STATE OF NEW YORK
SUPREME COURT — COUNTY OF MONROE

In the Matter of the Application of

STEVEN I. GOLDSTEIN, AS GENERAL
DIRECTOR AND CHIEF EXECUTIVE
OFFICER OF STRONG MEMORIAL HOSPITAL,

Index #08/03730

For the Appointment of a Guardian for

DOROTHY LIVADAS,

Respondent,

An Alleged Incapacitated Person.

Supreme Court, County of Monroe, Special Term
April 10, 14, and 15, 2008

Appearances:

Dutcher & Zatkowsky
Miles P. Zatkowsky, Esq., of counsel
Attorneys for Petitioner
1399 Monroe Avenue
Rochester, NY 14618

Harris Beach LLP
Heidi Schult Gregory, Esq., of counsel
Attorney for Respondent AIP
99 Garnsey Road
Pittsford, NY 14534

John Nacca, Esq.
Attorney for Respondent Daughter Ianthe Livadas
2430 Ridgeway Avenue
Rochester, NY 14626

2008 APR 30 AM 8:41

DECISION

GALLOWAY, J.:

The petitioner, on behalf of Strong Memorial Hospital ("SMH"), has petitioned the court for the appointment of a guardian for the personal needs and property management of respondent Dorothy Livadas, the alleged incapacitated person ("AIP"). This decision is made after a hearing

and includes findings of fact and conclusions of law.

I.

The AIP is 97 years old, widowed, currently a patient at SMH where she is unconscious, connected to a ventilator, and fed through a PEG tube. The parties have all agreed to waive the AIP's presence in court proceedings as she is completely unable to participate in the hearing, or, at the very least, no meaningful participation by her is possible. Her attending doctor has testified that the AIP is ventilator- dependent and that she is in a "persistent vegetative state" with no likelihood of recovery. Other evidence (albeit non-medical) has been presented suggesting that although the AIP is not verbally communicative and not fully conscious there are some signs to suggest that she might not be in a "persistent vegetative state". These differences notwithstanding, the evidence clearly and convincingly establishes beyond any question that the AIP is incapacitated to such an extent that the appointment of a guardian for personal needs and property management would be appropriate. Indeed, the AIP is totally dependent upon others for all of her personal and property management needs.

The petitioner requests that Catholic Family Center be appointed as guardian; but the AIP's daughter and sole heir (Ianthe Livadas) objects on grounds that no guardian is needed because she holds both a power of attorney and a health care proxy from her mother whereby she can effectively act as the AIP's guardian. The daughter further states that if the court were to deem the appointment of a guardian necessary then she is requesting that she be appointed as guardian. The petitioner, however, objects to the daughter's appointment and requests that her power of attorney and health care proxy be revoked because the daughter has failed and refused to carry out her mother's express wishes and directives as stated in her living will and further that the daughter has failed and refused to take any other actions necessary to effectuate a safe

discharge plan for her mother from SMH.

The evidence establishes that the power of attorney, health care proxy and living will were all duly executed together on April 22, 2005, by the AIP with the assistance and counsel of her attorney (Mr. Ralph J. Code, Esq.), that she was fully competent when she executed the documents and that each of these documents is valid. A controversy has arisen over the language of the proxy and the living will, and the daughter's obligations under that language.

The AIP's living will provides (in pertinent part):

> "If I should be in an incurable or irreversible mental or physical condition with no reasonable expectation of recovery or of regaining a meaningful quality of life (such as permanent unconsciousness or a persistent vegetative state) and the application of life-prolonging procedures would only serve to artificially prolong the dying process, I direct that such procedures (including but not limited to, cardiac resuscitation. . . tubal nutrition and antibiotics) be withheld or withdrawn and that I be permitted to die naturally. I direct that treatment be limited to the administration of medication or performance of any medical procedures deemed necessary to keep me comfortable and to alleviate pain. . . (and) shall be administered to me even if my life may be shortened thereby. This statement is made in accordance with my strong conviction and beliefs and is intended to be a clear and convincing expression of my wishes. Therefore, I expect that in the absence of my ability to participate in decisions regarding my medical care, this statement shall be honored by my family, physicians. . . and all other concerned parties as the final expression of my legal right to refuse treatment and accept the consequences of such refusal."

