

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

MATTER OF EDNA SHANNON,
FAMILY SERVICE SOCIETY OF YONKERS,
Petitioner,

-against-

No. 80

WESTCHESTER COUNTY DEPARTMENT
OF SOCIAL SERVICES,
Appellant,

EASTCHESTER REHABILITATION
& HEALTH CENTER,
Respondent.

Judicial Institute
84 North Broadway
White Plains, New York 10603
April 29, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

EILEEN CAMPBELL O'BRIEN, ESQ.
WESTCHESTER COUNTY DEPARTMENT OF LAW
Attorneys for Appellant
600 Michaelian Office Building
148 Martine Avenue, 6th Floor
White Plains, NY 10601

SARAH C. LICHTENSTEIN, ESQ.
ABRAMS, FENSTERMAN, FENSTERMAN, EISMAN, FORMATO,
FERRARA & WOLF, LLP
Attorneys for Respondent
1111 Marcus Avenue, Suite 107
Lake Success, NY 11042

Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 80.

2 Okay, counsel, you're up.

3 MS. O'BRIEN: Thank you, Your Honor.

4 CHIEF JUDGE LIPPMAN: Do you want any
5 rebuttal time, counsel?

6 MS. O'BRIEN: Two minutes, please, thank
7 you.

8 CHIEF JUDGE LIPPMAN: Two minutes, sure.
9 Go ahead.

10 MS. O'BRIEN: My na - - -

11 CHIEF JUDGE LIPPMAN: You're on.

12 MS. O'BRIEN: May it please the court, my
13 name is Eileen Campbell O'Brien, Senior Assistant
14 County Attorney, on behalf of the Westchester County
15 Department of Social Services.

16 The enactment of Mental Hygiene Law 81.44
17 was to provide a time frame with which a guardian is
18 to act. It was not enacted to provide preferential
19 treatment of the guardian's account upon the ward's
20 death or to expand the rights of the creditors. It
21 is to facilitate the transition between the guardian
22 and the personal representative of the estate, and to
23 provide - - -

24 CHIEF JUDGE LIPPMAN: Counsel, what - - -
25 what do you think is - - - is owed to you - - - to

1 the Department?

2 MS. O'BRIEN: I think the - - - I think
3 under the Supreme Court, the direction that the
4 guardian was given was to provide to pay back the
5 Medicaid claim was appropriate because it was part of
6 the estate of the decedent, Shannon.

7 JUDGE STEIN: What - - - what does Mental
8 Hygiene Law 81.44(d) mean when it says that the
9 guardianship property has to be delivered to the
10 representative of the estate, "except for property
11 retained to secure any known claim, lien or
12 administrative cost of the guardianship"?

13 MS. O'BRIEN: It would mean that - - - and
14 all those other - - - the claims and the liens, all
15 those involve the administrative cost of the
16 guardianship, because that is upon the death of a
17 ward, all that can be - - - can be paid for by the
18 guardian.

19 JUDGE STEIN: But why - - - but it says
20 three things: claim, lien, or administrative costs.
21 How can you say that it's only talking about
22 administrative costs?

23 MS. O'BRIEN: If you go to the legislative
24 intent, which the purpose of this statute was - - -

25 JUDGE STEIN: But that's not what - - - but

1 - - - but this is the plain reading of the statute.

2 MS. O'BRIEN: Yes, I understand, but a - -
3 - it should - - - it also needs to be considered with
4 the - - - with the intent of the statute, and also
5 with subdivision (e) - - -

6 JUDGE STEIN: Well, don't we - - -

7 MS. O'BRIEN: - - - which does limit the -
8 - - does - - - excuse me.

9 JUDGE STEIN: Don't we only get to the
10 intent if it's not clear?

11 MS. O'BRIEN: Well, I - - - you do get to
12 the intent - - - you - - - you always - - - I mean, I
13 think the intent is always there and it's in the
14 words that they use. However, when you look at (d),
15 it's not in isolation, and can't be raised to a
16 higher level to allow a guardian to do more than
17 they're able to do upon the death of the ward, and -
18 - -

19 CHIEF JUDGE LIPPMAN: Counsel, was the lack
20 of a judgment here that was obtained by the home,
21 dispositive?

22 MS. O'BRIEN: Yes, Your Honor. Had the - -
23 -

24 CHIEF JUDGE LIPPMAN: Is that - - - is that
25 what this case boils down to?

1 MS. O'BRIEN: Yes, it would - - - yes, Your
2 Honor.

3 CHIEF JUDGE LIPPMAN: If they had obtained
4 a judgment, we'd be in a different situation?

5 MS. O'BRIEN: Yes, if they had obtained a
6 judgment, we would've only been a preferred creditor
7 and we may have been subservient to their claim upon
8 the de - - -

9 JUDGE ABDUS-SALAAM: Counsel, was there any
10 - - -

11 MS. O'BRIEN: - - - through the estate.

12 JUDGE ABDUS-SALAAM: - - - was there
13 anything that DSS could do to protect itself while
14 Mrs. Sha - - - Ms. Shannon was alive, like, put a
15 lien on her house or something like that?

