



Unreported Disposition

31 Misc.3d 1233(A), 930 N.Y.S.2d
177 (Table), 2011 WL 2139089
(N.Y.Sup.), 2011 N.Y. Slip Op. 50969(U)

**This opinion is uncorrected and will not be
published in the printed Official Reports.**

***1** In the Matter of Walter K.H., Petitioner
for the Appointment of a Guardian of
the Person and Property of Rosalie
H., an Alleged Incapacitated Person

900763/2010
Supreme Court, Erie County
Decided on May 31, 2011

CITE TITLE AS: Matter of Walter K.H.

ABSTRACT

[Incapacitated and Mentally Disabled Persons
Guardian for Personal Needs or Property
Management](#)

Breach of Fiduciary Duty by Attorney-in-Fact
and Health Care Agent

Walter K.H., Matter of, 2011 NY Slip
Op 50969(U). Incapacitated and Mentally
Disabled Persons—Guardian for Personal
Needs or Property Management—Breach of
Fiduciary Duty by Attorney-in-Fact and Health
Care Agent. (Sup Ct, Erie County, May 31,
2011, Marshall, J.)

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OPINION OF THE COURT

Frederick J. Marshall, J.

Walter H., the son of Rosalie H., has petitioned this Court for an order appointing a guardian of the person and property of Rosalie H. pursuant to Article 81 of the Mental Hygiene Law. He alleges malfeasance on the part of his sister, Karen H., who was designated by Rosalie H. as her Attorney-in-Fact and health care agent in 1994. The respondents, Karen H., her sister Kimberly H. and her brother, Kevin H., oppose the petition on the grounds that the AIP, Rosalie H. is not in need of a guardian because she has provided for the handling of her personal and financial affairs by means of a Power of Attorney and Health Care Proxy.

Rosalie H., it is agreed, was wholly competent in 1994 when she executed the Power of Attorney and Health Care Proxy. The Power of Attorney, dated December 16, 1994, is a statutory short form Power of Attorney commonly known as a “durable springing power of attorney” designed to take effect should the Principal become incapacitated to the extent that she is unable to conduct her affairs in a competent manner. This “durable

springing power of attorney” provided the agent, Karen H., with the authority to handle all business and financial *2 transactions, as well as the authority to manage “personal relationships and affairs”. Rosalie H. initialed each and every type of transaction authorized by the document. However, the document did not authorize the attorney-in-fact to make any gifts to the agent or anyone else. Karen H. was the sole designated agent and no substitute agent was named in the event Karen H. should die or become otherwise unable to serve.

Rosalie H. also executed a Health Care Proxy on December 16, 1994 which named Karen H. as her health care agent and also named her daughter, Kimberly H. as alternate health care agent.

Both of these documents went unused for ten years, until December 2004 when the AIP, Rosalie H., suffered a stroke. She had been a widow for many years and after her hospitalization and rehab, Rosalie H. was placed in a senior independent living facility known as Montgomery Park. The placement was made by her attorney-in-fact, Karen H. At the hearing of this matter, Walter H. testified that he told Karen that he did not believe that this facility was suitable or adequate for Rosalie H. since he felt she needed more assistance with medications, meals and the daily tasks of life. He testified that Karen H. disagreed with him and told him that she would provide people to assist in the care of Rosalie H. At that time, Rosalie H. had a male companion who went to see Rosalie on a regular basis. Karen H. hired a health care aide, Joan W. who, for various reasons, did not serve adequately. Walter H. also provided care for his mother and went

to visit her on a daily basis, according to his testimony. Karen H., who lived out of town at the time of the stroke, returned to live in the Buffalo area in 2006 and she, too, assisted with her mother's care. However, she refused to accept Walter H.'s advice that their mother should be moved to a facility with a higher level of care due to her physical disabilities and now-increasing mental disabilities.

During subsequent years, and while a resident at Montgomery Park, Rosalie H. fell twice, breaking her wrist once, and had various other, medical difficulties, including incontinence. She became very disagreeable with strangers and would not readily accept care offered by strangers. She may also have had difficulty taking her medications on a regular schedule.

Walter H. has also made complaints regarding Karen H.'s handling of the AIP's financial affairs. He alleges that she has breached her fiduciary duties as attorney-in-fact by retaining her mother's automobile (a Lexus) for her own use and has used her mother's assets to pay for gasoline, automobile maintenance and automobile insurance. It is uncontested that Rosalie H. has not driven an automobile since her stroke. He also alleges that Karen H. has paid for airline tickets for her siblings to return home and has made various gifts to herself and the siblings (which, upon examination of the evidence, appear to be birthday and Christmas gifts).

