

Decided on June 5, 2008

Supreme Court, Queens County

**In the Matter of the Application of Jewish Association
for Services For the Aged Judy Fister An Incapacitated
Person**

100079/08

Charles J. Thomas, J.

On August 25, 2004 an Order to Show Cause was submitted in New York County and signed commencing a Petition pursuant to Article 81 of the Mental Hygiene Law. On January 12, 2005 a hearing pursuant to M. H. L. Section 81.11 was conducted by Hon. Martin Schoenfeld.. Justice Schoenfeld found Judy K. Fister to be an incapacitated person in accordance with Section 81.15 of the Mental Hygiene Law in a decision made on the record on the 12th day of January, 2005 and upon all the prior pleadings and proceedings in this action. On March 4, 2005 Justice Schoenfeld signed an Order and Judgment finding Judy K. Fister to be an incapacitated person and appointed the Jewish Association for the Aged (JASA) as guardian of the personal needs and property management of Judy K. Fister for a period of three years.

In March 2008 JASA moved within the three year period, by order to show cause in Supreme Court, New York County to modify the order of Justice Schoenfeld to the extent of changing the term from a period of three years to an indefinite period. Another judge, to whom the order to show cause was presented, declined to sign the order. Instead, on March 20, 2008 the court issued an order, *sua sponte*, which states: "ORDERED that the venue of this action is changed from this Court to the Supreme Court, County of Queens, and the Clerk of this Court is directed to transfer the papers on file in this action"

Clearly the court in New York County misapprehended the venue rules as applied here. The hearing of the special Proceeding pursuant to Article 81 had been completed and judgment had been entered three years ago. The attempt by the court to change venue at this juncture is without statutory basis.

"It has been a longstanding New York rule:[V]enue relates merely to *place of trial* and

not jurisdiction[,] and . . . improper venue may be waived unless objection is properly and timely made . . ." CPLR 509 *Mc Kinney's Practice Commentaries*, 2007 citing NY Adv. Comm. on Prac. & Proc., First Prelim. Rep., Legis.Doc.No6(b), p.16 (1957). It is clear that "an action ay be *tried* in the venue designated even though improper if there is no motion for change of venue" *supra*, citing NY Sen.Fin.Comm. et al., Fifth PrelimRep. LegisDoc.No15p.77 (emphasis added).

Cplr 509 states ". . . the place of *trial* of an action shall be in the county designated by the plaintiff unless the place of *trial* is changed to another county by order *upon motion* . . ." [*2](emphasis added).

Here the court in New York county has attempted to transfer the post-judgment management of a ward of that court to another county. While the order is silent as to the basis for its actions it appears that the court is acting under the guise of a change of venue pursuant to CPLR 510 or MHL 81.05(a). A review of both those statutes indicates that there is simply no authority to do so.

Section 81.05(a) of the Mental Hygiene Law provides as follows:

(a) "A proceeding under this Article shall be brought in the Supreme Court within the judicial district, or in the County Court of the County in which the person alleged to be incapacitated resides, or is physically present. If the Person alleged to be incapacitated is being cared for as a resident in a facility, the residence of that person shall be deemed to be in the County where the facility is located and the proceeding shall be brought in that County, subject to application by an interested party for a change in venue to another county because of the inconvenience of the parties or witnesses or the condition of the person alleged to be incapacitated".

Mental Hygiene Law Section 81(7) does not contain any provision for a change of venue because the matter is venued in an improper county. The only statute which provides for a change of venue, because of an improper county, is CPLR Section 510 (1), which states:

"The Court, upon motion, may change the place of trial of an action where:

(1) "The County designated for that purpose is not a proper County".

Any argument that CPLR Section 510 does not apply in Article 81 matters is specious as the result would remain same since a change of venue for an improper County is not permitted pursuant to Section 81.07 but only by CPLR Section 510 and that Section clearly reserves the right to change venue to a party and only upon motion. M.H.L. section 81.05, the specific venue statute, only allows for a change of venue when "subject to application by an interested party for a change in venue to another county because of the inconvenience of the parties or witnesses or the condition of the person alleged to be incapacitated."

The Appellate case law confirms this and has repeatedly admonished trial level courts for acting in violation of the statute. In *Nixon v. Federated Department Stores, Inc.*, 170 AD2d 659, the Appellate Division Second Department found: "[t]he Court abused its discretion in changing

venue *sua sponte* to New York County - a venue requested by no one - since CPLR Section 510(1) authorizes a Court to change venue only "upon motion", and not on its own initiative." (supra, 660).

The Court has more recently reaffirmed its position in *Mtr. Of Travelers Indemnity Co. Of Illinois v. Nnamani*, 286 AD2d 769; and *Mtr. Of Phoenix Insurance Co., et al v. Casteneda et al*, 287 AD2d 507. In both cases where the trial Court dismissed the action because of the improper venue [the Respondent resided in Queens County and the action was commenced in Nassau County] the Appellate Division reversed and reinstated the Petition. There the Court held that "in the absence of a motion or consent, *the Court has no authority to sua sponte change venue*," (emphasis added, supra, 508). "Contrary to the Court's conclusion, its inherent power to control its calendar does not include the authority to *sua sponte* dismiss an allegedly improperly venued proceedings", supra, 508. While the *Phoenix* and *Travelers* cases involved dismissals [*3]there is no difference whether the action taken by the Court is dismissal or a transfer to change the venue.

In *Mtr. Of Travelers v. Nnamani* the Court held while specific venue provisions supercede the general venue, provisions for special proceedings, "the CPLR Article 5 procedures for changing venue" remains applicable, *Nnamani*, supra, 770.

This court has recently been faced with a similar situation in which it became necessary to return a guardianship case to the county in which it was initiated. See, *Matter of Davis*, NYLJ 6/4/08, p.32, col.3.

Even more important, there is absolutely no authority to change the county where an action has been brought, post judgment. A court would never expect post judgment motions to be handled in a personal injury or commercial matter to be handled by another county simply because the defendant had moved . So too, in a guardianship case, there is no reason not to expect that such motions would be handled by the county where the judgment was entered.

Additionally, the attempt to transfer the case under these circumstances flies in the face of Article 44 and CPLR 2221 which requires that "a motion . . . to modify, an order shall be made . . . to the judge who signed the order . . ." or judgment. Here the motion that was made was to modify the order and judgment to the extent of extending the period of the guardianship. It is appropriately handled by that judge in that county and not by another judge in a different county.

It is utterly implausible to expect that a case should be transferred from county to county every time a ward is moved. To do so would sabotage the continuity by the court and court examiners to properly and efficiently administer a guardianship case throughout many years.

What is of particular concern to this Court is the delay caused by the New York County Court's action. This matter is a summary proceeding and should be considered expeditiously by the Court to which it is presented. This matter, being presented for consideration, sought by Order to Show Cause, the extension of the guardianship which has lapsed in the two month delay caused by the attempt to transfer this matter.

Therefore, the Court, having considered the Petition and its supporting papers, is signing the accompanying Order to Show Cause commencing the Petition. Said Petition shall be returnable in New York County in the Part where it was originally commenced. The Clerk of Queens County shall send the file of this action to the clerk of New York County where said action shall proceed under the original New York County caption and Index Number.

CHARLES J. THOMAS, J.S.C.

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