New York Law Journal

Trusts and Estates Law

Using a Power of Attorney To Conduct Litigation Strategy

C. Raymond Radigan and Jennifer F. Hillman, New York Law Journal

September 14, 2015

A recent report by the Alzheimer's Association stated that one in nine older Americans has Alzheimer's disease.[1] Based upon these numbers, it is clear that Alzheimer's disease, dementia or cognitive disorders will likely touch our personal and professional lives. Proper estate planning, like the execution of a power of attorney, can assure that a trusted agent is able to manage the practical and financial tasks that arise if someone becomes incapacitated.

This article focuses on one of the many powers granted to an agent in the New York statutory short form power of attorney related to claims and litigation. New York General Obligations Law 5-1502H further clarifies how that language must be construed. This article details some of the practical issues and concerns that may occur in the context of using a power of attorney to conduct litigation strategy, or how to proceed when there is no power of attorney in place.

Capacity to Sue

There is an important distinction between an individual's capacity to sue and her capacity to adequately prosecute or defend her rights. An incapacitated person does not lose her ability to assert or defend her rights in a litigation context because she is incapacitated. The law provides safeguards so that an agent, guardian ad litem or other authorized person can step in when a person's incapacity has affected her ability to adequately act for herself.

This distinction may seem obvious, but a facial reading of statutory law may muddy the issue. Pursuant to CPLR 3211(a)(3), a party may move for judgment dismissing a cause of action on the ground that the party asserting the cause of action does not have "legal capacity to sue."

However, a litigant's mental incapacity merely renders the plaintiff "incapable of adequately prosecuting or defending his rights." *Sayers v. Winthrop University Hospital*, 28 Misc3d 1201(A), *3 (Sup. Ct. Suffolk Co. 2010). It does not preclude an appropriate person with the ability to assert claims on her behalf from commencing a proceeding or otherwise defending against claims.

For example, in *Brown v. Lutheran Med. Ctr.*, 35 Misc3d 553 (Sup. Ct. Kings Co. 2012), aff'd,

107 AD3d 837 (2d Dept. 2013), defendants moved to dismiss a medical malpractice lawsuit arguing that the plaintiff lacked the capacity to sue because he was not the court-appointed guardian of the incapacitated person who was the party in interest. The plaintiff commenced a medical malpractice action on behalf of his wife, but he was not an agent under a power of attorney or a court-appointed guardian of the plaintiff (who at that time was alive but incapacitated). Instead, the plaintiff sued ostensibly as the "proposed guardian ad litem" for the actual party in interest. The proceeding was dismissed, and the plaintiff later commenced a new proceeding after he was appointed administrator of his (then deceased) wife's estate.[2]

In *Sayers v. Winthrop University Hospital*, the issue arose only after the litigation was commenced. While a personal injury case was pending, the plaintiff (who asserted individual claims as well as claims as executor of his wife's estate) allegedly became incapacitated due to his affliction with Alzheimer's disease. Once this became apparent, defendant moved to amend the answer to include lack of capacity to sue as an affirmative defense.

Upon review, the court stated that "[t]he litigant does not lack the capacity to sue or be sued; rather he or she is considered a ward of the court whose appearance in the action must be made by a CPLR 1201 representative." Id. The court also noted that the failure to appear by a CPLR 1201 representative is not jurisdictional in nature and may be cured nunc pro tunc anytime prior to judgment. Id. Thus, the proposed amended answer, which asserted the affirmative defense of lack of capacity to sue, was deemed palpably improper and the motion to amend the answer was denied.

The substitution of the appropriate party for the plaintiff in *Sayers* required some further review. The plaintiff's daughter held a power of attorney for her father. It was determined that the daughter may be entitled to be substituted as a representative plaintiff as agent under the power of attorney. However, her authority would extend only to the plaintiff's derivative claims which were asserted by the plaintiff in his individual capacity.

The claims of the plaintiff which had been asserted in his capacity as executor of the estate of his deceased wife could not be handled similarly. The court required substitution of a duly appointed successor personal representative of the estate. The court stayed the action to allow time for the parties to move for the appropriate substitution of persons in place and stead of the disabled plaintiff.

A particularly interesting scenario occurred in *Singer v. Seavey*, 39 Misc3d 1214(A) (Sup. Ct. N.Y. Co. 2013). While a proceeding concerning a potential sale of apartments by a partnership was pending, one of the general managing partners, Edmonds, suffered a stroke. Edmonds' attorney alleged that his client's mental capacity had not been impaired, and, allegedly on behalf of Edmonds, moved for an order enjoining certain defendants from selling the apartments. It appears that the attorney's actions were contested not only by the defendants, but also by Edmonds' agent under a power of attorney.

The defendants commenced a separate proceeding seeking the appointment of a guardian for Edmonds. Edmonds' niece was later appointed "temporary special guardian" of Edmonds for the "limited purpose of protecting and representing [Edmonds'] partnership interests." Id. at *1. However, the order further stated that "nothing contained herein shall be deemed a determination or finding by this court that the Special Guardian may exercise the rights and/or powers of a General Partner or Managing Partner of a partnership."