16 MS. O'BRIEN: The - - - a lien of the house
17 could've - - - could've been put - - - placed on by
18 the respondent at any time - - - at any time. The
19 Department is limited to when they were able to, in
20 fact, place a lien on the property, and that would
21 have only been at the time that it was the intent
22 that Ms. Shannon was not going to be returning home,
23 which was a subjective intent.

24 So they would not have been able to put one
25 until several - - - a year - - - about a year and a

1 half or so later than when the respondent was able to
2 actually attach or put a lien on the property,
3 because their claim accrued at the end - - - by
4 August 31st, 2008, because Medicaid picked up on
5 September 1st, 2008. They - - - they no longer were
6 accruing any more, so they could have, at that time,
7 placed a judgment or done something to attach to the
8 lien of the property.

9 JUDGE ABDUS-SALAAM: Well, I'm - - - I'm
10 trying to understand whether DSS could have protected
11 itself from what occurred here. In other words,
12 you're saying that they could only have become a
13 preferred creditor - - - I - - - if they had - - - if
14 the - - - the nursing home had gotten a judgment,
15 then her estate or the DSS would become a preferred
16 creditor, but the judgment would trump that.

17 And I'm asking, because the - - - the
18 nursing home brought its claim before she died, was
19 there anything that DSS could have done before she
20 died to protect itself?

21 MS. O'BRIEN: We were unable to assert a -
22 - - a Medicaid cla - - - claim against the decedent -
23 - - against Ms. Shannon prior to her death. That is
24 what was required in Social Services - - -

25 JUDGE READ: You - - - you have to wait - -

1 - you have to wait until there's a death?

2 MS. O'BRIEN: In order for us to assert a
3 claim, yes; however, if there was a lien, that would
4 have been whoever had filed the lien earlier, but we
5 were pro - - - DSS was prohibited - - -

6 JUDGE ABDUS-SALAAM: So you couldn't - - -
7 you couldn't file a lien.

8 JUDGE STEIN: What - - - why - - -

9 MS. O'BRIEN: You could not file a lien
10 until the - - - after such time as there was an
11 intent for Ms. Shannon not to return to her home.

12 JUDGE STEIN: Well, when the surrogate
13 court said that - - - that they - - - the guardian
14 could sell the house, because she wasn't going back,
15 wouldn't - - - wouldn't that have been a time you
16 could've done that?

17 MS. O'BRIEN: The Department could've;
18 however the fact that the Department didn't is not a
19 reason why we would not be eligible to recover,
20 because at the time of the death of the ward, her
21 assets then become part of her estate, and at that
22 time - - -

23 JUDGE ABDUS-SALAAM: Yes, but you're saying
24 that the nursing home should have gotten a judgment,
25 and that's why you believe that you should get

1 whatever's left of - - - of her estate, whereas
2 essentially you could have filed a lien and been in a
3 sort of, you know, equi - - - equal position to the
4 nursing home.

5 MS. O'BRIEN: Well, we - - - as - - - we
6 could not have filed the lien until - - - as - - - as
7 noted, until she was going to not to return to her
8 home, and that - - - and even if we had filed a lien,
9 we would - - - we may have been subsequent to the
10 respondent's lien had they, in fact, exercised their
11 rights - - -

12 CHIEF JUDGE LIPPMAN: Yeah, but your argu -
13 - -

14 MS. O'BRIEN: - - - in a timely fashion.

15 CHIEF JUDGE LIPPMAN: Your argument is
16 you're still a preferred creditor, regardless - - -
17 your argument, even if you acknowledge, which I
18 gather you are, that you could have done it, that
19 you're still a preferred creditor and - - - and their
20 not getting a judgment puts you ahead of them - - -

21 MS. O'BRIEN: That - - -

22 CHIEF JUDGE LIPPMAN: - - - regardless of
23 what you should have done, even if they didn't do
24 what they should have done, which clearly would have
25 eclipsed your claim or made it secondary.

1 MS. O'BRIEN: That's exactly correct.

2 CHIEF JUDGE LIPPMAN: I mean, that's - -
3 it's simple - - -

4 MS. O'BRIEN: That's correct.

5 JUDGE ABDUS-SALAAM: Well, if - - -

6 MS. O'BRIEN: And that - - - but - - -
7 excuse me.

8 JUDGE ABDUS-SALAAM: Counsel, if we read
9 the - - - the - - - this case the way that the
10 Appellate Division majority read it, then you would
11 not be able to collect. The nursing home would be -
12 - - would be able to co - - - collect, correct?