He also claims that after his mother's home was sold in 2005, that Karen H. put most of Rosalie's belongings in storage where they remain today. The cost of storage is over \$200 per month.

He also alleged that his brother, Kevin, had taken expensive paintings off his mother's walls and that he cashed a \$1,000 bond belonging to his mother and that Karen had done nothing about either of these transgressions.

Walter also claims that he and his sister, Karen, who is an attorney admitted to practice law in New York State, visited an estate attorney who advised them that Karen should sell the car and not use it for her own personal purposes. The attorney also suggested that Karen hold an *3 estate sale to sell their mother's personal belongings rather than store them for a long period of time. They also discussed medicaid planning. Karen H. testified inconsistently at her deposition and at trial, as to what occurred during this meeting. That inconsistency leads the Court to give credence to Walter's testimony.

As to the use of her mother's car, Karen testified that she did use the car for her own personal purposes, including traveling to court appearances in connection with her law practice, but that she also used it to see her mother and perform various tasks that would benefit her mother. She also testified that she kept her mother's belongings in storage because there were certain specific bequests in her Will that she wanted to carry out when her mother died. However, the Will was never introduced into evidence.

She admitted that she did use her mother's credit card to pay for insurance, gasoline and general upkeep of the automobile. She further testified that the automobile had 39,000 miles on it at the time she started driving it and now

has about 104,000 miles on the odometer. She admitted using her mother's money to purchase airline tickets for her sister and brother, who lived out of town and thought that these expenditures were justified because then her siblings could return back to the Buffalo area to visit their mother. She denied using her credit card for her own dental bills.

Of concern to the Court is the fact that Karen H. did not produce many of her mother's financial records, including checkbook records that she kept for 2004, 2005 and 2006. She claims that her brother, Walter H., possesses these records; but Walter H. denies that. Apparently, while the two siblings were getting along, Karen had some financial records sent to Walter's home and he allegedly stored them for his sister.

A checking account transaction register from 2009 and 2010, introduced in evidence as Petitioner's Exhibit 7, confirms that Karen H. used her mother's funds to make birthday and Christmas gifts, that she paid public storage fees of \$224 per month and that she paid credit card bills in her mother's name of over \$1,000 per month on average. (See Petitioner's Exhibit 13, in evidence). Petitioner's exhibit 13 contains credit card statements for a Bank of America credit card in the name of Rosalie H. which are dated 2005 through 2010. The statements also reflect numerous gasoline, supermarket, clothing store, department store and airline ticket purchases as well. She also appeared to have used the credit card to have the car washed on a regular basis.

Respondents claim that the Court should not consider these exhibits because they are hearsay. The Court agrees that these

documents are hearsay, but Karen H. has never denied their accuracy. Moreover, even though Petitioner's counsel did not seek to have these records admitted under CPLR §4518, the Court considers them sufficiently reliable, thereby providing “good cause” to waive the technical rules of evidence. *Mental Hygiene Law* §81.12(b).

Admittedly, Walter H. was aware that his sister was using his mother's assets for these purposes and made no objection until his petition was filed. For a period of time he was even using his mother's automobile, but on a sporadic basis. Karen H. seeks to justify her use of the automobile, claiming that she has used the automobile to pick up her mother's medications, to visit her and to take her various places, such as doctor's appointments and restaurants.

In late 2009 and early 2010, Walter H. began pressuring his sister, Karen, to make a change to their mother's residential circumstances. He wanted his mother moved to a facility *4 where she would receive additional care. He felt that she needed someone to watch her very closely, to monitor her medications, and to give her assistance in dressing and taking care of her personal hygiene. Karen disagreed and felt that her mother was being properly cared for at Montgomery Park with the assistance of aides and other friends and family who were involved in Rosalie's care. Walter is also dissatisfied with Karen's choice of a medical doctor and felt that his mother should have a house doctor at the facility where she currently resides.

