

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of

IAN C. DEVINE, CARLA HALL FRIEDMAN and
KARINE ALBERT MCCALL,

For the Appointment of Guardians of the Property and
Person of

HUGUETTE M. CLARK,

A Person Alleged to Be Incapacitated

Index No.

Hon.

**AFFIDAVIT OF
WALLACE BOCK
IN OPPOSITION TO
PETITIONERS' MOTION
FOR A TEMPORARY
RESTRAINING ORDER**

STATE OF NEW YORK)
)
COUNTY OF NEW YORK) ss.:

WALLACE BOCK, being duly sworn, deposes and says:

1. I have personal knowledge of the matters stated herein and submit this affidavit in opposition to the motion for a temporary restraining order (the "Motion") submitted by Ian C. Devine, Carla Hall Friedman and Karine Albert McCall ("Petitioners"), who are Ms. Clark's half great-nieces and nephew. I understand that the Motion seeks an order from the Court preventing me from communicating with Ms. Huguette M. Clark and from carrying on Ms. Clark's personal business affairs, as I have done for approximately fifteen years.

INTRODUCTION

2. Petitioners – who are Ms. Clark's very distant relations and who do not claim to have had any personal relationship with her – have initiated this proceeding *ex parte*, and without proper notice, seeking to have one or all of them appointed as guardian(s) of Ms. Clark's person (and seeking the appointment of Fiduciary Trust or Bessemer Trust Company, N.A. as guardian of her property). That petition, and the temporary restraining order that

Petitioners seek, are contrary to the manifest wishes of Ms. Clark, who has expressed to me on numerous occasions her desire that I handle her financial affairs and that her relatives, including Petitioners, should have no physical access to her.

3. In support of the Motion, Petitioners appear to speculate that I am involved in some kind of attempt to procure a Will from Ms. Clark and suggest that I am seeking to take advantage of her and to benefit as a result. In fact, however, Ms. Clark has had a duly executed and witnessed Will for over five years, and neither I, nor anyone else of whom I am aware, is attempting to get her to sign a new Will or to change her existing Will. Notably, although Petitioners contend that Ms. Clark is now incapacitated, a conclusion that I dispute, nothing they allege suggests that she would have been incompetent to execute a Will five years ago.

4. In order to issue a temporary restraining order, the Court must be “satisfied that in the absence of such a restraining order,” Ms. Clark’s property will be dissipated to her detriment or that her health, safety, and welfare will be endangered. *See* N.Y. Mental Hygiene Law § 81.23(2). Moreover, the Court must be satisfied that the specified harm is so imminent that a temporary restraining order is required until a hearing on Petitioners’ motion for a preliminary injunction can be heard. *Cf.* CPLR 6313(a) (requiring a showing that immediate harm will occur unless a temporary restraining order is issued “before a hearing can be had”).

5. Petitioners cannot meet this standard. They have not claimed that I have done anything to endanger Ms. Clark’s health, safety, and welfare. Indeed, they concede that she resides at Beth Israel Medical Center (“Beth Israel”), as she has done for many years, where her health, safety, and welfare are protected. In addition, Petitioners offer no meaningful allegation that I have done anything to dissipate Ms. Clark’s property to her detriment, much less that there

is any imminent threat that I will do so before a hearing can be held in this matter.

Notwithstanding the absence of such allegations, the Petitioners – very distant relatives of Ms. Clark, who have only recently appeared on the scene – ask the Court to disrupt the arrangements Ms. Clark herself made with respect to her affairs, and ask the Court to deprive Ms. Clark of the right to communicate with me, her long-standing attorney. Such an interference with Ms. Clark's interactions with others, particularly the people she chose to manage her affairs, is unwarranted and improper. *Cf. In re Isadora R.*, 5 A.D.3d 494, 773 N.Y.S.2d 96 (2d Dep't 2004) (“Isadora R. effectuated a plan for the management of her affairs and possessed sufficient resources to protect her well being, thus obviating the need for a guardian over her person or property.”). Ms. Clark has always been a strong-willed individual with firm convictions about how her life should be led and who should be privy to her affairs. A temporary restraining order would completely disrupt the plans she has set for her life.