The AIP's health care proxy provides (in pertinent part):

> "I direct my Agent to make health care decisions for me. . . and to withhold or withdraw life sustaining measures, and to direct that artificially provided fluids and nutrition such as by feeding tube or intravenous infusion, be withheld or withdrawn. I specifically direct my health care agent to follow my instructions and wishes contained in the Living Will which I have signed and a copy of which is attached to this document. This Health Care Proxy shall be construed in the broadest possible manner and my Agent may act or fail to act to the same extent as I could if I were able to make my own health care decisions, provided that my Agent shall do so in accordance with my wishes and instructions as known to my Agent or, in their absence, in accordance with my best interests."

II.

A.

In support of its petition, the petitioner presented Dr. Apostolakos, one of the AIP's treating doctors, who is the director of SMH's medical intensive care unit. He testified that the AIP was admitted to SMH on November 2, 2007 with dehydration, altered mental state, and a urinary tract infection; that initially she interacted with staff and had lucid moments, but was never oriented enough to have meaningful talks; that on November 7, 2007 she was transferred to his floor, and her mental status varied and worsened, and that she was not oriented at that time; that later she could not speak, did not respond to verbal inquiry and was not interactive; and that she was placed on custodial, chronic-ventilation care.

Dr. Apostolakos also testified that more recently he requested updated assessments of the AIP's health status and prognosis for recovery; that those requests were made to SMH's respective services for neurology, palliative care and geriatrics. The neurology service's updated assessment was performed approximately two weeks before Dr. Apostolakos testified, and it found that the AIP was in a persistent vegetative state and that her chances of recovery were "dismal". The palliative care service (which assesses patients for chronic pain, chronic medical conditions, and end-of-life issues) after its assessment found no significant chance of any medical recovery. Similarly, the geriatric service agreed and found no reason to change its opinion. Dr. Apostolakos noted that although the AIP was not technically "brain dead" because EEG testing had detected disorganized brain activity, in the past three months, he has not seen any signs that the AIP comprehends her surroundings or communicates in any way or form, and efforts to wean her off the ventilator were unsuccessful. He further stated that in his opinion there is no

reasonable likelihood that she will "awaken, communicate and thrive" and that it was as certain as medicine could be that she would not "sit up one day and converse with us". He acknowledged that recoveries from persistent vegetative states do happen, but emphasized that any such "recoveries" are generally rare and had never occurred in a 97-year old patient who had been in bed and ventilator-dependent for five months. He also testified that in view of the AIP's medical condition she does not need to receive in-hospital acute care; and that he has recommended as a safe discharge plan that she be transferred to an appropriate ventilator-equipped nursing home for custodial care.

He further testified that he unsuccessfully tried to discuss the AIP's condition with her daughter but that she would not accept the various medical opinions that her mother was not going to get better as reality. He also tried to discuss with her the plan to discharge the AIP to a ventilator-equipped nursing home, but the daughter responded that SMH had caused the AIP's problems and so SMH needed to get the AIP better before sending her anywhere.

Dr. Apostolakos also testified that when he was attempting to discuss the AIP's condition with the daughter, the daughter requested a second opinion from a doctor who was not affiliated with SMH. Dr. Steven Rich, a geriatric specialist (unassociated with SMH) was consulted and, with the daughter's consent, examined the AIP. According to Dr. Apostolakos, Dr. Rich thereafter made a note in the AIP's medical record and concluded that the AIP has no significant chance of any meaningful recovery.

Dr. Apostolakos expressed his opinion that the daughter fails, or is unable, to appreciate or understand her mother's true medical condition, as she believes her mother will recover. He stated that she has urged the use of vitamin therapy (which the doctors rejected as too risky for

the anticipated benefits). Also the testimony of a nurse manager in the AIP's unit established that the daughter has employed alternative therapies for the AIP such as crystal-related therapy and Reiki therapy.

Dr. Apostolakos also indicated that when he and the daughter were at the AIP's bedside the daughter indicated to him that her mother was then "reacting", but that he saw absolutely no evidence of any reaction. He also indicated that any reactions and movements by the AIP are involuntary. Further, he noted that based on the AIP's true medical condition and the language in the AIP's living will and health care proxy, the daughter, in his opinion, is not following her mother's expressed wishes and directives.

