

Decided on May 30, 2008

**Supreme Court, Queens County**

**In the Matter of the Application of Leonard Davis for  
the appointment of a Guardian for the Person and  
Property of Edward Davis An Alleged Incapacitated  
Person**

100079/08

The attorney of record for the Petitioner is:

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Charles J. Thomas, J.

On April 21, 2008, Leonard Davis filed a Petition for the appointment of a Guardian for his brother, Edward Arnold Davis. Edward Davis is currently living in the Veteran's Home in St. Albans, Queens. The Petition was filed in Kings County under Index No.100079/08. On April 28, 2008 the Court in Kings County issued an order, *sua sponte*, transferring the action to Queens County pursuant to Mental Hygiene Law Section 81.05 (a). Section 81.05(a) of the Mental Hygiene Law provides as follows:

(a) "A proceeding under this Article shall be brought in the Supreme Court within the judicial district, or in the County Court of the County in which the person alleged to be incapacitated resides, or is physically present. If the Person alleged to be incapacitated is being cared for as a

resident in a facility, the residence of that person shall be deemed to be in the County where the facility is located and the proceeding shall be brought in that County, subject to application by an interested party for a change in venue to another county because of the inconvenience of the parties or witnesses or the condition of the person alleged to be incapacitated".

Mental Hygiene Law Section 81(7) does not contain any provision for a change of venue because the matter is venued in an improper county. The only statute which provides for a change of venue, because of an improper county, is CPLR Section 510 (1), which states:

"The Court, upon motion, may change the place of trial of an action where: [\*2]

(1) "The County designated for that purpose is not a proper County".

Any argument that CPLR Section 510 does not apply in Article 81 matters is specious as the result would remain same since a change of venue for an improper County is not permitted pursuant to Section 81.07 but only by CPLR Section 510 and that Section clearly reserves the right to change venue to a party and only upon motion.

The Appellate case law confirms this and has repeatedly admonished trial level courts for acting in violation of the statute. In *Nixon v. Federated Department Stores, Inc.*, 170 AD2d 659, the Appellate Division Second Department found: "[t]he Court abused its discretion in changing venue *sua sponte* to New York County - a venue requested by no one - since CPLR Section 510(1) authorizes a Court to change venue only "upon motion", and not on its own initiative." (Supra, 660).

The Court has more recently reaffirmed its position in *Mtr. Of Travelers Indemnity Co. Of Illinois v. Nnamani*, 286 AD2d 769; and *Mtr. Of Phoenix Insurance Co., et al v. Casteneda et al*, 287 AD2d 507. In both cases where the trial Court dismissed the action because of the improper venue [the Respondent resided in Queens County and the action was commenced in Nassau County] the Appellate Division reversed and reinstated the Petition. There the Court held that "in the absence of a motion or consent, *the Court has no authority to sua sponte change venue*," (emphasis added, supra, 508). "Contrary to the Court's conclusion, its inherent power to control its calendar does not include the authority to *sua sponte* dismiss an allegedly improperly venued proceedings", supra, 508. While the *Phoenix* and *Travelers* cases involved dismissals there is no difference whether the action taken by the Court is dismissal or a transfer to change the venue.

In *Mtr. Of Travelers v. Nnamani* the Court held while specific venue provisions supercede the general venue, provisions for special proceedings, "the CPLR Article 5 procedures for changing venue" remains applicable, *Nnamani*, supra, 770.

MHL Section 81.07, the specific venue statute, only allows for a change of venue when "subject to application by an interested party for a change in venue to another county because of the inconvenience of the parties or witnesses or the condition of the person alleged to be incapacitated."

What is of particular concern to this Court, is the inordinate delay caused by the King's County Court's action. This matter is a summary proceeding and should be considered expeditiously by the Court to which it is presented. Consideration of the Order to Show Cause should not be delayed almost two (2) months as is the case here.

Therefore, the Court having considered the Petition and its supporting papers is signing the accompanying Order to Show Cause commencing the Petition. Said Petition shall be returnable in Kings County in the Part where it was originally commenced.

The Clerk of Queens County shall send the file of this action to the Clerk of Kings County where said action shall proceed under the original Kings County Caption and Index Number. [\*3]

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CHARLES J. THOMAS, J.S.C.

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