6. Petitioners' application for a temporary restraining order also should be denied because Petitioners failed to provide proper notice of that application, as required by 22 N.Y.C.R.R. § 202.7(f). That section requires that a party seeking a temporary restraining order give the party that is to be restrained notice of the time and date when the application is being submitted. I believe that Petitioners' application was submitted to the Guardianship Clerk on Friday, September 3, 2010, but I was never notified. I heard about Petitioner's Motion from the press before I received a copy of their papers. Ms. Clark has been a very private person for as long as I have known her. She has often expressed to me her desire to maintain her privacy. The Petitioners' apparent attempts to contact the press and make this proceeding a public matter are completely contrary to Ms. Clark's long-established wishes.

FACTS

7. I have been admitted to practice law in the State of New York since 1958, and am a member of the bar in good standing. In fifty-two years of practice, I have never been the subject of a disciplinary sanction. I am on the panel of mediators for the United States District Court for Southern District of New York. I was a member of the panel of arbitrators for the American Arbitration Association. I am a current member of the Trusts and Estates, Elder Law and Real Estate committees of the New York State Bar Association. I am a member of the Association of the Bar of the City of New York. I am a member of and chair of the Law and Legislation committee of Community Board 9, Queens County, and formerly first vice-chair of that Community Board.

8. As an attorney, I have represented Ms. Clark for approximately fifteen years. I was introduced to Ms. Clark through Donald Wallace, her former attorney. I worked for her on his behalf for several years. When Mr. Wallace suffered a heart attack, I assumed his duties. Over the years, I spoke frequently with Ms. Clark. Today, we are in frequent communication, whether by phone, by mail or through her nurses and other attendants. It took many years for Ms. Clark to become comfortable with me— to my knowledge, I am the only attorney that she has been willing to meet face-to-face. Indeed, Mr. Wallace never met her, though serving as her attorney for at least twenty years.

9. On July 2, 1996, Ms. Clark appointed me as her attorney-in-fact pursuant to a power of attorney that permits me to carry on banking transactions on her behalf, including writing checks against certain of her accounts. Subsequently, on March 15, 2005, Ms. Clark executed a durable power of attorney permitting me to manage her affairs relating to the sale of her New Canaan, Connecticut property (the “Connecticut Property”). And, on July 14, 2009,

Ms. Clark executed a durable general power of attorney in favor of Mr. Kamsler and myself in order to ensure that we could freely continue to handle her affairs. Indeed, the power of attorney reflects that we should be appointed as her guardians if such an appointment were to become necessary.

10. The following is a non-exclusive list of the functions I perform or have performed on her behalf:

- a. Communicating with Ms. Clark's doctor and Beth Israel hospital regarding her medical care, and regarding financial matters.
- b. Negotiating and arranging the sale of Ms. Clark's personal property in accordance with her instructions, ensuring that she has sufficient resources to support her lifestyle.
- c. Arranging and overseeing the transfer of funds between Ms. Clark's various bank accounts to ensure that sufficient funds are available to maintain her properties and to pay her bills.
- d. Managing Ms. Clark's charity and gift-giving in accordance with her instructions.
- e. Communicating with Ms. Clark regarding her wishes with respect to two trusts administered on her behalf.
- f. Arranging Ms. Clark's burial plans, including working with her family, the cemetery housing her family's mausoleum, and engineers to make significant modifications to the family mausoleum to enable her to be buried there.
- g. Bidding at auction on behalf of Ms. Clark for dolls and other items in accordance with her instructions.
- h. Helping Ms. Clark to find a replacement healthcare facility when it became necessary for her to move from Mount Sinai Medical Center ("Mount Sinai"), and coordinating her move to Beth Israel.
- i. Consulting daily with Irving Kamsler, Ms. Clark's accountant, with respect to all of her financial matters.
- j. Consulting frequently with accounting staff with respect to payroll and related financial matters.
- k. Consulting frequently with Ms. Clark's personal assistant in connection with the performance of his duties on her behalf, including the maintenance of her New York City apartments.

