

Goldstein v New York & Presbyt. Hosp.
2018 NY Slip Op 32062(U)
August 22, 2018
Supreme Court, New York County
Docket Number: 805321/17
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 11

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 ROBYN GOLDSTEIN, by SAUL GOLDSTEIN, Curator Ad
 Personam and Curator Bonis (Guardian of the Person and the
 Property) of ROBYN GOLDSTEIN, Pursuant to the High
 Court of South Africa,

INDEX NO. 805321/17

Plaintiff,

-against-

THE NEW YORK AND PRESBYTERIAN HOSPITAL,
 NEW YORK-PRESBYTERIAN/WEILL CORNELL
 MEDICAL CENTER, AJAY GUPTA, M.D., ROBERT
 DAVID ZIMMERMAN, M.D.M GLORIA C. CHIANG,
 N.D., LINDA ANNE HEIER, M.D., J. LEVI CHAZEN, M.D.,
 BABKA NAVI, M.D., DANA LEIFER, M.D., THEODORE H.
 SCHWARTZ, M.D., JUSTIN SCHWARZ, M.D., NEAL S.
 PARIKH, M.D., IBRAHIM HUSSAIN, M.D., AARON
 GUSDON, M.D., ROHAN RAMAKRISHNA, M.D.,
 ALEXANDRA TATUM-HANNA, M.D., OBAID AHMAD
 SIGHER, P.A., and SARAH KENWORTHY, R.N.,

Defendants.

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 JOAN A. MADDEN, J.:

Defendants Ajay Gupta, M.D., Gloria C. Chiang, M.D., Linda Anne Heier, M.D., J. Levi
 Chazen, M.D., Neal S. Parikh, M.D. and The New York and Presbyterian Hospital s/h/a The
 New York and Presbyterian Hospital, New York Presbyterian/Weill Cornell Medical Center
 (collectively the “moving defendants”), move for an order pursuant to CPLR 3211(a)(3)
 dismissing the action on the ground that plaintiff lacks the legal capacity to commence and
 prosecute this action. Plaintiff opposes the motion and cross-moves for an order pursuant to
 Mental Hygiene Law §81.81 appointing Saul Goldstein as an ancillary guardian of the property

of the incapacitated adult Robyn Goldstein, located in New York. The moving defendants oppose the cross-motion.

For the purpose of the instant motion and cross-motion, the following facts are taken from the “Founding Affidavit” of Saul Goldstein (“Saul”) sworn and dated October 19, 2016. Plaintiff Robyn Goldstein (“Robyn”) resides in South Africa and on February 23, 2015, when she was 37 years old, she traveled by plane to New York City. She had a headache on the plane, which persisted and progressively worsened while in New York City. On February 27, after speaking on the telephone to her husband, Saul Goldstein, that her body was “feeling a bit limp,” she took a taxi to Weill Cornell Medical Center. As she was exiting from the taxi outside the emergency department, she had a seizure and was admitted to the hospital. When Saul arrived in New York City on February 28, he was advised that Robyn had suffered a “cortical vein thrombosis” or “burst vein in the brain.” According to Saul, Robyn appeared to be stable during the weekend of February 28, but on March 2, her condition “deteriorated rapidly” to the extent she could not move her body. Medical scans revealed that a mass was growing on her brain and her brain was swelling.

On March 4, the medical staff advised Saul that they were “unsure of her diagnosis” and would conduct further medical tests. Early in the morning on March 7, Robyn suffered a “conification or severe and rapid swelling of her brain.” Emergency surgery was performed to remove the right side her skull. During surgery, an abscess was discovered on the top of her brain and the abscess was drained. When her condition did not improve sufficiently, a second surgery was performed to drain the abscess again. Robyn remained in intensive care for three

weeks, and was then transferred to the high care unit where she was in a “state of complete disorientation and confusion,” and the left side of her body was “completely non-functioning.” Scans showed “considerable swelling” of the brain. Although the damage could not be assessed until after the swelling abated, Saul was advised that Robyn “had probably suffered a number of mild strokes and of particular concern was the brain tissue in contact with the abscess.” In or about mid-April, Robyn was transferred to a rehabilitation unit at Mt. Sinai Hospital, where she was taught how to perform basic bodily functions.