After Walter H. filed his petition, this Court appointed a Court Evaluator, Mr. Joseph

Augustine, Esq., who ably reported his findings to the Court. The Court also appointed Toby F. Laping, Ph.D. to evaluate the living situation of Rosalie H. and make recommendations. She recommended that Rosalie H. be moved to a secure unit in an adult care facility.¹ She expressed serious concerns about the level of care offered at Montgomery Park and felt that this was an inappropriate living situation for Rosalie. She also expressed concern about a plan offered by Rosalie's daughter, Kimberly, which involved buying a housing unit for Rosalie and having Kimberly move in with her. As reported by the Court evaluator and agreed to by all parties, Rosalie H. still suffers from the ill-effects of her stroke and late-stage dementia. A Court appointed neuro-psychologist, Dr. Ralph Benedict, confirmed these findings and found the AIP to be irritable and suspicious. He confirmed that she did not understand the nature of the guardianship petition. He further found that she was severely impaired and needed 24 hour care and supervision. Lastly, he found that she had “little to no insight into her medical condition”.

Uncontested by any party is the fact that Rosalie H. is an incapacitated person as defined in *Mental Hygiene Law* §81.02(b). In addition, the Court has taken into consideration the Court Evaluator's report and the report of Dr. Benedict. The Court finds that there is clear and convincing evidence that Rosalie H. is incapacitated and that her appearance or testimony at the trial of this action would have served no useful purpose. Despite admitting her incapacity, the respondents contend that the appointment of a guardian is unnecessary due to the existence of the Power of Attorney and Health Care Proxy. They contend that all of

the personal needs of the AIP are provided for and that the attorney-in-fact has been adequately managing the AIP's financial affairs and property. *Mental Hygiene Law* §81.02(a)(1). The Court has considered the report of the Court Evaluator and the “available resources”, including the Power of Attorney and Health Care Proxy signed by the AIP. *Mental Hygiene Law* §81.02(a)(2). See also *Mental Hygiene Law* §81.03(e).

Petitioner contends, however, that his sister, Karen H., has violated her fiduciary duties under the Power of Attorney and that it should be revoked by the Court. *General Obligations Law* §5-1510(2)(f). See also *Mental Hygiene Law* §81-29(d). He also contends that the Health Care Proxy should also be revoked because his sister is “not reasonably available, willing and competent to fulfill his or her obligations . . .” *Public Health Law* §2992(2). See also *Mental Hygiene Law* §81.29(d).

“The relationship of an attorney-in-fact to his principal is that of agent and principal and, thus, the attorney-in-fact must act in the utmost good faith and undivided loyalty toward the principal, and must act in accordance with the highest principles of morality, fidelity, loyalty and *5 fair dealing. Consistent with this duty, an agent may not make a gift to himself or a third party of the money or property which is the subject of the agency relationship. Such a gift carries with it a presumption of impropriety and self dealing, a presumption which can be overcome only with the clearest showing of intent on the part of the principal to make the gift”. *Semmler v Naples*, 166 AD2d 751 [3rd Dept.1990] Appeal dismissed 77 NY2d 936 [internal quotation marks and citations

omitted]. See also *Gorgos v Naumoff*, 301 AD2d 802 [3rd Dept.2003].

Absent any authority given in the Power of Attorney, the respondent, Karen H., was without authority to make any gifts to herself or others unless she could establish that her mother clearly intended to continue a previous pattern of gift giving. Some evidence was received that this was the case with regard to Christmas and birthday gifts. However, the respondent Karen H., went far beyond that. She retained her mother's car (still registered in her mother's name) and has continued to drive the car and derive personal benefit therefrom for almost five years. Registration, insurance, gasoline, maintenance and repairs have been paid for with her mother's assets. Yet, respondent admitted that the car was used, in large part, for her own personal purposes, including in the course of her work as an attorney. The respondent also benefitted her siblings by purchasing airline tickets for their travel back to Western New York. There was no evidence that this had occurred prior to the attorney-in-fact assuming her duties. The fact that her brother, Walter H., the petitioner herein, condoned these activities for a period of time is of no moment. The duty of a fiduciary is owed to the principal, in this case Rosalie H., not to any third party. What makes matters worse is that the respondent is an attorney and is presumed to know the law. There is further evidence that she received advice from another attorney that her use of her mother's car was inappropriate. Yet she continued to use the vehicle and use her mother's assets for expenses related to the vehicle even up to the date of trial.

The Court also notes that many of the checking account records are missing, thus indicating a failure on the part of Karen H. to “keep a record of all receipts, disbursements, and transactions entered into by the agent . . .”. *General Obligations Law* §5-1505(2)(a)(3).

Interestingly, counsel for the AIP argued that the respondent did not breach any fiduciary duty and, even if she did so, her actions were condoned and even participated in by the petitioner, Walter H., and that therefore, his petition for a guardian should be denied. This Court disagrees with the position of respondent's counsel and can find no support for it in the law.

