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Obviating the Need for Guardianship With Powers of Attorney: It's Not as Easy as You Think

By Daniel J. Reiter

I. Introduction

There is a widely held belief among practitioners that a valid power of attorney and health care proxy, in effect, will always obviate the need for guardianship. This is not the case. Despite the broad and expansive powers granted an agent in letter "O" of the N.Y. General Obligations Law § 5-1513 (GOL) statutory short form power of attorney, or the N.Y. Public Health Law § 2981 (PHL) form health care proxy, agents are, on occasion, unable to make certain decisions on behalf of their incapacitated principals, and guardianship may be necessary despite what appeared to be comprehensive planning prior to incapacity. This article discusses certain powers that (arguably) *can* be added to the statutory short form power of attorney to expand the agent's powers beyond the statutory limitations in order to avoid guardianship, certain powers that can *never* be exercised by an agent or a guardian, and a means to include these provisions in a power of attorney during the planning process.

II. An Instructive Example: Choosing the Place of Abode

In *In re Julia C.,* the son of the alleged incapacitated person, Julia C., petitioned for the appointment of a guardian for the person and property of Julia C. pursuant to N.Y. Mental Hygiene Law article 81 (MHL).[1] Julia C.'s daughter, the respondent, alleged that there were less restrictive alternatives, and available resources in place, to meet Julia C.'s needs, namely a power of attorney and health care proxy.[2]

With regard to the statutory short form power of attorney in place, respondent-daughter argued that the power of attorney executed by Julia C. gave Julia C.'s agents the power to choose her place of abode.[3] The court held otherwise.[4]

> Here, the power of attorney signed by Mrs. C. contains the standard powers designated under General Obligations Law 5-1501, together with additional powers such as access to medical records, establish and fund trusts and to do any act necessary to maintain the principal's standard of living. The Court finds no power for the attorney-in-fact to choose the place of abode. The Court will not read paragraph O[5] [all other matters] to give carte blanche authority to an attorney-in-fact to exercise powers clearly outside the contemplation of the power of attorney.[6]

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Pursuant to MHL article 81.22, a guardian may choose its ward's place of abode (with restrictions).[7] The court in *In re Julia C.* does not affirmatively decide whether the choice of abode is a power that a principal can include in the modifications section of the statutory short form power of attorney, but the decision is instructive.[8] One could argue that the court's analysis leads the practitioner to infer that such a power *can* be added to the modifications section (or could be included in a custom power of attorney) because the court's analysis does not turn on whether such a provision would have been valid, but whether such a provision was included in the power of attorney at issue.[9]

Yet, GOL § 5-1503, which governs the modifications section of the statutory short form power of attorney, states that a modification *is valid* if it meets one of the following three requirements: (1) the modification eliminates from the statutory short form power of attorney (or statutory gifts rider) one or more of the powers enumerated in the constructional sections of the statute, affirmatively chosen by the principal; or (2) supplements one or more of the aforesaid powers, affirmatively chosen by the principal, by specifically listing additional powers of the agent; or (3) **makes some additional provision which is not inconsistent with the other provisions of the statutory short form power of attorney or of the statutory gifts rider.[10]** This last point, (3), on its face arguably enables the principal to give an agent broad authority, which may not even relate to property management, so long as the addition in the modifications section is not inconsistent with any other provision in the statutory short form power of attorney.[11] Furthermore, GOL § 5-1502G(10) grants an

agent the power "to do any other act or acts, which the principal can do through an agent."[12]

In a more practical sense, at first glance, the choice of place of abode, particularly regarding health care decisions, would seem to be a power more appropriate for a health care agent. But the court in *In re Julia C.* gives the practitioner pause before relying on a health care proxy for such authority.[13]

> Section 2982(l) of the Public Health Law give the health care agent the authority to make any and all health care decisions on the principal's behalf that the principal could make. A health care decision is defined as any decision to consent or refuse to consent to health care [defined as 'any treatment, service or procedure to diagnose or treat an individual's physical or mental condition']. Public Health Law 2980(4), (6). The fact that a health care proxy exists does not, in itself, always obviate the need for a guardianship. Public Health Law 2992. The scope of Article 81 of the Mental Hygiene Law and Article 29-c of the Public Health Law do not overlap with respect to making decisions regarding the social environment and other such aspects of the life of the incapacitated person and choosing her place of abode. Mental Hygiene Law 81.22(2) and (9). Article 29-c of the Public Health Law is very specific—it is health care treatment related. While treatment may be ancillary to placement (i.e. skilled nursing care), the agent under a health care proxy is not afforded the same authority over an individual as a personal needs guardian, who is subject to Court scrutiny.[14]

The Court's decision, read in full, seems to suggest that *only a guardian* has the authority to choose another's place of abode, particularly given the "subject to Court scrutiny" declaration made by the court.[15] However, a synthesized reading of the power of attorney statute, and the *In re Julia C.* decision, leaves open the possibility for a principal of a statutory short form power of attorney to give its agent the power to choose the place of abode in the modifications section. Additional case law, as expounded up below, supports this argument.