- l. Reviewing utility, insurance and other bills relating to her various properties, and paying those bills by executing checks on Ms. Clark's behalf.
- m. Reviewing Ms. Clark's nurses' weekly time reports and issuing payroll checks.
- n. Handling disputes among the nurses.
- o. Communicating on a weekly basis with the manager of the Connecticut Property to learn of necessary repairs or other concerns related to the house or the estate.
- p. Communicating periodically with the broker offering the Connecticut property for sale.
- q. Consulting periodically with the tax certiorari attorney in Connecticut who is challenging the tax assessment on the Connecticut property.
- r. Supervising and arranging the use of the Connecticut property by the non-profit organization Summer Theatre of New Canaan; negotiating the terms of that use.
- s. Reviewing the monthly statements of operating expenses for the Santa Barbara, California property (the "California property"); discussing necessary repairs, salaries, and other aspects of property management with the property manager as well as with the local attorney representing Ms. Clark's affairs in Santa Barbara.
- t. Arranging visits to the California property by family members and others.
- u. Until recently, arranging approximately monthly conference calls between Ms. Clark and a distant relative living in California.
- v. Working with Ms. Clark's insurance agents with respect to the issuance, renewal, and premium reduction of a variety of insurance policies.

11. The Petition accurately states that Ms. Clark is 104 years old, is unmarried, and has no children. It accurately states that she currently resides at Beth Israel hospital in New York, New York. Petitioners attempt to suggest that I have somehow secreted Ms. Clark away in Beth Israel. In fact, however, Ms. Clark selected Beth Israel from among a number of possible facilities. She resides there voluntarily, and has resided in a hospital setting for approximately 20 years. She has expressed to me on many occasions that she prefers living in a hospital to any of her other residences.

12. Moreover, Ms. Clark previously resided at Mount Sinai in New York, New York. She voluntarily admitted herself into Mount Sinai in 1988, many years before she

was introduced to me.

13. Ms. Clark is subject to 24-hour care from a variety of nurses, doctors and personal attendants. She employs a day nurse, a night nurse and various other licensed practical nurses to ensure that she is never unattended. She employs a personal physician, who I believe visits her daily and is in constant contact with Beth Israel specialists to ensure her health is maintained.

14. The Petition accurately states that Ms. Clark is the daughter of Senator Clark by his second marriage and is the sole surviving descendant of Senator Clark by his second wife. Petitioners are the descendants of Senator Clark by his first wife. Ms. Clark has had minimal contacts with the descendants of her half-siblings and has had virtually no contact with the Petitioners.

15. The Petition accurately states that Ms. Clark owns sizable assets, including properties in Santa Barbara, California, New Canaan, Connecticut, and New York City, New York.

16. Although Ms. Clark is physically frail and has poor eyesight and hearing, the temporary restraining order sought by Petitioners would be improper under the circumstances presented to the Court. Petitioners make no allegation that I present a threat to Ms. Clark's health, safety, or welfare, nor could they. Ms. Clark's personal needs, including food, shelter, health care, and safety, are currently being met in exactly the manner Ms. Clark has determined for herself. She resides in a hospital room under twenty-four hour surveillance by hospital staff. She is attended by personal nurses at all times who ensure that she eats properly and is comfortable. I believe her personal physician also visits her on a daily basis.

17. The temporary restraining order that Petitioners seek would disrupt this

carefully established system of care that Ms. Clark arranged for herself and which I have actively managed on her behalf. Moreover, contrary to the goals of the New York Mental Hygiene Law, it would take away Ms. Clark's control over her environment. Ms. Clark determined who shall provide her personal care and assistance. She determined her place of abode. She has made her own decisions regarding her social environment, including demanding that her relatives have no physical access to her. Petitioners' proposed temporary restraining order therefore would be contrary to her long-standing wishes.

18. Similarly, Petitioners have made no showing that I should be restrained from handling Ms. Clark's financial affairs. In order to demonstrate the need for a temporary restraining order, they must show a real risk that I will dissipate Ms. Clark's property to her detriment. In reality, I have managed Ms. Clark's business affairs for many years, pursuant to durable powers of attorney that Ms. Clark executed in order to ensure that I would continue to do so on her behalf. Here again, Petitioners seek to disrupt the system that Ms. Clark put in place to manage her own affairs: indeed, at this very moment, payroll checks for last week need to be signed and distributed, and utility invoices and insurance premiums must be paid. And here again, they fail to show a real threat to Ms. Clark's interests.