13 MS. O'BRIEN: That's correct. And that
14 really would go against what public policy is,
15 because it is - - - it is really not - - - this
16 statute was not enacted, 81.44, to somehow jump the
17 rights of Medicaid to recover from an estate. This
18 was strictly to provide a time frame for the
19 guardians and - - - and to retain cost reasonably
20 anticipated for the administration of the
21 guardianship account. And so by allowing or
22 expanding this right to the creditor - - -

23 JUDGE ABDUS-SALAAM: Could the guardian
24 have paid the debt before she died?

25 MS. O'BRIEN: They - - - I - - - they - - -

1 if they had asserted the claim appropriately, they
2 could have, and - - - but the fact that the guardian
3 did not - - -

4 JUDGE ABDUS-SALAAM: Well, was there any
5 question that they didn't assert the claim
6 appropriately?

7 MS. O'BRIEN: I - - - they did - - - they
8 did provide a notice I be - - - to the nursing - - -
9 to the - - - to the guardian that they, in fact, were
10 owed some money. However, by the fact that the
11 guardian didn't pay at all for years, they sat on
12 their rights, and then they waited till upon her
13 death to actually assert them. They could have gone
14 at any time, gone back to court to compel payment.
15 They could have put a judgment that would have
16 protected their rights. They failed to timely
17 exercise their right, which should not have - - -

18 JUDGE FAHEY: Well, they - - - they - - -
19 they made - - - they made the claim in June of 2010,
20 and I guess she died in December of 2011.

21 MS. O'BRIEN: That's correct.

22 JUDGE FAHEY: And I think - - - I think
23 that's right. But really it comes down to, if this
24 was a simple matter of the Social Services Law, then
25 you'd be the preferred creditor, and it - - - and it

1 would be relatively simple. But it's not because of
2 81.44 and the interplay between sections (d) and (e),
3 and so the question is, is in our statutory
4 interpretation, do we get to the point where we look
5 at the sponsor's memorandum?

6 MS. O'BRIEN: I think - - -

7 JUDGE FAHEY: And you're argument is, is
8 that (e) conflicts with (d), right?

9 MS. O'BRIEN: I bu - - - (e) limits (d) in
10 that, and I think that is consistent - - -

11 JUDGE FAHEY: Well, it's - - - yeah, you
12 could - - -

13 MS. O'BRIEN: - - - with legislative
14 intent.

15 JUDGE FAHEY: You could read it - - - (d)
16 doesn't favor you at all the way I read it, but - - -
17 but (e) can be read to favor your position, yeah.

18 MS. O'BRIEN: Well, I - - - I don't
19 actually think - - - I mean, I think (d) - - - I
20 think known claims would involve only those involving
21 with the administrative costs, so I don't think it
22 does - - - it would - - - it - - - it does damage to
23 the Department, because - - -

24 JUDGE FAHEY: Um-hum.

25 MS. O'BRIEN: - - - that is a not - - - the

1 administra - - - the nursing home claim is not a - -
2 - is not part of the administrative cost.

3 JUDGE READ: So you say you have to read
4 the two together to make this - - -

5 MS. O'BRIEN: Yes, I do believe that that's
6 the case. And actually, (d) references subdivision
7 (e).

8 CHIEF JUDGE LIPPMAN: Okay. Thank you.

9 MS. O'BRIEN: Thank you.

10 CHIEF JUDGE LIPPMAN: Anything else,
11 counsel?

12 MS. O'BRIEN: No, thank you, Your Honor.

13 CHIEF JUDGE LIPPMAN: Okay, thanks.

14 MS. LICHTENSTEIN: Good afternoon, Your
15 Honors. Excuse me. I'm Sarah Lichtenstein, from
16 Abrams Fensterman, representing Eastchester in this
17 matter.

18 CHIEF JUDGE LIPPMAN: Counsel, how do you -
19 - - how do you get around the issue of your failing
20 to obtain a judgment and their being a preferred
21 creditor? What - - -

22 MS. LICHTENSTEIN: Very easily, Your Honor.

23 CHIEF JUDGE LIPPMAN: Go ahead.

24 MS. LICHTENSTEIN: Because we're not
25 playing, if you - - - if you permit me to - - - we're

1 not playing in the same sandbox. These are not
2 competing claims. The judgment is relevant only to -
3 - - to determine priority if the claims are the same.
4 Eastchester's claim was a lifetime claim asserted
5 against the guardianship property - - -

6 CHIEF JUDGE LIPPMAN: Yeah, yeah, but - - -
7 but how does that lifetime claim assert itself when -
8 - - when the - - - she's deceased? The ballgame
9 starts at - - - that's the sandbox.

10 MS. LICHTENSTEIN: No, there's - - -

11 CHIEF JUDGE LIPPMAN: You have an estate
12 and you both want claims against the estate. How - -
13 - how do you prevail? What's the legal way - - -

14 MS. LICHTENSTEIN: With - - -

15 CHIEF JUDGE LIPPMAN: - - - that you
16 prevail?

17 MS. LICHTENSTEIN: With respect to Your
18 Honor, our claim is not against the estate. It was a
19 lifetime claim and as Judge Abdus-Salaam said, we
20 could have been - - -

21 CHIEF JUDGE LIPPMAN: Yeah, but where's the
22 - - - where's the money, though, once - - - once she
23 died?

24 MS. LICHTENSTEIN: Well, let me - - - if -
25 - - I'm trying to answer that.

1 CHIEF JUDGE LIPPMAN: No, answer my
2 question, and then you'll - - - you'll give your
3 explanation.

4 MS. LICHTENSTEIN: The answer is that the
5 money is in the control of the guardianship court - -
6 -

7 CHIEF JUDGE LIPPMAN: Yes.

8 MS. LICHTENSTEIN: - - - and it's
9 guardianship property, and since it could - - - it
10 could have been paid during the lifetime, it equally
11 could have been paid after death. The order - - -

12 CHIEF JUDGE LIPPMAN: Yeah, yeah, but
13 that's my point to you - - -

14 MS. LICHTENSTEIN: It's a claim - - - it's
15 still a claim against the guardianship property.
16 It's not a claim against the estate. That claim gets
17 determined first in the guardianship court.