III. Broad Authority of Agent, but Limitations Abound

Pursuant to MHL article 81.22(a)(2), a guardian may be granted the power to "make decisions regarding social environment and other social aspects of the life of the incapacitated person."[16] In *Perosi v. LiGreci* the Appellate Division, Second Department noted that "[g]enerally, the scope of a power of attorney is limited only by the boundaries of the principal-agency relationship," with exceptions.[17] The court opined that the "exceptions include, but are not limited to: the execution of a principal's will... the execution of a principal's affidavit upon personal knowledge...or the entrance into a principal's marriage or divorce...".[18] Indeed, some decisions are so personal that neither an agent under a power of attorney *nor a court-appointed guardian* could be granted decision-making authority, such as divorce.[19] In *Arens v. Shainswit* the Appellate Division, First Department opined that:

> The General Obligations Law codifies as the public policy of this State that there be liberal use and judicial recognition of the efficacy of powers of attorney and further states that the general authority with respect to "all other matter" authorizes the agent to act as alter ego of the principal with respect to any and all possible matters and affairs. (General Obligations Law, §§ 5-1501, 1502 L.)[20]

However, the court in *Arens v. Shainswit* qualifies this rule by holding that there are powers that are "so peculiarly personal that delegation is forbidden."[21] In the end, the general rule, consistent with the holding in *Perosi v. LiGreci*, is that a power affirmatively delegated to an agent by a principal in the modifications section of a statutory short form power of attorney is valid *and* will generally obviate the need for guardianship. This is especially true since the public policy of New York State from 1993 on is to require judicial recognition and approval of the plan an individual has made for the management of his or her property and personal needs, and *not* to impose a guardianship if that plan meets the needs of the individual.[22]

IV. Conclusion

The statutory short form power of attorney provides a broad range of default powers in paragraph "O," but estate planning and elder law attorneys would be wise to add additional provisions to the modifications section, in consultation with the client, of course, that could further protect the principal-client from guardianship, i.e., a provision authorizing the agent to choose the place of abode or make decisions regarding social environment

and other social aspects of the life of the incapacitated person. This is consistent with the policy that an agent is a principal's alter ego, and the policy that guardianship is a last resort.[23]

Endnotes

1. *In re Julia C.*, N.Y.L.J. March 15, 2004, p. 17, col. 3 (Nassau Co. Ct.).
2. *Id.*
3. *Id.*
4. *Id.*
5. Now paragraph "N."
6. *In re Julia C.*, N.Y.L.J., March 15, 2004, p. 17, col. 3 (Nassau Co. Ct.).
7. MHL art. 81.22.
8. *In re Julia C.*, N.Y.L.J., March 15, 2004, p. 17, col. 3 (Nassau Co. Ct.).
9. *Id.*
10. GOL § 5-1503.
11. GOL § 5-1503(3).
12. GOL § 5-1502G(10).
13. *In re Julia C.*, N.Y.L.J., March 15, 2004, p. 17, col. 3 (Nassau Co. Ct.).
14. *Id.*
15. *Id.*
16. MHL art. 81.22(a)(2).
17. *Perosi v. LiGreci*, 98 A.D.3d 230, 238 (2d Dep't 2012).
18. *Id.* at 237.
19. *Mallory v. Mallory*, 113 Misc.2d 912, 915 (Sup. Ct., Nassau Co. 1982); *In re Irving Wechsler*, 3 A.D.3d 424 (1st Dep't 2004).
20. *Arens v. Shainswit*, 37 A.D.2d 274, 279 (1st Dep't 1971).
21. *Id.*
22. *In re Estate of Murray*, 14 Misc.3d 591, 599 (Sur. Ct., Erie Co. 2006).
23. *In re Julia C.*, N.Y.L.J. March 15, 2004, p. 17, col. 3 (Nassau Co. Ct.).

Daniel J. Reiter, Esq. is an attorney admitted to practice in New York and New Jersey. Mr. Reiter focuses in the areas of trust and estate litigation, guardianship, estate planning, elder law, and special needs law. He regularly teaches a continuing legal education course with the National Law Institute on Mental Hygiene Law Article 81. Mr. Reiter, a sole practitioner, is based in New York City and practices throughout the state.

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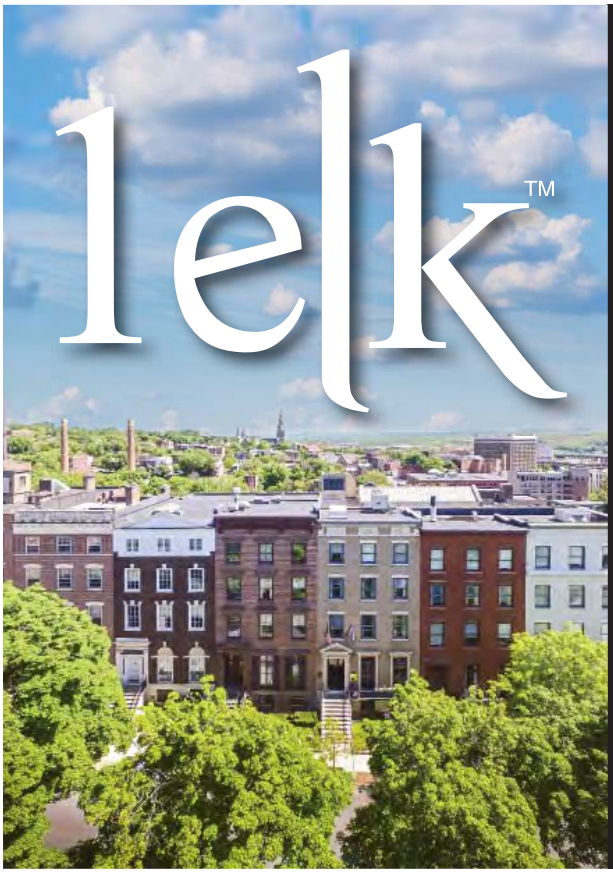

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