At the end of May 2015, Robyn was considered sufficiently stable to return to South Africa. She was admitted to the neuro-rehabilitation unit of Netcare Rosebank Hospital in Johannesburg and subsequently underwent a number of surgical procedures including the insertion of a balloon in her skull that was inflated weekly to stretch her skin around the area where her skull had been removed; and plastic surgery in December 2015 to insert a plastic plate into her head to replace the portion of the skull that had been removed. In August 2015, Robyn was discharged to her home where she presently resides with 24-hour care.

In October 2016, Saul commenced proceedings in South Africa for his appointment as “curator bonis” and “curator ad persona” for Robyn, which is essentially equivalent to a guardian of the person and property in New York.¹ On October 31, 2016, Judge Wepner of the High Court of South Africa issued an order appointing Aasifa Saldulker as curator ad litem to investigate and report to the court as to whether Robyn Goldstein is of sound mind and capable

¹The terms “curator ad persona” and “curator ad personae” are used interchangeably in the South Africa court proceedings.

of managing her own affairs, and whether Saul Goldstein should be appointed as curator bonis and curator ad persona.² On December 2, 2016, the curator ad litem filed a 36-page report recommending that Robyn Goldstein “be declared as being of unsound mind and incapable of managing her own affairs” and that Saul Goldstein “be appointed as curator bonis and curator ad personae.” On December 28, 2016, the Master of the High Court of South Africa filed a report recommending Saul Goldstein’s appointment. On February 23, 2017, Judge Haupt of the High Court of South Africa issued an order declaring Robyn Goldstein “incapable of managing her affairs,” and appointing Saul Goldstein, as curator bonis and curator ad persona. Among the powers of the curator bonis specified on the order is the power to “institute or defend proceedings which may be necessary in the interest of the Patient [Robyn Goldstein] or for the due and proper administration of her estate.”

On August 24, 2017, plaintiff, denominated as “Robyn Goldstein by Saul Goldstein, as Curator Ad Personam and Curator Bonis (Guardian of the Personal and Property) of Robyn Goldstein, Pursuant to the High Court of South Africa” commenced the instant action for medical malpractice. The complaint alleges defendants departed from the standard of care by failing to timely and properly diagnose and treat the brain abscess, and as a result of the delay, Robyn sustained severe injuries, including brain swelling and numerous strokes, which caused impaired mental status and cognition, paresis, plegia, loss of short term memory, impaired long

²The order also authorized the curator ad litem to act in her *nomino officio* capacity in a divorce action to be instituted by Saul Goldstein against Robyn Goldstein, and “to take all the necessary steps to act in such capacity, including (inter alia), to receiving the service of the divorce summons, in my *nomino officio* capacity as the curator *ad litem* and to negotiate and sign a settlement agreement with the applicant [Saul] on the patient’s [Robyn’s] behalf.”

term memory, inability to walk unaided, loss of peripheral vision in both eyes, and inability to complete any activities of daily living, including feeding, dressing and bathing.

Several defendants are now moving to dismiss the action, asserting plaintiff lacks the legal capacity to commence and prosecute the action. Moving defendants argue there is no indication Saul Goldstein submitted a foreign guardianship application in New York, and since he has not obtained guardianship status of Robyn Goldstein as recognized by the courts in New York, he does not have the legal capacity to bring or prosecute the instant action.

Plaintiff opposes the motion, and cross-moves for an order pursuant to Mental Hygiene Law §81.81 appointing Saul Goldstein as an ancillary guardian of the property of the incapacitated adult Robyn Goldstein, such property consisting solely of the cause of action for medical malpractice in the instant action, with the power to continue to prosecute this action to conclusion. Plaintiff asserts that an ancillary guardianship is necessary to protect Robyn's property interest in this medical malpractice action, and since all of her personal affairs are fully provided for under the South Africa court order, there is no need to consider the appointment of a guardian of the person to act in New York.

In support of the cross-motion, plaintiff submits sworn statements from Robyn's mother, father, and five sisters, all consenting to Saul's appointment as an ancillary guardian for Robyn in this action; a certified copy of the South Africa court order appointing Saul Goldstein as the curator bonis and curator ad persona for Robyn Goldstein; and certified copies of the complete "bundle" of papers comprising the High Court of South Africa file on Saul's application in that court. That "bundle" of papers includes the Master's Report, the Report of the Curator Ad

Litem, and the documents the curator ad litem relied on, consisting of affidavits from Saul Goldstein, Nicole Paluch (Robyn's friend of 23 years), Joan Struck (Robyn's mother), and Selwyn Struck (Robyn's father); and reports or sworn statements from Robyn's treating physicians and therapists, Dr. Isaacs (neurologist), Dr. Cox (specialist physician), Yvonne Vermaak (counselling psychologist), Janine Gonlag (occupational therapist), Kalli Haggiyannes (speech therapist), and Somarie Steyn (speech therapist). Plaintiff also submits a copy of Section 57 of the Uniform Rules of the High Court which authorizes the South Africa court to appoint a curator ad bonis and curator ad persona for persons who are "mentally incapacitated," and sets forth the procedural and substantive requirements for such appointment.