The AIP's counsel also argued that despite all these years of assisted care, that his client's assets had only been slightly diminished over the course of the six plus years that Karen H. was in control of her mother's assets. The Court finds this argument equally unavailing.

Therefore, this Court finds that Karen H. has engaged in a self-dealing course of conduct and has breached her fiduciary duty to her mother, Rosalie H. The Court revokes the Power of Attorney immediately upon the qualification of the guardian appointed pursuant to the terms of this Decision. The respondent, Karen H., shall also account to the guardian for all income, assets, expenditures and debts, and shall promptly reimburse the guardian for all expenditures made in breach of her fiduciary duty. See *Mental Hygiene Law* §81.29(d). The newly appointed guardian must make a careful evaluation of all expenditures to determine if, and to what extent, those expenditures may have unlawfully benefitted Karen H. or third

parties. An agent, duly appointed by a valid Health Care Proxy may be “removed on the ground that the agent (a) is not reasonably available, willing and competent to fulfill his or her obligations under *6 this article or (b) is acting in bad faith”. *Public Health Law* §2992(2). See also *Mental Hygiene Law* §81.29(d). In this case, the petitioner, Walter H., has not sustained his burden of proof and the Health Care Proxy dated December 16, 1994 shall remain in full force and effect with respect to health care decisions to be made on behalf of Rosalie H. While the petitioner, Walter H., may have disagreed with some of the decisions his sister made with respect to the health care of their mother, there was insufficient proof to afford relief under the statute. Karen H. was not shown to be unavailable or unwilling to act and it cannot be said that her actions or inaction rose to the level of incompetence or bad faith.

In light of the Court's decision to revoke the Power of Attorney and retain the Health Care Proxy, the Court finds that it is necessary to appoint a full guardian for the purposes of managing the property of Rosalie H. and a limited guardian for the purpose of managing her personal needs. The appointed guardian shall have all of those powers delineated in *Mental Hygiene Law* §81.21 for the purposes of managing property and shall, with one exception, have all of those personal needs powers delineated in *Mental Hygiene Law* §81.22. Karen H. shall continue to exercise her powers as Health Care Agent, thereby obviating the need to appoint a guardian to make decisions with respect to Rosalie H.'s health care, as that term is defined in *Public Health Law* §2980(4). Those powers contained in *Mental Hygiene Law* §81.22(8) shall not

vest in the guardian, but shall remain with the Health Care Agent. The Court further finds that because of the physical and mental conditions of Rosalie H. and her inability to adequately understand and appreciate the nature and consequences of those conditions, she will likely suffer harm unless a guardian of her person and property is appointed. The Court further notes that Rosalie H. has over \$600,000 in financial resources, as well as Social Security and pension income. Her mental impairment makes her incapable of managing those resources. Clearly, the appointment of a guardian of her person and property is needed.

In light of the conflicts that have arisen between the petitioner, Walter H. and the respondent, Karen H., and keeping in mind that Karen H. will continue to exercise her duties as Health Care Proxy, the Court finds that it would be improvident to appoint Walter H. as personal needs guardian as he requested.

The Court hereby appoints Kevin D. Walsh, Esq. as the guardian of the property and as limited guardian of the person of Rosalie H. His appointment shall be without duration and he shall serve without bond. The Court will not require that Rosalie H. receive copies of the initial and annual reports to be filed by the guardian. The order of appointment of the guardian shall identify all persons entitled to notice of all further proceedings. The Court further directs that a judgment be

entered determining the rights of the parties in accordance with this decision.

The fees of the Court Evaluator shall, upon proper application, be paid by the estate of Rosalie H. *Mental Hygiene Law* §81.09(f). The fees of the attorney for the AIP, Rosalie H., shall, upon proper application, be paid by the estate of Rosalie H. *Mental Hygiene Law* §81.10(f). Inasmuch as the petition was partially granted and partially denied, the attorney for the petitioner may make application for reasonable compensation, which the Court shall consider. *Mental Hygiene Law* §81.16(f). The respondents shall be responsible for their own counsel fees. *Matter of Ruth Q.*, 23 AD3d 479, 808 NYS2d 110 [2nd Dept.2005]. Compensation of the guardian shall be determined by subsequent Order.

Submit Order and Judgment. *7

DATED: May 31, 2011

Hon. FREDERICK J. MARSHALL

Justice, Supreme Court

FOOTNOTES

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Footnotes

- 1 Rosalie H. now resides at Clare Bridge in Williamsville, NY, which is a specialized memory care facility.

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