

**Burns-Smith v Mount Sinai Hosp.**

2008 NY Slip Op 32506(U)

September 10, 2008

Supreme Court, New York County

Docket Number: 0015432/1992

Judge: Stanley L. Sklar

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Stanley L. Sklar  
Justice

PART 29

Burns - Smith

INDEX NO. 15432/92

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

- v -  
NY Sinai Hosp, et al.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
_____
_____
_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with memorandum decision of today.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9/10/08

[Signature]  
STANLEY L. SKLAR J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 29

-----X  
RODRICK BURNS-SMITH,

Plaintiff,

Index No.: 15432/92

-against-

THE MOUNT SINAI HOSPITAL, et al.,

Defendant.

-----X

**SKLAR, J.:**

This is an application by Kim Burns, the mother of the once infant plaintiff, to relieve Brian J. Farrell, Esq. (Farrell) as the Temporary Successor Guardian for the former infant, Rodrick Burns-Smith, and reinstate her as Rodrick's "guardian".

Farrell was appointed by order of Justice Sherry Klein-Heitler dated November 29, 2007. According to Farrell's affirmation, and the settlement papers in the County Clerk's file, this matter was settled in August 2000 for \$900,000, consisting in part of a lump sum payment, the net proceeds of which were to be paid to Kim Burns, mother and natural guardian of Rodrick Burns-Smith, jointly with an officer of Chase Manhattan Bank (now JPMorgan Chase Bank). The settlement also included an annuity of \$1,200 per month for 174 months, starting December 1, 1999. Payments 1 to 50 were to be paid to the mother, jointly with an officer at JP Morgan Chase Bank, to be held in an account for Rodrick's benefit, subject to further court order. Also, an application was to be made to the Court before Rodrick reached 18 to decide whether the payments should be made to Rodrick or a guardian.

In like fashion payments 51 to 102 were to be paid to the mother jointly with an officer of Dime Savings Bank (now Washington Mutual Bank). Starting May 31, 2014, the sum of \$4,833.32 monthly was to be paid to Rodrick or his guardian for 20 years or for Rodrick's life, whichever is longer.

In or about May 2006 it was discovered that all of the funds deposited in JPMorgan Chase had been withdrawn, amounting to \$103,500.81. Also, \$25,575.00 had been withdrawn from Washington Mutual Bank.

In addition, "it was determined that Kim Burns had cashed the annuity checks for March, April and May, 2004, totaling \$3,600". A separate order provided that Kim Burns would repay those funds. Orders then put a hold on the accounts and directed the cessation of annuity payments.

Farrell learned that Rodrick attended the Westchester School for Special Children (WSSC) in Yonkers. Also, he was in the custody of Family Support Systems Unlimited, Inc. (FSSU), was in foster care and was then living in Queens. Rodrick at first declined to meet with Farrell. Kim Burns called Farrell and advised "that she was now out of jail and wished to be reinstated as her son's guardian".

Farrell finally met with Rodrick at his school on June 6, 2008. Farrell asserted that "it is apparent after only a short time that he has significant cognitive deficiencies. Since becoming 18, Rodrick signed himself out of FSSU, but was going to continue at the school". (Farrell aff. ¶ 19).

Farrell demanded that the two banks pay the withdrawn funds. He, after many discussions, agreed to accept 80% of the withdrawn funds.

Farrell notes (Aff, p. 28) that there is an action pending against Kim Burns in the Family Court, New York County, Docket No. N-03255-57/07, in which a hearing is scheduled for October 2008. He recommends against a decision herein until after that hearing, since it might substantially impact the relief Kim Burns seeks on this application. However, this Court believes that in light of the denial herein of her application, it is not necessary to wait for the Family Court's decision. The Court must consider the withdrawals from the two bank accounts, and also consider that Kim Burns cashed the annuity checks for March, April and May, 2004, totaling \$3600, which was to have been repaid. Even if I were to assume, arguendo, that Kim Burns had nothing to do with the withdrawals from the banks, it appears clear that Kim Burns cashed the March, April and May 2004 checks. Kim Burns' current application fails to assert that those sums have been repaid.

Rodrick is now over 18 years of age. Farrell is only the temporary guardian of Rodrick. If Rodrick needs a permanent guardian, that is, one appointed pursuant to Mental Hygiene Law, Article 81, an application for such relief must be made to an appropriate Supreme Court (usually in the county of residence of the alleged incapacitated person) and to a part in that court that handles Article 81 proceedings, so that Rodrick has the full protections of that article. An Article 81 guardian is very different from a temporary guardian. The information in Farrell's affirmation about Rodrick being in the WSSC, reinforced by Farrell's impression after meeting with Rodrick, strongly suggests that a separate proceeding should be made to an appropriate court and part pursuant to Mental Hygiene Law Article 81 to determine whether a guardian of Rodrick's property and/or person should be appointed. This Court's first responsibility is to him and it is critical to have that determination made. If Kim Burns has anything to say when that application

is made, she may make an appropriate submission to that court. If she believes that a guardianship is appropriate, and if she still feels that she should be appointed guardian, she may so indicate, including whatever, if anything, she wishes to indicate about the withdrawal of funds from the two banks and whether she has repaid the sum of \$3,600 (representing the annuity checks of March, April and May 2004) as directed by another Justice of this Court. The timing realities of an application for the appointment of a guardian should permit the completion of the hearing scheduled for October 2008 in the Family Court, New York County, against Kim Burns before resolution of any application for the appointment of a guardian for Rodrick. It is requested that Mr. Farrell institute, after appropriate preparation, such proceedings pursuant to Article 81 for the appointment of a guardian of the property, and if deemed appropriate of the person as well, of Rodrick Burns-Smith.

In light of the foregoing, the application of Ms. Burns to discharge Farrell and reinstate herself as "guardian" is denied.

Settle order.

Dated: September 10, 2008  
60 Centre Street  
New York, NY



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J.S.C.

**STANLEY L. SKLAR**