18 CHIEF JUDGE LIPPMAN: So you're saying the
19 - - - the guardian then pays that before it goes into
20 the estate?

21 MS. LICHTENSTEIN: Exactly. And
22 Eastchester's claim - - -

23 CHIEF JUDGE LIPPMAN: Under what authority
24 do you say?

25 MS. LICHTENSTEIN: Under the authority of

1 the Mental Hygiene Law and the supervision of the - -
2 -

3 CHIEF JUDGE LIPPMAN: Where - - - where
4 exactly does the - - -

5 MS. LICHTENSTEIN: - - - guardianship
6 court.

7 CHIEF JUDGE LIPPMAN: - - - does the Mental
8 Hygiene Law say that?

9 MS. LICHTENSTEIN: Okay, it says it in
10 several places. First of all, it says the - - - the
11 order that appointed the guardian which tracks the
12 guardianship, the Mental Hygiene Law permits the
13 guardian to pay claim - - - pay bills after death
14 that could've been paid prior to the death. And
15 there's no question that this could have been paid
16 prior to Ms. Shannon's death.

17 Number two, 81.44 governs the - - - what
18 happens upon the death of an incapacitated person
19 including the disposition of claims that - - - known
20 claims - - - and this - - - there's no issue that
21 Eastchester's claim was a known claim - - - prior to
22 turning over property to the estate representative.
23 So with a - - -

24 JUDGE PIGOTT: I read 81.44 as a wind-up
25 provision, you know.

1 MS. LICHTENSTEIN: I'm sorry.

2 JUDGE PIGOTT: I read it as a wind-up
3 provision. In other words, you know, the - - - the
4 person's now dead, so now you got to go up to
5 surrogate's court. But up until then, the - - - the
6 - - - it was a guardianship. So you have to - - -
7 you know, you - - - you have to - - - you can do a
8 few little things.

9 But if I'm - - - if I'm the guardian, and
10 someone dies, and I say, you know what? I - - - what
11 I really ought to pay is that 50,000 dollars that
12 this now deceased guardian of mine owes my son. So
13 I'm going to pay that money now as part of my duties
14 under 81.44, and the County can wait for its money.

15 Now, you would agree that that's not the
16 way this thing's supposed to read? I - - - I think
17 you're supposed to just wind up fully.

18 MS. LICHTENSTEIN: Well, it - - - it - - -
19 but part - - - we agree that it's wind-up. But part
20 of the wind-up is to pay - - - is to address the
21 known claims that haven't yet been paid - - -

22 JUDGE PIGOTT: But don't you have to - - -
23 doesn't it occur to - - - it seems to me, that here's
24 a nursing home that, for two years, didn't pursue
25 this. I mean, she was gone. And - - - and - - - and

1 - - - so you've got a right to sue her.

2 MS. LICHTENSTEIN: No, actually, Your
3 Honor, that's - - - that's not correct. In order for
4 - - - for - - - first off, let me explain why
5 Eastchester did not seek to get a judgment in this
6 case. It wasn't necessary. First of all,
7 Eastchester's - - -

8 JUDGE PIGOTT: Let's assume it was. Do you
9 have a right to - - -

10 MS. LICHTENSTEIN: Eastchester's claim was
11 undispute - - -

12 JUDGE PIGOTT: Do you have a right to sue
13 her?

14 MS. LICHTENSTEIN: We have to - - -

15 JUDGE PIGOTT: You said you don't.

16 MS. LICHTENSTEIN: We have to seek
17 permission first from the guardianship court. It's -
18 - - I'll take you through the process because it ends
19 up - - - it's mostly a futile process in practice.

20 JUDGE PIGOTT: Well, that's - - - that's
21 your complaint. But what - - - what you've done now
22 is you've sat on your rights. You're owed a lot of
23 money. It's too bad, but here comes the big County,
24 and believe me, they - - - they do this very often.

25 MS. LICHTENSTEIN: Excuse me - - - Your

1 Honor - - -

2 JUDGE PIGOTT: And they're saying this is
3 taxpayer dollars. We want it and you can't say, oh,
4 well, your son is owed 50,000 dollars from the guard
5 - - - from the - - - from the guard - - - from the -
6 - -

7 MS. LICHTENSTEIN: With respect, that's
8 really - - -

9 JUDGE PIGOTT: - - - her, and therefore,
10 we're not going to pay you.

11 MS. LICHTENSTEIN: - - - that's really
12 looking at it from a Medicaid-centric perspective.
13 You really have to look at this case from the
14 perspective of the guardianship system that's set
15 forth in the Article 81 of the Mental Hygiene Law.
16 In fact, federal - - - the federal Medicaid Act,
17 which is followed in Social Services Law, Section
18 369, the default is that Medicaid does not have a
19 right to recover against the Medicaid recipient until
20 after - - - until - - - unless and until the person
21 dies - - - well, not unless - - -

22 JUDGE PIGOTT: When this lady died - - -
23 when this lady died, you know, on day one, and on day
24 - - - I think you can get 150 days - - - day 100, can
25 you deed her property to somebody else?

