

220 A.D.3d 1091

Supreme Court, Appellate Division, Third Department,  
New York.

In the **MATTER OF KIMBERLY DD.**, Alleged to  
be an Incapacitated Person.

Brooke Daley, as Administrator of the Washington  
Center for Rehabilitation and Nursing, Petitioner;

v.

**Kimberly DD.**, Respondent.

Washington County Department of Social Services,  
Appellant,

and

Saratoga County Department of Social Services,  
Respondent.

535921

Calendar Date: September 5, 2023

Decided and Entered: October 19, 2023

### Synopsis

**Background:** Skilled nursing home facility filed petition pursuant to Mental Hygiene Law seeking appointment of a guardian for one of its residents. Following appointment of counsel for resident and a hearing, the Supreme Court, Washington County, Kathleen B. Hogan, J., granted the petition, directing facility to prepare a proposed judgment naming county commissioner of social services for county where facility was located as guardian, and, over facility's county's objection contending that county commissioner of social services for county in which resident resided upon admission to facility was the more appropriate guardian, signed the proposed judgment as submitted. Facility's county appealed.

**Holdings:** The Supreme Court, Appellate Division, Lynch, J., held that:

[1] fact that facility's administrator served resident with underlying pleadings did not deprive trial court of personal jurisdiction over resident;

[2] trial court's failure to provide notice of petition either to facility's county or to county of residence at time of admission was not a fatal jurisdictional defect; and

[3] commissioner of social services for county of residence at time of admission was appropriate guardian to be appointed.

Affirmed as modified.

**Procedural Posture(s):** On Appeal; Petition for Appointment of Guardian.

West Headnotes (5)

[1] **Process** → Defects and irregularities in service or return or proof thereof

Administrator of skilled nursing home facility was not personally a party in proceeding on facility's petition pursuant to Mental Hygiene Law seeking appointment of a guardian for one of its residents, and thus fact that administrator served resident with the underlying pleadings did not deprive trial court of personal jurisdiction over resident; administrator was suing in a representative capacity, and any discrepancy in that regard was a mere irregularity. *N.Y. CPLR § 2103(a); N.Y. Mental Hygiene Law § 81.01 et seq.*

[2] **Process** → Waiver of defects and objections

Resident of skilled nursing home facility waived any objection to being served by facility administrator with the pleadings underlying facility's petition under Mental Hygiene Law seeking appointment of a guardian for resident, where resident was represented by counsel and participated in the proceeding. *N.Y. CPLR § 2103(a); N.Y. Mental Hygiene Law § 81.01 et seq.*

<sup>[3]</sup> **Mental Health** → Effect of want of, or irregularity of, notice

Trial court's failure to provide notice of skilled nursing home facility's petition seeking appointment of a guardian for one of its residents to either the county where facility was located or county in which resident resided upon admission to facility, in violation of statute governing notice of such petitions, was not a fatal jurisdictional defect, where statute drew a distinction between service of the petition and a separate notice of the proceeding, and trial court received opposition papers filed by facility's county prior to issuing judgment naming facility's county as guardian.

📄 N.Y. Mental Hygiene Law § 81.07(b)(3), (e)(1)(i, ii, iii), 📄 (g)(1)(v), (g)(2).

<sup>[4]</sup> **Mental Health** → Effect of want of, or irregularity of, notice

Trial court's failure to provide notice of skilled nursing home facility's petition seeking appointment of a guardian for one of its residents to either the county where facility was located or county in which resident resided upon admission to facility violated rule governing notice of proceedings for appointment of a guardian, where resident was receiving Medicaid assistance, which, under the statute, meant that trial court was required to provide notice to the local department of social services. 📄 N.Y. Mental Hygiene Law § 81.07(g)(1)(v).