Petitioner also presented the testimony of Martha Case Neubert, a medical social worker for SMH. Neubert testified that she became the AIP's social worker in January of 2008, and immediately met with the AIP's medical team and defendant to discuss the AIP's transfer to a facility with ventilator beds. Neubert indicated to the daughter that there were only a few local ventilator-equipped facilities so it was necessary to begin early discharge planning; and that she gave the daughter a financial form and requested that she complete and return it with information as to the AIP's finances, for use in finding a suitable, qualified nursing home for the AIP. The daughter told Neubert that she would work with her and provide the information. However, she failed to return the form or furnish any information. When Neubert followed up with her, she said that she had to consult with a lawyer and get back to her because she was unaware of the AIP's financial information.

B.

The daughter testified in opposition to the petition. She was, understandably, an

emotional witness and consequently had difficulty in remaining calm and composed and in directly answering questions presented to her. She acknowledged that her mother is not fully conscious and does not speak but stated that she does see her mother reacting and communicating with her when she speaks to or touches her mother – those reactions consisting of bodily movements or facial expressions by the AIP. She acknowledged that some of the movements or expressions could be subject to different interpretation and could be involuntary but maintained that many of them are voluntary and not subject to other interpretations.

She also acknowledged that Dr. Rich examined her mother at her request. She testified that he told her that the AIP was "sluggish" and that he had made a treatment program for her, but that he did not indicate to her any diagnosis, prognosis or opinions as to the AIP's medical condition. She did not, however, question the testimony that Dr. Rich had made a note in the AIP's hospital chart.

Significantly, the daughter did not call Dr. Rich to testify. Nor was any other medical evidence presented either to refute and question the testimony and opinions of Dr. Apostolakos or to support the daughter's contentions. The daughter did call a non-medical witness (Barbara Carlton), a therapist using Reiki therapy, which Ms. Carlton described as an alternative therapy utilizing the patient's (AIP's) own inner energy. When petitioner's attorney objected to the competency of this witness as a medical expert, the daughter's attorney acknowledged, in response, that Ms. Carlton was not a medical doctor or expert and that her testimony was not being offered to refute the medical evidence. Although this testimony is clearly not competent medical evidence, it will be allowed, given the unusual circumstances and issues presented herein, but only to put the medical evidence into some perspective. Ms. Carlton's testimony as to

her observations and treatment of the AIP is, however, based on much subjectivity and lacks specificity and detail and, as such, is inadequate and of insufficient weight, to counter or rebut the medical evidence.

The daughter stated her belief that her mother will recover, and that while the time will come when her mother will die, that time has not come yet; and that she knows her mother is not ready to die, as her mother has always told her she wants to live as long as possible and that she has always shown a strong desire to live on previous occasions of medical emergencies. As an example, she said that when her mother previously had a heart attack, she rejected a suggestion that she sign a "do not resuscitate order". The daughter also stated that if she were to feel that her mother's time has come and that her mother wants to die, she would respect her mother's wishes. She also testified that she did not accept the statements and opinions of the AIP's treatment team; and that she told two staff doctors that she does not want them anywhere near the AIP as she disagreed with them and their mindset; and, also, that if the doctors were to tell her that the AIP would not recover, she would tell them to "take a hike."

The daughter said that she had read the third paragraph of her mother's living will (quoted herein above) and that her understanding of what that paragraph expresses is that her mother "had bought a bill of goods which was her habit, her lifetime habit." She further stated that paragraph three would apply only to cases like those of the widely reported cases of Ms. Shaivo or Ms. VonBulow; and that her mother's case is different from those cases. Thus, she flatly rejects the only medical opinions she has apparently received. The daughter acknowledged that she has been utilizing the alternative therapies mentioned above and that she did request vitamin therapy, all for the purpose of assisting her mother's recovery. She further indicated that

she had directed certain SMH staff doctors not to treat her mother because she disagrees with them.

The daughter acknowledged that she was asked to provide financial information to SMH. She testified, however, that she lost the form and was too busy to look for it, and when she did later find it, she realized it required detailed information such that she needed to consult an attorney, and that she was too busy caring for her mother to do that.