1 MS. LICHTENSTEIN: The guardianship
2 property? No, Your Honor, that's the - - -

3 JUDGE PIGOTT: Of course, because you don't
4 have any authority anymore, because you're not a
5 guardian anymore - - -

6 MS. LICHTENSTEIN: Yes, but - - -

7 JUDGE PIGOTT: - - - because the
8 guardianship is over.

9 MS. LICHTENSTEIN: But - - -

10 JUDGE PIGOTT: And yet you want to say,
11 even though the guardianship is over, I have this
12 multi-thousand dollar claim that I decided I want to
13 prefer over the County.

14 MS. LICHTENSTEIN: With respect, Your
15 Honor, first of all, we didn't sit on our rights,
16 because 81.44 - - -

17 CHIEF JUDGE LIPPMAN: How difficult would
18 it have been to get a judgment?

19 MS. LICHTENSTEIN: I'm so - - - I'll - - -
20 I'll explain.

21 CHIEF JUDGE LIPPMAN: Explain - - -

22 MS. LICHTENSTEIN: Okay. So first - - -

23 CHIEF JUDGE LIPPMAN: - - - succinctly how
24 difficult it is.

25 MS. LICHTENSTEIN: First, you have to make

1 a motion to - - - for permission to sue either the
2 incapacitated person or the guardian.

3 CHIEF JUDGE LIPPMAN: Okay.

4 MS. LICHTENSTEIN: Assuming that that's
5 approved, you then have to start a plenary action in
6 Supreme Court.

7 CHIEF JUDGE LIPPMAN: Okay. Go ahead.

8 MS. LICHTENSTEIN: And invariably in
9 Supreme Court, the Supreme Court judge will say, this
10 is related to a guardianship, so you must make a
11 motion to consolidate and bring your - - - your
12 action or your motion to obtain the judgment back to
13 the guardianship judge.

14 And then when we go back to the
15 guardianship judge, the guardianship judge says,
16 invariably, let's just wait and handle this during
17 the settlement of the - - - of the guardian's final
18 account, when the guardianship is terminated. So the
19 creditor has accomplished nothing - - -

20 JUDGE PIGOTT: So you're - - - you're upset
21 that - - - you're - - -

22 MS. LICHTENSTEIN: - - - and the
23 guardianship estate has been reduced.

24 JUDGE PIGOTT: I'm almost done. You're
25 upset that the procedure is difficult.

1 MS. LICHTENSTEIN: No, it - - - no.

2 JUDGE PIGOTT: And so you say, what we're
3 going to do is we're going to wait until she dies,
4 and then - - - and then we have a better chance.

5 MS. LICHTENSTEIN: That's really not the
6 case, Your Honor, because as I kept trying to say,
7 there was no reason for Eastchester to obtain a
8 judgment. There were no competing - - -

9 JUDGE READ: Because you thought - - -

10 MS. LICHTENSTEIN: - - - creditors - - -

11 JUDGE READ: Because you thought you didn't
12 have to.

13 MS. LICHTENSTEIN: We didn't have to. The
14 claim on the merits was - - -

15 CHIEF JUDGE LIPPMAN: Yeah, yeah, but - - -
16 I understand. But if you're wrong that you didn't -
17 - - that - - - that there was no need for you to do
18 it, then you're out of luck now.

19 MS. LICHTENSTEIN: No, Your Honor - - -

20 CHIEF JUDGE LIPPMAN: It - - - it - - -
21 no, no, no. That's right. That if you're wrong,
22 you're out of luck.

23 MS. LICHTENSTEIN: No, with respect, if
24 we're wrong about whether we should have gotten a
25 judgment - - -

1 CHIEF JUDGE LIPPMAN: That you didn't need
2 to obtain - - - yes.

3 MS. LICHTENSTEIN: - - - we're out of luck.
4 We're not out of court because the claim is still a
5 claim. You must take - - - recognize the distinction
6 between Eastchester's claim being against the
7 guardianship property - - -

8 CHIEF JUDGE LIPPMAN: Yeah, yeah, but we
9 went in - - -

10 MS. LICHTENSTEIN: - - - and it gets
11 addressed be - - -

12 CHIEF JUDGE LIPPMAN: - - - but Judge
13 Pigott - - - no, no. But counselor, Judge Pigott
14 just went with you. You're assuming that the
15 guardian, after she's dead, can go and say, oh,
16 great, there are all these claims I know that I'm
17 going pay them, rather than just wrapping up.