19. Petitioners' allegations suggesting that Ms. Clark is likely to suffer personal or financial harm are unfounded. Petitioners' "evidence" in this regard consists largely of unsubstantiated tabloid news reports, is inaccurate, or misconstrues the actions I undertook in the service of Ms. Clark:

- a. I have not "controlled" Ms. Clark's affairs; I have managed them in accordance with her wishes. Notwithstanding the powers of attorney entrusted to me, I frequently have ensured that I was acting in strict accordance with Ms. Clark's wishes by requesting that she provide written authorization.
- b. I have not limited access to Ms. Clark against her wishes; nor did I falsely represent to

Petitioners that she refused to meet with them. Ms. Clark has explicitly instructed me on many occasions that she does not want visitors and does not want anyone – including her relatives – to know where she resides. Until last year, when her hearing loss became acute, Ms. Clark was willing to speak with a relative in California. I arranged their phone calls and routed his packages to her without any interference; she insisted that I arrange their contacts so that he would not be aware of her precise whereabouts. To my knowledge, her other relatives, including Petitioners, never requested to speak with Ms. Clark over the telephone. I have always fulfilled Ms. Clark’s relatives’ requests to the extent that I was authorized to. For example, with Ms. Clark’s approval, I willingly arranged for one of the Petitioners to visit Ms. Clark’s estate in Santa Barbara on multiple occasions.

- c. Furthermore, to my knowledge, apart from her relative residing in California, none of her family members, including Petitioners, sought any contact with Ms. Clark until approximately eight years ago, when a request was made for a contribution to an endowment benefiting the family mausoleum.
- d. As noted above, Ms. Clark has a Will, which she executed over five years ago. That Will reflects Ms. Clark’s decisions regarding the disposition of her estate. I have not made any attempt since the execution of that Will to get Ms. Clark to change it in any way, nor am I aware of any such attempt by anyone else. There is no basis for Petitioners’ attempt to suggest that such efforts are being made. In the interests of maintaining Ms. Clark’s privacy, her Will has not been submitted with this affidavit; however, it can be made available to the Court for *in camera* review at any time.
- e. I did not provide false next-of-kin information to Beth Israel. I am unaware if it was done and by whom. I did arrange for Ms. Clark to be listed under a different name, once newspaper reports about Ms. Clark appeared, to protect her privacy. I did so with the knowledge and assistance of Hospital staff, including the President of the Hospital. This arrangement was made only in the last several months in accordance with what I understood to be her desire for privacy.
- f. Petitioners’ assertion that I permitted Mr. Kamsler to continue in Ms. Clark’s service, despite his guilty plea, misconstrues events. I was never in any position to fire Mr. Kamsler; that decision was Ms. Clark’s alone. I did insist that he disclose his conviction to Ms. Clark, which I understood he did. At the time of my conversations with Ms. Clark’s relatives, I believed that Mr. Kamsler retained his Certified Public Accountant license, that no proceeding was underway to suspend that license, and that his conviction did not bear negatively on his ability to serve as her accountant. The fact that Petitioners are raising this issue now, for the first time, despite admitting that they have been aware of this situation since 2008, demonstrates that there is no urgency of the kind that would justify the drastic step of imposing the temporary restraining order that Petitioners seek.
- g. Petitioners’ assertion regarding a \$1.5MM donation to build a “bomb shelter” for a settlement in Israel is misleading. I informed Ms. Clark, as well as a number of friends and colleagues, of a fund-raising effort to develop a security system in Efrat, which is a

settlement on the West Bank where my daughter and her family live. The settlement had determined that such a system was necessary to prevent terrorist attacks. It was designed to benefit everyone living there. I informed Ms. Clark of the fund-raising effort because of her continued interest in my daughter and her family's safety in Israel. In my letter to Ms. Clark, I suggested only that she determine whether to make a donation and, if so, the amount. Ms. Clark decided on her own, outside of my presence, to make a significant donation, and authorized me to draw money from her account to pay for her pledge. The money was paid in increments, as needed, to an escrow account maintained by an attorney in Israel. During the design and construction of the security system, I requested interim progress reports, reviewed contracts, and sought background information on the members of the steering committee to ensure that Ms. Clark's donation was properly implemented. At Ms. Clark's request, until the project was completed, her participation as the primary donor was undisclosed.