New York Mental Hygiene Law §81.18 is entitled "Foreign guardian for a person not present in the state," and "permits the appointment of a property guardian for someone who is absent from New York State but for whom another jurisdiction has appointed a guardian. Such application is directed to the court's sound broad discretion." In re Gabr, 39 Misc3d 746 (Sup Ct, Kings Co 2013). MHL §81.18 provides as follows:

Where the person alleged to be incapacitated is not present in the state and a guardian, by whatever name designated, has been duly appointed pursuant to the laws of any other country where the person alleged to be incapacitated resides to assist such person in property management, the court in its discretion, may make an order appointing the foreign guardian as guardian under this article with powers with respect to property management within this state on the foreign guardian's giving such security as the court deems proper. In its discretion the court may utilize the provisions of article eighty-three of this title.

The parties agree that the South Africa court order appointing Saul as curator bonis and curator ad personae for Robyn, is not entitled to full faith and credit. See In re Gabr supra; In re

Sulzberger, 159 Misc2d 236 (Supt Ct, NY Co 1993). Pursuant to MHL §81.18, however, New York courts have discretion to grant comity to a foreign order if the foreign jurisdiction provides the alleged incapacitated person (“AIP”) with “substantially similar due process and substantive rights as exist under MHL Art. 81.” In re Gabr supra. The heightened protections afforded under Mental Hygiene Article 81 are compared with the procedures of the foreign jurisdiction to determine what treatment of the foreign guardian is appropriate on a case-by-case basis. See id. The foreign proceedings need not be identical to those in New York, but the foreign jurisdiction must have afforded the incapacitated person “substantially similar due process and substantive rights.” Id. If the foreign jurisdiction is found to have not provided the AIP with sufficient due process and substantive rights, the foreign guardianship is not entitled to comity and a full de novo Article 81 proceeding and hearing are required. See id.

Based on the submissions and a review of the guardianship procedures in South Africa, plaintiff has made a sufficient showing for the appointment of Saul Goldstein pursuant to MHL §81.18 as foreign guardian of the property of Robyn Goldstein in New York, for the purpose of prosecuting her claim for medical malpractice in the instant action to conclusion. While New York and South Africa guardianship procedures are not identical, under the circumstances presented, this Court is persuaded that the procedure in South Africa adequately protected Robyn Goldstein’s substantive and due process rights.

As described above, the court in South Africa appointed a curator ad litem who conducted a thorough fact-finding investigation in which she interviewed, either in-person or by telephone, Robyn’s parents, a long-time friend, Robyn’s *au pair*, and numerous treating

physicians and therapists; most of those people also provided affidavits or written reports.³ The curator ad litem additionally met Robyn in person during an occupational therapy session, and interviewed Saul and his father, a retired judge, who was the proposed alternative guardian.

The curator ad litem issued a 36-page report detailing each interview and her findings as to Robyn's physical, mental and emotional condition in support of her recommendation that Robyn "ought to be declared as being of unsound mind and incapable of managing her own affairs." The curator ad litem further found that "[i]n almost every interview I conducted, there was overwhelming support" for Saul's appointment, and noted that ^{Saul's} ~~Saul's~~ father, retired Justice Goldstein, "who is suggested as an alternative curator, indicated to me that the applicant was best suited." The curator ad litem concluded that "[i]n my view, the applicant is the only suitable candidate for the appointment."

Although not identical, the role and responsibilities of the curator ad litem in South Africa are substantially similar to those of a court evaluator in a New York Article 81 proceeding. Like a court evaluator, the curator ad litem is appointed by the court, conducts an independent investigation and assessment, and reports back to the court with recommendations.⁴

³Robyn's neurologist, Dr. Isaacs, stated that Robyn has "very poor short-term memory," she "repeats herself constantly," forgets what has been said, and cannot perform any "high cognitive functions due to the cortical damage." Dr. Isaacs also states that with the "severe cerebral damage" from the cerebral abscess, which is permanent, it is "unlikely" Robyn will improve further. Robyn's physician, Dr. Cox, stated that Robyn has severe and permanent cognitive impairment, no short-term memory, is unable to retain information, constantly repeats herself, has little memory of her illness, is "unlikely to recover further and her outlook in terms of cognitive function [is] poor and permanent."