18 MS. LICHTENSTEIN: No, no, what I'm saying
19 - - -

20 CHIEF JUDGE LIPPMAN: Isn't that what
21 you're assuming?

22 MS. LICHTENSTEIN: No, that's not what I'm
23 saying.

24 CHIEF JUDGE LIPPMAN: What are you saying?

25 MS. LICHTENSTEIN: I'm saying - - - I'm

1 saying that upon the incapacitated person's death,
2 the guardian is required, pursuant to 81.44, to do
3 several things. One of them is to issue a statement
4 to the estate representative concerning what the
5 remaining assets are and then transfer to the estate
6 representative property - - - all of that property -
7 - - except property sufficient to secure known
8 claims.

9 JUDGE PIGOTT: Right. Can you pay off - -
10 -

11 MS. LICHTENSTEIN: And then - - -

12 JUDGE PIGOTT: Can you pay off the car? If
13 she had a car - - -

14 MS. LICHTENSTEIN: It gets handled - - -

15 JUDGE PIGOTT: - - - can you say I want to
16 pay off the car?

17 MS. LICHTENSTEIN: It gets - - - if the
18 claim - - - probably, if the claim arose prior to - -
19 -

20 JUDGE PIGOTT: Can you - - - can you - - -
21 can you buy - - -

22 MS. LICHTENSTEIN: - - - the person's
23 death.

24 JUDGE PIGOTT: Can you buy the Buffalo
25 Bills' seasons tickets, because you know that's what

1 she would want to do? I don't mean to be flip, but
2 where does - - - there's - - -

3 MS. LICHTENSTEIN: The - - - the - - -
4 because the claims get - - -

5 JUDGE PIGOTT: There seems to be no end to
6 what you think a guardian can do even after the - - -
7 after the - - -

8 MS. LICHTENSTEIN: That's not what I'm
9 saying, and I - - - I apologize if that's the
10 impression that we've made, because the conclusion of
11 the guardianship is handled by the guardianship
12 court. The guardian submits a final account, and the
13 claims - - - and whether there are claims that should
14 be paid before the balance of the money is
15 transferred to the estate representative, is
16 supervised, determined - - -

17 JUDGE RIVERA: But what - - - what - - -
18 what if - - -

19 MS. LICHTENSTEIN: - - - and controlled by
20 the guardianship judge.

21 JUDGE RIVERA: What if the guardian is
22 disputing your claim, and that's why they don't pay
23 for over a year? Don't you have to get a judgment?

24 MS. LICHTENSTEIN: Not if we're the on - -
25 - no, because it still can get handled in the context

1 of the final accounting.

2 JUDGE RIVERA: So - - -

3 MS. LICHTENSTEIN: And if there's no other
4 competing - - -

5 JUDGE RIVERA: I don't understand that.
6 I'm sorry; wait a minute. You're saying once she - -
7 - once - - - once you have the - - - the person who
8 is - - - you - - - you have the decedent; at that
9 point you're saying that now the guardian can
10 continue to engage in some negotiation with you to
11 resolve a dispute over a claim?

12 MS. LICHTENSTEIN: In the con - - - what
13 happens is the guardian is required under 81.44 to
14 set - - - to judicially settle its final account,
15 makes a report to the guardianship court, and says
16 this is all the property that I - - - I gathered
17 during the course of the guardianship.

18 JUDGE RIVERA: Right.

19 MS. LICHTENSTEIN: These are the payments
20 I've made. These are the outstanding claims, if
21 there are some. Also the administrative costs get
22 paid.

23 JUDGE RIVERA: These are the outstanding
24 claims that are disputed. I want to keep negotiating
25 this and figure this out.

1 MS. LICHTENSTEIN: Well, not negotiating -
2 - -

3 JUDGE RIVERA: How much longer can the
4 guardian hold this money to figure this out?

5 MS. LICHTENSTEIN: It gets - - - it gets -
6 - - it gets litigated in front of the guardianship
7 judge. The guardian is saying - - -

8 JUDGE RIVERA: Well, how much longer? How
9 much longer? Because the person has now died.

10 MS. LICHTENSTEIN: Well, the - - - the - -
11 - the guardian - - -

12 JUDGE RIVERA: And you have an estate and
13 they want to proceed on paying whatever bills they
14 have to pay.

15 MS. LICHTENSTEIN: The guardian is required
16 under the statute to - - - to settle its judicial
17 account within 150 days - - -

18 JUDGE ABDUS-SALAAM: So, counsel, if - - -

19 MS. LICHTENSTEIN: - - - of the decedent's
20 - - - of the IP's death.

21 JUDGE RIVERA: However if it's in dispute
22 and they don't agree with you, you're then going to
23 do what?

24 MS. LICHTENSTEIN: It's - - - it's
25 litigated before the guardianship judge, however, you

1 know, they - - -

2 JUDGE ABDUS-SALAAM: So you're saying that
3 no payment can be made until the judge approves the
4 guardianship account?