The daughter also testified that prior to 2004, she was living in the East Hampton area of Long Island, New York; that she attended law school, was employed as a practicing astrologist, and worked for two astrology magazines; that she returned to Rochester in late 2003 or early 2004 when the AIP was hospitalized; that after treatment the AIP was discharged and the daughter elected to relocate here to look after her; that she occupied a separate residence near her mother's home until the summer of 2007 when she moved into her mother's house; that in the summer of 2007 she took the AIP to SMH Emergency Department for treatment of an infection; that after the initial work-up, the AIP indicated she wanted to go home and she was discharged over the daughter's objections; that on November 2, 2007 she and others convinced the AIP to go to the hospital and she has remained there since that admission; that the AIP was coherent from 2004 up to when she was admitted in 2007 and remained so up until she "coded" in late December 2007, and was put on a ventilator. By "coded", the daughter later explained, she meant that some life-threatening development had occurred to the AIP requiring immediate emergency care. She noted that the AIP had been revived without the need to perform CPR.. The medical staff subsequently did a tracheotomy and also a PEG procedure (i.e., inserting a feeding tube directly into the stomach to furnish nutrition). The AIP has been unable to speak

(because of the tracheotomy) but the daughter has described her interpretation of her mother's facial expressions and head and body movements; she interprets those expressions and movements as indicating her mother's desire for treatment so she can recover and live; as, for example, when the hospital staff was preparing to place a central IV line near the AIP's neck and the daughter suggested delaying the procedure, the AIP, according to the daughter, shook her head up and down, which the daughter interpreted to mean that the AIP wanted the procedure done without delay.

The daughter states that the above-described "coding" and resuscitation event is the cause of her mother's current semi-conscious condition, but she has offered no medical evidence to establish that contention. Dr. Apostolakos was not cross-examined on this subject, nor was the production of the relevant hospital records demanded or presented.

The daughter also acknowledged that she filed an affidavit (dated April 3, 2008) in this proceeding in which she stated (at paragraph 5) that the AIP "is not in a persistent vegetative state. . . and has given clear indication of consciousness and understanding." However, she also admitted filing an affidavit (dated March 6, 2008) in a Surrogate's Court, Monroe County, proceeding in which she stated, (at paragraph 6) that ". . . while [at SMH, the AIP] developed a staff infection as well as pneumonia. As a result it was necessary to perform a tracheotomy and she is unable to speak. In point of fact [the AIP] is not coherent and does not understand her surroundings in most instances." This affidavit was submitted to Surrogate's Court in support of the daughter's application to be appointed Administratrix CTA of her father's estate (to replace the AIP who had served as executrix of that estate) for the purpose of selling certain real estate still titled in her deceased father's name.

C.

The daughter expresses and demonstrates much concern for her mother but credible evidence was presented which indicates that their relationship is not without its problems, difficulties and tensions. The daughter testified that they share a "fundamentally loving" relationship but that they "are different". However, she also described her mother as a "narcissistic personality". Also, evidence established that the daughter has accused her mother of wrongfully taking from her father's estate certain assets which in her opinion should have been given to her because she feels that is what her father had intended.

Further, proof of their relationship is evinced by the fact that virtually every witness who observed these two persons interacting, described the daughter "yelling at", "berating" or being "verbally abusive to" her mother.

The evidence further establishes three incidents which also afford insight into the mother-daughter relationship. The first incident occurred between December 2004 and April 2005. In December 2004, the daughter contacted an attorney, Ralph Code, about terminating a trust which held title to the mother's home. Mr. Code testified that he subsequently met (alone, at first) with the AIP who told him that she wanted to protect her daughter but that she was being strongly pressured by her daughter on an ongoing basis to eliminate the trust and that it was causing a lot of tension in the house; and that she had fears about her daughter and did not trust her daughter's ability to sell the house, and that she was also afraid the daughter could sell the house out from under her. (The daughter testified herein that she had communicated with her father through a medium, who told her that selling her mother's home was indicated). As a result, the AIP signed a new will eliminating the trust and leaving her house outright to the daughter; in conjunction

therewith, she also signed two powers of attorney, one to the daughter and one to Mr. Code; but – upon the AIP's private instructions – only Mr. Code's power of attorney contained a power to sell real estate. This was apparently designed to protect the mother's house against a sale by the daughter and also to ease the mother-daughter tensions at home by the power-of-attorney given to the daughter.