<sup>[5]</sup> **Mental Health** → Persons Who May Be Appointed

County commissioner of social services for county in which resident of skilled nursing home facility resided upon admission to facility, not commissioner of social services for county where facility was located, was appropriate guardian to be appointed in proceeding on facility's petition pursuant to Mental Hygiene Law seeking appointment of a guardian for resident, where county of residence at time of admission was resident's residence district for purposes of medical assistance and was still providing medical assistance to resident, and resident social services

districts were also statutorily required to provide protective services to individuals in need, including arranging for guardianship. N.Y. Mental Hygiene Law § 81.01 et seq.; N.Y. Social Services Law §§ 62(5)(d), 📄 473(1)(c); N.Y. Comp. Codes R. & Regs. tit. 18, § 457.1.

#### Attorneys and Law Firms

**\*\*235** Roger A. Wickes, County Attorney, Fort Edward (Daniel S. Martindale of counsel), for appellant.

Sheila E. Shea, Mental Hygiene Legal Service, Albany (Shannon L. Stockwell of counsel), for **Kimberly DD.**, respondent.

Michelle Granger, County Attorney, Ballston Spa (Ann Flower E. Stitt of counsel), for Saratoga County Department of Social Services, respondent.

Before: Lynch, J.P., Clark, Aarons and Ceresia, JJ.

#### MEMORANDUM AND ORDER

Lynch, J.P.

**\*1091** Appeal from a judgment of the Supreme Court (Kathleen B. Hogan, J.), entered August 11, 2022 in Washington County, which, in a proceeding pursuant to Mental Hygiene Law article 81, appointed Washington County Department of Social Services as guardian for the person of respondent.

In June 2022, petitioner, a skilled nursing home facility located in Washington County, filed a petition pursuant to Mental Hygiene Law article 81 seeking the appointment of a guardian for one of its residents, respondent. Respondent had lived in the facility since 2013. Supreme Court appointed counsel for respondent and, after a hearing on July 20, 2022, granted the petition, directing petitioner to prepare a proposed judgment naming the Washington County Commissioner of Social Services (hereinafter referred to as Washington County) as guardian. After being notified of the proposed

appointment, Washington County submitted an objection to the court, contending that the Saratoga County Commissioner of Social \*\*236 Services (hereinafter referred to as Saratoga County) was the more appropriate guardian since respondent was a resident of Saratoga County prior to her admission to petitioner's facility and receives Medicaid assistance through Saratoga County. The \*1092 court signed the judgment as submitted. Washington County appeals.<sup>1</sup>


<sup>1</sup> <sup>2</sup> We begin by emphasizing that the parties do not challenge Supreme Court's determination to appoint a guardian of the person for respondent. Rather, in the recognized absence of any family or other individuals to appoint, the dispute centers on whether the Social Services Commissioner of either Washington County or Saratoga County should serve as guardian. As a threshold argument, Washington County maintains that the court lacked personal jurisdiction over respondent because petitioner's administrator personally served her with the underlying pleadings. While a party may not personally serve papers (*see* CPLR 2103[a]), the administrator is not personally a party because she is suing in a representative capacity and we consider any discrepancy in this regard “ ‘a mere irregularity’ ” (*Matter of Conti v. Clyne*, 120 A.D.3d 884, 886, 991 N.Y.S.2d 663 [3d Dept. 2014], *lv denied* 23 N.Y.3d 908, 2014 WL 4230818 [2014], quoting *Matter of Schodack Concerned Citizens v. Town Bd. of Town of Schodack*, 148 A.D.2d 130, 133, 544 N.Y.S.2d 49 [3d Dept. 1989], *lv denied* 75 N.Y.2d 701, 551 N.Y.S.2d 905, 551 N.E.2d 106 [1989]). In any event, respondent was represented by counsel and participated in the proceeding, thereby waiving any objection.