5 MS. LICHTENSTEIN: Well, what I'm - - -

6 JUDGE ABDUS-SALAAM: Or if the payment is
7 already made - - -

8 MS. LICHTENSTEIN: What I'm - - - if - - -

9 JUDGE ABDUS-SALAAM: - - - would DSS be
10 able to come in and dispute it?

11 MS. LICHTENSTEIN: No, that's our position.
12 If - - - if the guardian had paid this claim in due
13 course while the - - - while Ms. Shannon was still
14 alive, which he had - - - clearly had the authority
15 to do - - -

16 JUDGE READ: We'd have - - -

17 MS. LICHTENSTEIN: - - - we wouldn't be
18 here.

19 JUDGE READ: Well, that's for sure. That's
20 the point.

21 MS. LICHTENSTEIN: And DSS wouldn't be able
22 to - - - wouldn't have a complaint.

23 JUDGE READ: But - - - but he didn't.

24 MS. LICHTENSTEIN: The guardian didn't
25 because guardians tend not to.

1 CHIEF JUDGE LIPPMAN: The guardian didn't -
2 - -

3 MS. LICHTENSTEIN: Guardians are
4 conservative - - -

5 CHIEF JUDGE LIPPMAN: And - - - and the
6 guardian didn't and you didn't do anything about it.

7 MS. LICHTENSTEIN: We didn't because
8 Eastchester - - -

9 CHIEF JUDGE LIPPMAN: Because the system is
10 complicated, and you decided, gee - - -

11 MS. LICHTENSTEIN: No.

12 CHIEF JUDGE LIPPMAN: - - - I can't do it.

13 MS. LICHTENSTEIN: No, Your Honor.

14 CHIEF JUDGE LIPPMAN: Is that why?

15 MS. LICHTENSTEIN: No, Your Honor.

16 JUDGE RIVERA: But the guardian might have
17 disagreed with the amount you were billing them?

18 MS. LICHTENSTEIN: The guardian might have,
19 and that would have been addressed during the course
20 - - -

21 JUDGE RIVERA: So how - - - how much mon -
22 - -

23 MS. LICHTENSTEIN: - - - of the final
24 accounting.

25 JUDGE RIVERA: How much of the estate is

1 the guardian going to withhold while they're figuring
2 out this dispute?

3 MS. LICHTENSTEIN: Enough to secure - - -

4 JUDGE RIVERA: The total amount you're
5 demanding?

6 MS. LICHTENSTEIN: They don't have a
7 choice. They're - - - they're instructed by the
8 statute. 81.44(d) says you turn over everything
9 except a sufficient to secure - - -

10 JUDGE RIVERA: So they hold the entire
11 amount you're demanding even if they're disputing
12 that amount, to insure that they pay that amount - -
13 -

14 MS. LICHTENSTEIN: If the cou - - - if - -
15 - right, if it's determined that we had a legi - - -

16 JUDGE RIVERA: - - - if required to do so.

17 MS. LICHTENSTEIN: If they had - - - if
18 they had disputed the validity of the claim, which
19 they never did.

20 JUDGE RIVERA: And how long will it take to
21 resolve this, when you say they're going to resolve
22 it?

23 MS. LICHTENSTEIN: In the course of the
24 final accounting?

25 JUDGE RIVERA: Yeah, well, how long will

1 that take?

2 MS. LICHTENSTEIN: I don't - - - I - - -
3 frankly, I can't answer that. I don't - - - I don't
4 know.

5 JUDGE PIGOTT: In - - - in - - - in real
6 life, I suppose, would that 150 days - - - could you
7 effectively el - - - you know, eliminate the estate?
8 In other words, you know there's a big lien out there
9 from the County, and you say we've got only X number
10 of dollars. If we spend this within the next 150
11 days, the County's out of luck. Could you do that?

12 MS. LICHTENSTEIN: Well, the guard - - -
13 no. The guardian is not spending it. The guardian
14 is, as you've said - - - as we've said, is winding up
15 the affairs of the guardianship. And - - - and - - -

16 JUDGE PIGOTT: What's wrong with spending
17 it? I'm saying - - -

18 MS. LICHTENSTEIN: Without spending it.

19 JUDGE PIGOTT: No, what - - -

20 MS. LICHTENSTEIN: There are certain
21 limited - - -

22 JUDGE PIGOTT: We're fencing over a word, I
23 guess. What - - - what I'm saying is, they dispose
24 of all the assets in the 150 days before the - - -
25 all calling it a wind-up, because we know the

1 County's coming. So can we pay off every bill that
2 we think might be owed? Is that - - - is that within
3 the limits?

4 MS. LICHTENSTEIN: Well, not every bill
5 that they think might be owed, but if it's a
6 legitimate bill, they have the authority under the
7 statute, and under - - - usually under the order
8 appointing them to pay bills that - - - after death -
9 - - that could have been paid beforehand. In prac -
10 - -

11 JUDGE ABDUS-SALAAM: Is that the rule that
12 you're asking us to adopt here? That guardians can,
13 in their winding up, pay bills that they know are le
14 - - - well, how would - - - how would the guardian
15 determine whether it's a legitimate bill or not?