Mr. Code and the AIP thereafter privately discussed a health care proxy and a living will; and Mr. Code explained to her in detail the function of each document. The AIP had previously given a health care proxy to a third person which she wanted to revoke. Mr. Code testified that when he asked the AIP who she wanted to name as her new health care agent, she first mentioned her brother (but apparently that was not possible) so she asked Mr. Code himself to serve as her health-care agent, but he declined. So she named her daughter, stating that she knew her and was comfortable with her doing it, especially if there was a living will in place to clarify her intent. Subsequently, in April 2005, after several discussions, the AIP signed the new will, the two powers of attorney, the living will and the health care proxy, and revoked the daughter's prior power of attorney.

The second incident occurred in the summer of 2005 (a few months after the AIP had signed the above mentioned documents) when Eldersource (a local agency assisting the elderly) received a telephone call reporting possible elder abuse or neglect of the AIP. Sandra Schencke (who investigated and managed the case for Eldersource) testified at the hearing herein. She indicated that she monitored and visited with the AIP during an 18-month period from early summer 2005 to December 2006. Ms. Schencke testified that the AIP told her that she had a health care proxy and living will which were with Mr. Code, and commented that she had lived

long enough and did not want to live on a machine; and that approximately a year later the AIP told her she did not want to be living much longer. Ms. Schencke said that she talked with the daughter about maintaining safety items in the house; and that the daughter wanted to have her "fired" because she "was causing problems". The AIP told her that her daughter was taking care of her, had struck her once, and was verbally abusive to her, and was draining her financially. Ms. Schencke stated that she spoke with the AIP about moving from the house, or changing the locks to keep out the daughter, but that the AIP ultimately did not take action; Ms. Schnecke said that it was a pattern for her to seek her advice and not act on it. She also testified to code violations at the property, and indicated that the AIP was facing a gas shut-off due to an unpaid utility bill. She also testified that she saw no evidence of physical abuse of the AIP, but did see the daughter verbally abuse the AIP, shouting and arguing about finances. Ms. Schencke also stated she was fearful at times for the AIP's safety. Eldersource ended its services in December 2006, and the daughter later moved into her mother's house in the summer of 2007.

The third incident occurred in October 2007 (i.e., ten months after Eldersource ended its monitoring of the AIP, and two to four months after the "summer of 2007", when the daughter testified that she moved into the AIP's home). Monroe County Adult Protective Services, acting on an anonymous telephone call about the AIP's welfare, sent a caseworker to the AIP's home to investigate. The caseworker testified that she found the AIP sitting up in bed, and that she observed that the AIP could only minimally communicate, was very frail, below normal weight, and lethargic; that she visited the AIP three times in October and told the AIP and her daughter on all three occasions that the AIP needed a higher degree of medical care than the daughter could provide. The daughter, however, indicated that her mother needed rehabilitation only. The

caseworker also indicated that the AIP was not eating or drinking enough and as a result she was becoming weaker. She further testified that the daughter responded that she was doing the best she could, and that the AIP was eating only small amounts, and that the daughter was "overwhelmed" as primary caretaker for the AIP. She noted that the AIP needed 24-hour care which the daughter could not furnish. The caseworker testified that on her last home visit, she told the AIP and her daughter that the AIP's hospitalization was required, but they both rejected this advice. Shortly thereafter, on November 2, 2007, the AIP was hospitalized and Adult Protective Services discontinued its services to the AIP.

III.

The evidence presented herein demonstrates that the existing health care proxy and power of attorney in favor of the AIP's daughter are not sufficient to protect the best interests of the AIP, and further, that revocation of these documents and the appointment of an institutional guardian (Catholic Family Center) for the personal needs and property management of the AIP is warranted.