<sup>3</sup> We agree with Washington County that Supreme Court erred in failing to provide it with notice of the proceeding pursuant to *Mental Hygiene Law* § 81.07, but do not agree that such error is a fatal jurisdictional defect. The statute draws a distinction between service of the petition and a separate notice of the proceeding. The order to show cause and petition, together with any supporting affidavits, must be served on the alleged incapacitated person, the person's counsel and the court evaluator appointed by the court (*see* *Mental Hygiene Law* § 81.07[b][3]; [e][1][i]-[iii]). A separate notice of the proceeding, together with a copy of the order to show cause, must be mailed to family members, if any, and other interested parties (*see* *Mental Hygiene Law* § 81.07[g][1], [2]). Pertinent here, where the petitioner knows that the

alleged incapacitated person “receives public assistance,” notice must be sent to “the local department of social services” (*Mental Hygiene Law* § 81.07[g][1][v]).<sup>2</sup>

<sup>4</sup> As discussed, we have determined that respondent was duly \*1093 served and note that respondent raises no challenge as to Supreme Court's jurisdiction. That said, as it is undisputed that respondent was receiving Medicaid assistance, the court was required to provide notice to “the local department of social services” (*Mental Hygiene Law* § 81.07[g][1][v]) and failed to provide any such notice to either Washington County or Saratoga County. Nevertheless, the error is not jurisdictional in nature under the statutory structure described above (*see* \*\*237 *Matter of Rose*, 26 Misc.3d 1213[A], \*1, 2010 N.Y. Slip Op. 50087[U], 2010 WL 276698 [Sup. Ct., Dutchess County 2010]), and the court received Washington County's opposition papers prior to issuing the judgment.

<sup>5</sup> Finally, under the circumstances presented, we cannot say that Supreme Court abused its discretion in appointing Washington County as guardian. Nonetheless, in view of Saratoga County's status under *Social Services Law* § 62 as respondent's residence for purposes of medical assistance and public assistance or care, we conclude, in the exercise of our own discretion, that Saratoga County's Commissioner should serve as respondent's guardian (*see* *Matter of Von Bulow*, 63 N.Y.2d 221, 224, 481 N.Y.S.2d 67, 470 N.E.2d 866 [1984]). Under *Social Services Law* § 62(5)(d), when, as here, a person who was admitted to a nursing home located in a “district other than the district in which he [or she] was then residing ... is or becomes in need of medical assistance, the social services district *from which* he [or she] was admitted ... shall be responsible for providing such medical assistance” (emphasis added). Here, Saratoga County openly acknowledges that it is respondent's residence district under *Social Services Law* § 62 and, in fact, has and continues to provide medical assistance to her. Saratoga County maintains, nonetheless, that its fiscal role does not make it the most appropriate entity to serve as guardian. The statute, however, also charges the residence district with providing “public assistance or care” (*Social Services Law* § 62[5][d]). Pertinent in that regard, under *Social Services Law* § 473, a resident social services district must also provide “protective services” to an individual in need, including services “arranging, when necessary, for ... guardianship ... either directly or through

referral to another appropriate agency” ( [Social Services Law § 473\[1\]\[c\]](#); *see* [18 NYCRR 457.1\[a\]](#); [d][7], [9]). Given this statutory mandate, we conclude that Saratoga County's Commissioner of Social Services should serve as respondent's guardian.

[Clark, Aarons](#) and [Ceresia, JJ.](#), concur.

**\*1094** ORDERED that the judgment is modified, on the facts, without costs, by substituting the Saratoga County Commissioner of Social Services as guardian for respondent, and, as so modified, affirmed.

#### **All Citations**

220 A.D.3d 1091, 199 N.Y.S.3d 234, 2023 N.Y. Slip Op. 05298

### Footnotes

- <sup>1</sup> There is no dispute that Washington County is an aggrieved party for purposes of taking this appeal (*see* CPLR 5511) and we have accepted briefs filed on behalf of both Washington County and Saratoga County.
- <sup>2</sup> The statute refers to Social Services Law article 9–B, entitled “Adult Protective Services.” The reference to Title 9–B, “Public assistance employment programs,” in Saratoga County’s appellate brief is misplaced; that provision is included in Social Services Law article 5.