16 MS. LICHTENSTEIN: It's - - - it's not a
17 rule we're asking the court to - - - to make. It's -
18 - - it's provided in - - - it's already in the
19 statute, and it goes case-by-case - - -

20 CHIEF JUDGE LIPPMAN: Even though - - -
21 even - - -

22 MS. LICHTENSTEIN: - - - if it's in order
23 approve - - - appointing the guardian.

24 CHIEF JUDGE LIPPMAN: Even though there's a
25 preferred creditor?

1 MS. LICHTENSTEIN: DSS is not a preferred
2 creditor in the guardianship. They only become a
3 preferred creditor upon the death of the guardian - -
4 -

5 CHIEF JUDGE LIPPMAN: And we have - - -

6 MS. LICHTENSTEIN: - - - and they - - - I
7 mean, the IP.

8 CHIEF JUDGE LIPPMAN: And we have the death
9 here.

10 MS. LICHTENSTEIN: Yes, except that there
11 was no estate, again, for which them to apply their -
12 - -

13 JUDGE READ: Well, you're saying they don't
14 - - - they don't become preferred until the estate is
15 fully wound up, however, long - - -

16 MS. LICHTENSTEIN: They don't - - - they
17 don't become preferred until there's an estate that
18 exists - - -

19 JUDGE READ: Well, they - - - until the
20 guardianship is wound up.

21 MS. LICHTENSTEIN: - - - and there's no
22 estate here, because it was - - - it was - - -

23 JUDGE READ: Until the guardian is wound
24 up.

25 CHIEF JUDGE LIPPMAN: Okay, counsel, we

1 understand your arguments. Thanks.

2 MS. LICHTENSTEIN: Thank you.

3 CHIEF JUDGE LIPPMAN: Let's get rebuttal
4 now.

5 MS. O'BRIEN: Thank you, Your Honor. It -
6 - - exactly right. If the guardian were ab - - - if
7 the guardian were able to pay any and all claims that
8 were put before them, it would, in fact, be the
9 entire estate.

10 CHIEF JUDGE LIPPMAN: What is the
11 guardian's power at that point where - - -

12 MS. O'BRIEN: At the time of the death - -
13 -

14 CHIEF JUDGE LIPPMAN: Yes.

15 MS. O'BRIEN: - - - of the ward, their
16 power is really only to cover costs, retain assets to
17 cover costs for the reasonably anticipated
18 administrative costs - - -

19 CHIEF JUDGE LIPPMAN: What is that in real
20 - - - in real - - -

21 MS. O'BRIEN: - - - of the guardianship.

22 CHIEF JUDGE LIPPMAN: - - - in practical
23 terms, what do they do?

24 MS. O'BRIEN: They - - - they would - - -
25 they would maybe - - - they would maintain the money

1 to pay the court examiner, to pay the premiums on the
2 bonds which would need to continue for the
3 guardianship account. They may have to pay
4 attorneys' fees. They would have to pay the
5 accountant. Those are - - -

6 JUDGE PIGOTT: I - - - I think - - -

7 MS. O'BRIEN: - - - some of things that may
8 in fact have to be - - - I apologize.

9 JUDGE PIGOTT: No, I'm interrupting you. I
10 - - - I think one of the concerns is that why - - -
11 why wouldn't a nursing home apply for a guardianship
12 for an IP early enough so then they get, you know, a
13 guardian in and take care of themselves? In other
14 words, if - - - there's allegations in - - - in the
15 past that - - - that nursing homes have done that.
16 They've - - - you know, they've fi - - - they've
17 filed for a guardianship. They get a guardian
18 appointed, and that guardian then does what the - - -
19 what the nursing home would like to have done and get
20 their bills paid, while the County and everybody else
21 is sitting outside.

22 MS. O'BRIEN: Well, and that - - - what
23 would happen if the guardian was allowed to expend
24 all the assets in - - - in - - - in the account - - -

25 JUDGE PIGOTT: But where - - - where do you

1 draw the line, though?

2 MS. O'BRIEN: - - - prior to transfer to
3 the estate.

4 JUDGE PIGOTT: I mean, counsel makes an
5 argument, I mean, this - - - these are bills; they
6 ought to be paid. And you, of course, making your
7 argument, but 81.44 must mean something to - - -

8 MS. O'BRIEN: It means that it's for the
9 administrative costs of the guardianship account, and
10 then the other - - - all those assets that are not
11 for that would go to the estate, which then would be
12 determined in - - - on the - - - in the order in
13 which is paid and how much for everybody was going to
14 be paid.

15 And Your Honor, if I may just close up?

16 CHIEF JUDGE LIPPMAN: Finish up, go ahead,
17 counsel.

18 MS. O'BRIEN: Yes, thank you. A private
19 entity's failure to preserve its rights should not
20 result in an inability of Medicaid to recoup from an
21 available resource, which is what an estate is, funds
22 that are vital for its continued assistance. And
23 this is not - - - and 448 - - - 81.44 is not an
24 expansion of rights.

25 CHIEF JUDGE LIPPMAN: Okay, counsel.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MS. O'BRIEN: Thank you, Your Honor.

CHIEF JUDGE LIPPMAN: Thanks, counsel.

Thank you both; appreciate it.

(Court is adjourned)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Shannon, No. 80, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street

Suite # 607

New York, NY 10040

Date: May 6, 2015