- h. As a token of our friendship, and her interest in the lives of my children and grandchildren, Ms. Clark provided my granddaughter, when she was approximately six years old, with a custom-built dollhouse. I never solicited the gift; Ms. Clark volunteered it out of the kindness of her heart. Over the years, Ms. Clark frequently made gifts of dolls or dollhouses to the children or grandchildren of her friends and employees.
- i. Petitioners' assertion regarding my conversation with a former secretary in recent weeks is inaccurate. I called my former secretary in response to a message she left with Mr. Kamsler. The press were outside her home and she was very agitated and upset. I suggested that if she did not want to be bothered by the press, she should move temporarily to her parents' house or elsewhere. I did not ask her to refrain from speaking with anyone about Ms. Clark's matters. I told her she was under no obligation to speak with the press but that she would have to speak with a district attorney or the police if questioned. Nevertheless, I do believe that her statements to the press regarding Ms. Clark, many of which are demonstrably false, have violated Ms. Clark's privacy, and the duty of confidentiality that she owed, and still owes, to a client of the law firm.
- j. Petitioners' assertion that I "joked about and cursed" Ms. Clark behind her back in the course of attempting to have her sign a Will that would leave money to me is inaccurate. In light of Ms. Clark's professed desire to control the distribution of her assets upon her death, Mr. Kamsler and I frequently spoke regarding our mutual concern that Ms. Clark would die intestate. We never denigrated her. As her attorney, it was my obligation to advise her to sign a Will. Don Wallace, Ms. Clark's attorney before me, similarly advised her, as did his predecessors. The draft Wills that I prepared never made specific provisions to any named individual unless Ms. Clark had communicated that a gift should be made to that individual.
- k. Petitioners' assertion that the tax liens described in newspaper articles represent evidence of my mismanagement of Ms. Clark's affairs is inaccurate. I was not Ms. Clark's accountant and was not responsible for the preparation of her taxes. In any event, my understanding is that any tax liens were the result of a failure by the IRS to credit an overpayment of taxes in a prior year to the current year's tax obligation, or the result of

the IRS misplacing a properly filed return. These issues have been resolved with the IRS.

CONCLUSION

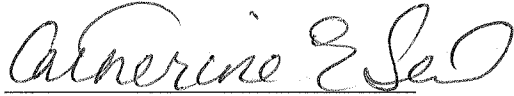
20. As is demonstrated in this Affidavit, there simply is no basis in fact or in law for the granting of any temporary restraining order pursuant to Mental Hygiene Law Section 81.23 to these three Petitioners, whose petition under Mental Hygiene Law Article 81 is without merit. Petitioners are nothing more than officious interlopers, all three of whom are virtual strangers to Ms. Clark, and with whom Ms. Clark has knowingly and assiduously avoided contact for decades. When this Court has the opportunity to review the guardianship Petition on its merits, it will surely conclude that there is no "necessity" for the appointment of a guardian for Ms. Clark within the meaning of Mental Hygiene Law Section 81.02, because Ms. Clark has had in place for a very long time a carefully crafted, comprehensive plan that she herself created for the management of her personal and financial affairs. That system has been working as she intended. For this Court to reward the never-before-involved Petitioners with a temporary restraining order that disrupts Ms. Clark's long-standing plan for her own care and asset management would be contrary to both the policy of the Mental Hygiene Law Article in favor of personal autonomy, and the law's many specific provisions which provide that a guardianship, much less a temporary restraining order in connection with an application for a guardianship, is an absolute last resort, to be utilized only where the person has not made adequate plans to provide for her own personal and financial affairs. Ms. Clark manifestly and indisputably has made such plans, many years ago, and they are working fine, to her clear and continuing benefit. On these facts, and under the applicable law, the Court should not grant

temporary restraining order sought by the Petitioners.



WALLACE BOCK

Sworn to before me this
14th day of September, 2010



Notary Public

CATHERINE E. SEEL
Notary Public, State of New York
No: 01SE5003530
Qualified in New York County
Commission Expires October 28, 2010

ND: 4822-7297-1271, v. 2