⁴In reply, plaintiff submits an affirmation from Jane Andropoulos, an Attorney of the High Court of South Africa, who represented Saul Goldstein in the South Africa guardianship proceeding. She describes the guardianship process, including the role of the curator ad litem, as follows:

In opposition, moving defendants focus on the differences between the New York and South Africa procedural requirements for the appointment of a guardian of the person or property. The primary difference is that in South Africa the proceeding is ex parte, so the “patient” is not served, whereas in New York the alleged incapacitated person (“AIP”) is personally served with the Article 81 petition, a hearing is held in the presence of the AIP, either at the courthouse or where the AIP resides, so the AIP has an opportunity to participate in the hearing and oppose the application. In South Africa, however, even though the proceeding is ex

I confirm that the process followed in South Africa with regards to the appointment of guardians in the form of a Curator Bonis and Curator ad Personam is a rigorous process, which bears scrutiny by the High Court at the highest level in light of the fact that the person who forms the subject matter of the application is incapable of managing their own affairs. In this matter Mrs. Goldstein is severely cognitively impaired and this is dealt with extensively in the comprehensive report filed of record by the Curator ad Litem and in the supporting affirmations from her treating doctors. . . . I confirm that the Curator ad Litem’s report was prepared by an Advocate of the High Court who has no interest in the matter, who exercised her professional and statutory obligation to conduct herself in an independent manner, to uphold the Constitution with absolute integrity and scrupulous honesty. . . . I further confirm that the High Court exercised its discretion not to have Mrs. Goldstein before it. This was in light of the fact that Mrs. Goldstein is severely cognitively impaired and the High Court determined that it would be more traumatic for her to appear before it after having heard the oral delivery of the Curator ad Litem’s report to it. The Curator ad Litem was present in the High Court when her report was presented before Mr Goldstein was appointed as Curator Bonis and Curator ad Personam, It was only after she had presented her report that the appointment was affirmed. In the circumstances, I confirm that Mrs. Goldstein receives the utmost care and attention, as recorded in Mr. Goldstein’s affidavits, all of which facts are attested to and confirmed by independent persons. It is in Mrs. Goldstein’s interests that Mr. Goldstein, who has been appointed in South Africa a her Curator Bonis and Curator ad Personam be recognized as her Guardian in the Supreme Court of New York. His appointment as Mrs. Goldstein’s Curator Bonis and Curator ad Personam is supported by Mrs. Goldstein’s family.

parte, Section 57 of the Uniform Rules of the High Court of South Africa requires the curator ad litem to interview the patient, and inform the patient “of the purpose and nature of the application unless after consulting a medical practitioner . . . he is satisfied that this would be detrimental to the patient’s health.” Section 57 also requires a hearing on the application, when the “court may require the attendance of the . . . patient” and “upon consideration of the application and the reports of the curator ad litem . . . the court may direct service of the application on the patient or declare the patient to be of unsound mind and incapable of managing his own affairs and appoint a suitable person as curator to his person or property to both.” Just as in New York, these procedural requirements are designed to ensure that the patient’s due process rights and substantive rights are protected.

Defendants additionally object that Saul is no longer married to Robyn having secured a divorce in connection with the guardianship proceedings in South Africa. Citing In re Gabr, supra, defendants assert that under Article 81, the “social relationship” between the AIP and the proposed guardian must be “explored.” Defendants’ reliance on In re Gabr is misplaced, as the facts in that case are vastly different from facts in the case at bar. In Gabr, the court concluded that the foreign guardianship order was not entitled to comity since the proceedings in Egypt conflicted both procedurally and substantively with New York law.⁵ For that reason, the court

⁵The court in Gabr found that the Egyptian Appellate Court based “its decision on physical changes in the alleged incapacitated brain without addressing, as would be statutorily required in this jurisdiction, the AIP’s functional level as well as any safeguards in place to protect him.” The court also found that Egyptian law was gender-biased since only a man can be appointed as guardian, and New York law is “gender neutral and, in fact, lists the spouse as the first appointee.”

held a full de novo Article 81 proceeding which included the appointment of a court evaluator and a hearing at which the AIP, his wife and his son, the foreign guardian, testified; the court determined the son could not be appointed as guardian of his father's property in New York.⁶ In contrast, in the case at bar, the South Africa proceedings adequately protected Robyn's due process and substantive rights, so the foreign guardianship order is entitled to comity, and a full de novo Article 81 proceeding is not necessary where the "social relationship" between the AIP and the proposed guardian would be examined.

