compensated at the rate of \$10.00 per hour, totaling \$150.00 per day, seven days a week.

In July and August, 2004, and again in September 2004, Mr. Loftman approached Mr. Palomino regarding the possibility of purchasing Mrs. Biehl's house. Mr. Loftman acknowledged that he did not really have funds for a down payment and Mr. Palomino told him he should not do anything like that, as it would be a conflict with his employment.

Over the next few months, a concerted effort was made by Mr. Loftman and Mrs. Greenbaum to exclude Mr. Palomino from his sister. When he called her at home, he was hung up on. Little by little, Mr. Loftman and his mother took over the care of Mrs. Biehl, commanding her entire social life, preventing Mr. Palomino from seeing and talking to her and preventing her from talking to anyone else. Mr. Palomino protested this exclusion and told Mr. Loftman that he wanted his sister to have free time to talk to and meet with other people and get a real prospective on her life. Mr. Loftman refused and said he would not do that because "Pat wants it that way". (Transcript Page 47, line 7).

Little by little, Mr. Loftman continued to insinuate himself into all aspects of Mrs. Biehl's life: sharing a hotel room on a long weekend, bathing her at his apartment and rubbing her down.

Eventually Mrs. Biehl's independent will was broken down and became completely taken over by Mr. Loftman and Mrs. Greenbaum, and a bank account Mrs. Biehl had in trust for Mr. Palomino was quickly eliminated.

In November 2004, Mr. Palomino became concerned about the possibility that his sister was being taken advantage of when he learned that Mrs. Greenbaum was taking care of her full time and that Mr. Loftman was still being compensated as well. Mr. Palomino made several attempts to talk to his sister regarding decisions she was making that involved Mr. Loftman, and his mother, but Mrs. Biehl refused to speak with him and Mr. Palomino's attempts to discharge Mr. Loftman and Mrs. Greenbaum proved futile.

On November 18, 2004, Brian Loftman, age 42, took Mrs. Biehl, age 89, to Boro Hall in Queens and obtained a marriage license. Mr. Loftman claims to have done so to appease Mrs. Biehl, but Mrs. Biehl acknowledged that it was done to keep her brother out of the picture.

On December 4, 2004, Mrs. Biehl was examined by James J. Lynch, M.D., who is Board Certified in Neurology and Psychiatry. Dr. Lynch found that Mrs. Biehl suffers from Early Senile Dementia most likely of the Alzheimer's Type and that her overall degree of disability is moderate to severe. Dr. Lynch also found that her insight and judgment were impaired. Dr. Lynch's findings are most persuasive especially in light of Mrs. Biehl's victimization.

On February 2, 2005 Mr. Loftman arranged to have Mrs. Biehl execute a Power of Attorney naming Brian Loftman and Thomas Adams as attorneys in fact.

One week later, Mrs. Biehl entered into a contract to sell her home. Mr. Loftman arranged for Mrs. Biehl to "sell" her house to him for the sum of \$125,000.00. Mr. Loftman admits that he never had the house appraised to determine a fair market value, but concedes its value to be in the "high \$600,'s".

The agreement provided that Mr. Loftman would put down \$250.00 and Mrs. Biehl take back a mortgage on the property in the amount of \$124,750.00. The mortgage would be fully satisfied upon her death or upon Mr. Loftman's execution of a satisfaction of the mortgage as Mrs. Biehl's power of attorney.

In addition to this unusually questionable mortgage and power of attorney, Mrs. Biehl paid over \$10,000.00 towards the fees and expenses incurred by Mr. Loftman for the sale of the property plus approximately \$250,000.00 and later an additional \$45,000.00 for renovations on the house.

In addition to the incredulous windfall of the house Mr. Loftman also arranged to become a significant beneficiary of her estate in the amount of \$200,000.00, Mr. Loftman also raided Mrs. Biehl's bank accounts and "loaned" thousands of dollars to one Joe Souza, Mr. Loftman's domestic partner. All this from someone he had known for less than one year.

Based upon the foregoing findings of fact the Court determines that it has been established by clear and convincing evidence that Patricia Biehl is an Incapacitated Person in that

she is unable to provide for her personal needs and property management. Mrs. Biehl suffers from dementia and assorted age related ailments, which result in a functional limitation which impairs her ability to provide for her personal needs and property management and that it is necessary that a guardian be appointed to provide for her needs. The court is greatly disturbed by the conduct of Mr. Loftman and his mother, Mrs. Greenbaum. The undue influence imposed upon Mrs. Biehl by both was unceasing. In their position, as health care attendants, they isolated Mrs. Biehl, creating an estrangement between Mrs. Biehl and her brother, Mr. Palomino, who saw them for what they really are.

Given the nature of the confidential relationship of Mr. Loftman as a health care attendant and fiduciary, the court must carefully scrutinize Mr. Loftman and Mrs. Greenbaum's relationship with Mrs. Biehl. See in Re Slaverlee's Will, 281 AD251; Marx. V. McGlynn 88 NY357.

It is clear that Mrs. Biehl has been victimized by shameless exploitation by two grifters, Mr. Loftman. Mr. Loftman's undue influence rose to the level of "moral coercion" which restrained independent action and destroyed her free will. It was coercion which was produced by importunity and "by a silent resistless power which could not be resisted", and clearly Mr. Loftman's motives were controlling. Children's Aid Society of City of New York v. Loveridge, 70 NY387, 394-395. Mr. Loftman's repeated protestations that his conduct is excusable because "Pat wanted it that way" rings hollow to this Court's ears. Mrs. Biehl has absolutely no understanding of her financial situation and she

believed that her intention in selling her house at a greatly reduced price was her way of paying Mr. Loftman for his services. Mrs. Biehl clearly has no understanding that Mr. Loftman and his mother, Mrs. Greenbaum, were being compensated by a regular salary and that the reduction she allowed bears absolutely no reasonable relation to the services provided, even allowing for a deduction for the life estates. After hearing all of the testimony regarding the compensation paid out to Brian Loftman for her care, Mrs. Biehl still could not comprehend that they had essentially become salaried employees.

The Court hereby appoints Ira Miller, Esq., as guardian of the person and property and shall have the personal powers requested in the Petition. These powers are determined to be the least restrictive form of intervention based upon the court's findings. The court also revokes the Power of Attorney executed on February 2, 2005.

Furthermore, the court hereby appoints Ira Miller, Esq. as a Special Guardian who shall serve without bond pending his qualification and commission. As the Special Guardian, Mr. Miller is directed to insure the appropriate transfer of the deed of the property located at 61-53 Palmetto Street, Ridgewood, Queens, back into the name of Patricia Biehl and ensure that Mrs. Biehl is appropriately cared for. The Special Guardian shall also immediately illustrate and determine whether any other monies have been misappropriated by either Brian Loftman or his mother, Mrs. Greenbaum.

The Cross-Petition is dismissed in its entirety. Petitioner is directed to submit a further order providing for the payment of fees. All attorneys and the Court Evaluator shall submit Affidavits of Professional Services and report any monies received in connection with this matter from any source whatsoever.

Submit order.

CHARLES J. THOMAS, J.S.C.