When faced with a perceived ambiguity, the Special Guardian commenced a new action

seeking an order confirming the validity of a 2003 durable power of attorney naming her as Edmonds' attorney-in-fact. The durable power granted the niece the right to make "business operating transactions." Upon review in this new proceeding, the court determined that Edmonds' attorney-in-fact had the authority to speak for Edmonds as an "alter-ego of the principal, authorized to make litigation decisions in the principal's place." It was also determined that the niece, as attorney-in-fact, could act as general partner on Edmonds' behalf. See also *Zaubler v. Picone*, 100 AD2d 620 (2d Dept. 1984) (finding partner's attorney-in-fact is authorized, absent any indication to the contrary, to institute an action in the name of his principal to dissolve a partnership). As a side note, the attorney offered no reason why he did not honor the power of attorney and abide by the agent's litigation strategy in the first instance.

Limitations of Agent

Pursuant to N.Y. Gen Oblig Law 5-1502H, an agent is authorized to conduct litigation strategy and otherwise step into the shoes of the incapacitated person. However, there are limitations on that ability. A non-attorney who is an agent acting as attorney-in-fact pursuant to a power of attorney cannot also act as an attorney at law.

CPLR 321(a) and section 478 of the Judiciary Law preclude a non-attorney from representing another individual in a civil action. An individual may not appear pro se on behalf of another litigant, because to do so would be to engage in the unauthorized practice of law. Practice Commentaries, 5-1502H; See *Whitehead v. Town House Equities*, 8 AD3d 369 (2d Dept. 2004) (sanctioning agent under power of attorney who attempted to appear pro se for principal by striking respondent's brief); *Blunt v. Northern Oneida County Landfill* (*NOCO*), 145 AD2d 913 (4th Dept. 1988) (finding plaintiff husband should not have been permitted to appear on behalf of co-plaintiff wife pursuant to a power of attorney where husband was not licensed to practice law).

An attorney-in-fact who is also an attorney at law may bring a suit on behalf of a principal without violating this rule. See e.g., *Dick v. Citibank*, 145 Misc2d 563 (Civ. Ct. Kings Co. 1989).

Guardian ad Litem

When it appears that a party may be incapacitated, an interested person should request that the court appoint a guardian ad litem. Pursuant to CPLR 1202, in the context of a mentally incapacitated litigant, this motion can be made by a relative, friend or guardian of the litigant. An opposing party also has standing to make the motion.

Regardless of the extra work or expense that may occur when opposing counsel brings the proceeding, it is in everyone's best interests to make certain that all parties to a proceeding can adequately protect their rights. Otherwise, neither a default judgment against the defendant nor any other proceedings that prejudice the defendant will be effective. See*Riverside Park Community v. Stubbs*, 39 Misc3d 1219(A)(Civ. Ct. N.Y. Co. 2013). In *Riverside*, it was uncontested that respondent was severely physically disabled and mentally ill, a fact that petitioner and respondent's attorneys were well aware of. Yet, at no time was a guardian ad litem appointed. Instead, a default judgment was entered against the respondent.

Later the Department of Social Services moved for an order appointing a guardian ad litem for respondent, and seeking to vacate the judgment and warrant of eviction. After recounting the

long procedural history, the court stated that respondent's mental incapacity were evident to "[a]ll of the actors in this matter…[including] Petitioner's counsel, the court and Respondent's counsel, as well movant…" The motion for a guardian ad litem was granted; the default judgment and the warrant of eviction were deemed void as a matter of law and therefore vacated.

This is not a position that anyone wants to find themselves in.

Attorney's Ethical Obligations

It may be that an attorney, through her privileged communications with her client, concludes that her client may be incapacitated. Under these circumstances, the attorney can seek to withdraw as counsel. However, the attorney may also have an obligation to seek the appointment of a guardian ad litem to represent the client's interests. This could lead to some concerns about disclosure of privileged communications.

New York Rules of Professional Conduct, Rule 1.14 states that when a lawyer reasonably believes that the client has diminished capacity, the lawyer may take "reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian."

The First Department has even stated it is "incumbent" upon the attorney to move for the appointment of a guardian ad litem to protect the interests of the client. *Brewster v. John Hancock Mutual Life Ins. Co.*, 280 AD2d 300 (1st Dept. 2001); see also CPLR 1202(a)(3).

The most prudent course of action would be to move to withdraw as counsel, and also move pursuant to CPLR 1202 to have a guardian ad litem appointed.

As discussed above, this ethical obligation may also extend to adverse litigants who are not your client. See *Sarfaty v. Sarfaty*, 83 AD2d 748 (4th Dept. 1981); *Rakiecki v. Ferenc*, 21 AD2d 741 (4th Dept. 1964).

Conclusion

Practitioners should be aware of the pitfalls that could arise, as well as the practical solutions, when a litigant is or becomes incapacitated. A principal places a great amount of trust in her agent when she executes a power of attorney. The ability of an agent to conduct litigation strategy on behalf of the principal may be one of the most important, and at the same time most overlooked powers granted.

ENDNOTES:

1. 2015 Alzheimer's Disease Facts and Figures. www.alz.org/facts/downloads/facts_figures_2015.pdf.

2. The first proceeding was dismissed "with prejudice." In the second proceeding, defendant asserted the affirmative defenses of collateral estoppel and res judicata based upon the court's use of the phrase "with prejudice" in the initial order. Plaintiff moved to strike these affirmative defenses from the answer. The motion was granted and affirmed by the Second Department

which determined that the Supreme Court did not intend to preclude the plaintiff from commencing a new action once he acquired the capacity to sue. *Brown v. Lutheran Med. Ctr.*, 107 AD3d 837 (2d Dept. 2013).

C. Raymond Radigan is a former Surrogate of Nassau County and of counsel to Ruskin Moscou Faltischek. Jennifer F. Hillman is a partner at Ruskin Moscou.