Notwithstanding the foregoing conclusion, the Court notes that the South Africa court explicitly considered the effect of the divorce on Saul's continuing relationship with Robyn. As noted above, the divorce was an issue at the outset of the South Africa proceedings, since the court order appointing the curator ad litem also authorized her to act in her *nomino officio* capacity in the divorce action. The curator ad litem's report states that the divorce action was settled and as part of the settlement, Saul agreed to "continue to provide financial support to the patient [Robyn] with a view to maintain the constant medical assistance, care and support that she is receiving and to make payment of all of her expenses, now and in the future arising until her death," including, but not limited to, living, housing, clothing, recreational, medical and

⁶The Gabr court denied the son's appointment as an ancillary guardian over his father's property in New York, which consisted of a joint bank account with his wife, into which his social security and pension payments were deposited. The court found that the son had no means of support, had declared bankruptcy, had not supported his father or his father's wife for years, and had "extreme animus" towards his father's wife. The court further found that there was no need to appoint a property guardian in New York since the "AIP by allowing his spouse access to his New York funds, has basically exercised his right to make an appropriate advanced directive as to said property."

dental expenses, and the “costs for the continued and/or future employment of all the necessary staff members to provide her with 24-hour a day assistance and care.”

Thus, since Robyn’s procedural and substantive rights were adequately protected in South Africa, and given the circumstances presented, where the overwhelming evidence establishes that Robyn is severely cognitively impaired, her parents and sisters all consent in writing to Saul’s appointment as ancillary guardian of Robyn’s property in New York, Robyn has no property in New York other than her interest in this malpractice action, and the purpose of the ancillary guardianship is limited to the prosecution of this malpractice action to conclusion, the Court concludes that plaintiff has made a sufficient showing under Mental Hygiene Law §81.18 for the appointment of Saul Goldstein as ancillary guardian of the property of Robyn Goldstein in New York.

In view of the foregoing determination, defendants’ motion to dismiss based on plaintiff’s lack of legal capacity to commence and prosecute this action, is denied as moot.

Accordingly, it is

ORDERED that defendants’ motion to dismiss is denied as moot; and it is further

ORDERED that plaintiff’s cross-motion is granted; and it is further

ORDERED that pursuant to Mental Hygiene Law §81.18 Saul Goldstein is hereby appointed guardian of the property of the incapacitated adult Robyn Goldstein in New York, such property consisting solely of the cause of action for medical malpractice alleged in the complaint in this action, with all powers with respect to property management in this state, including the power to continue the prosecution of this action to conclusion; and it is further

ORDERED that the filing of a bond is dispensed with; and it is further

ORDERED that the caption is amended to reflect the appointment of the guardian, and

the amended caption shall read as follows:

SAUL GOLDSTEIN, as Guardian of the Property of
the Incapacitated Adult ROBYN GOLDSTEIN,
in New York consisting solely of the Cause of Action
for Medical Malpractice in this Action,

Plaintiff,

-against-

THE NEW YORK AND PRESBYTERIAN HOSPITAL,
NEW YORK-PRESBYTERIAN/WEILL CORNELL
MEDICAL CENTER, AJAY GUPTA, M.D., ROBERT
DAVID ZIMMERMAN, M.D.M GLORIA C. CHIANG,
N.D., LINDA ANNE HEIER, M.D., J. LEVI CHAZEN, M.D.,
BABKA NAVI, M.D., DANA LEIFER, M.D., THEODORE H.
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ALEXANDRA TATUM-HANNA, M.D., OBAID AHMAD
SIGHER, P.A., and SARAH KENWORTHY, R.N.,

Defendants.

and it is further

ORDERED that plaintiff shall forthwith serve a copy of this order on the Clerk of Trial
Support and the County Clerk so that their records can be changed to reflect the amendment to
the caption; and it is further

ORDERED that within 20 days of the date of this decision and order, defendants shall
serve and file their answer(s); and it is further

ORDERED that the parties shall appear for a preliminary conference on October 4, 2018
at 11:00 a.m., in Part 11, Room 351, 60 Centre Street.

DATED: August 22, 2018

ENTER:



J.S.C.

HON. JOAN A. MADDEN
J.S.C.