Clearly the law favors and encourages the appointment of a family member particularly of one to whom the AIP has given a health care proxy and power of attorney. Also, it is understandable that a family member can be emotionally distressed in making a difficult decision. However, prime consideration must be given to the AIP who is entitled to have her wishes and directives followed and to have a person who can effectively, objectively and responsibly make the necessary decisions. Admittedly, some leeway and delay is properly to be afforded to a person faced with deciding whether the terms and conditions of a family member's living will have been met, so that he or she can actively seek information and other opinions

before deciding. However, the daughter here has no medical evidence or opinion supporting her views and opinion and is apparently not actively seeking it. The proof establishes that the daughter fails to appreciate her mother's true medical condition and lacks the objectivity and insight to make necessary decisions. Moreover, her apparent headstrong, demanding nature prevents her from hearing and considering opinions different from her own, thus impeding the meaningful discussions needed to resolve the issues. In short, it appears that she is unable to separate her views from those of others, and generally considers anyone with a different opinion to be the enemy, or simply dismisses the opinion as non-existent. Critically, those other opinions include those of her mother, as expressed in the living will and as expressed to others who testified herein, and as the AIP's health care agent, she is bound to abide by her mother's wishes. Perhaps the daughter is too close to the situation to be objective. Nevertheless, the evidence shows that she is unable to fulfill this obligation. *See* Public Health Law § 2992(2)(a); Mental Hygiene Law § 81.29(d). Accordingly, it is necessary to appoint a guardian who can rationally examine and consider all relevant competing factors and discuss them with the hospital staff and possibly other advisors, and then ultimately make a decision.

In addition to the obligation of the decision maker to consider and decide whether the terms of a living will have been met is the obligation to cooperate with the hospital for the safe discharge of the AIP to a more appropriate level of care in an appropriate non-hospital facility. In that way, the decision maker can take more time to investigate and decide the end-of-life issues without unduly taxing the capacity of a hospital facility when hospital care is not necessary. The evidence shows that the daughter has acted irresponsibly by refusing to cooperate with the hospital in effectuating a safe discharge plan, specifically by refusing to furnish her

mother's financial information which is essential to finding suitable accommodations for her mother. Interestingly, it would appear that the daughter who testified herein that she was too busy to consult with a lawyer about furnishing to SMH the requested financial statement required to assist in discharge planning for the AIP, was in fact consulting at that time with her lawyer about the Surrogate's Court proceeding to replace the AIP as executrix of her father's estate for the purpose of selling certain real estate still titled in her deceased father's name. This tends to show that the daughter was not sincere in her efforts to assist SMH with transferring her mother to a more appropriate facility. Under these circumstances, the evidence supports the revocation of the power of attorney. *See Matter of Rochester General Hosp. (Levin)*, 158 Misc 2d 522 (Sup Ct Monroe County 1993). The daughter's expressed attitude that her mother's condition was SMH's fault and that SMH should fix it again underscores her inability to place her mother's present interests above fighting her own perceived battles.

Although appointing the daughter and Catholic Family Center to serve as co-guardians has been considered, that option would likely cause problems in view of the daughter's steadfast views and attitude as depicted herein. It is vital that the AIP have a guardian who can act reasonably and cooperatively under the circumstances and who has the ability to make appropriate decisions when necessary. Also, in this instance the personal needs and property management need to go hand in hand and, thus, the authority to decide where the AIP will reside, the future course of her treatment, and the authority to pay the costs thereof must be vested in the same person or entity. Accordingly, the daughter's health care proxy and her power of attorney must both be voided and revoked so that the appointed guardian can coordinate actions taken in view of the AIP's expressed wishes and best interests. The better option is the appointment of

Catholic Family Center as guardian of the AIP's personal needs and property management, with the requirement that the Center consult fully with the daughter when making any decisions, affording her a reasonable opportunity to express her views. If, however, she refuses to cooperate, makes herself unavailable or fails to keep the Center advised of where she can be readily reached, or fails to act reasonably or conduct herself properly during discussions with the Center, then the Center would have no option but to proceed without the daughter's input.

Finally, additional findings are hereby made as follows:

1. The alleged incapacitated person, Dorothy Livadas, is unconscious and unable to understand and appreciate the nature of her limitations and it is likely that she will suffer harm because of her limitations and therefore the appointment of a guardian is necessary to prevent such harm;

2. Catholic Family Center is hereby appointed guardian of the personal needs and property management needs of Dorothy Livadas;

3. The duration of said guardianship shall be indefinite; and

4. The guardian is hereby granted all of the personal needs powers and property management needs powers as are specifically requested in the petition herein.

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MONROE COUNTY CLERK

Submit judgment.

DATED: April 28, 2008
Rochester, NY

HAROLD L. GALLOWAY, J.S.C.