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To: Greg Morcroft
Fax: (347) 521-2164
From: Aaron J. Goldberg, Esq.
Date: April 18, 2008
Re: Catherine S. Samis

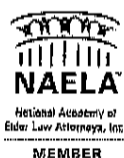
Number of pages including this cover sheet: 9

MESSAGE:

Enclosed please find a copy of the Findings, Decision and Order.

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STATE OF VERMONT
DISTRICT OF ORLEANS

PROBATE COURT
DOCKET NO. P068-2007-C-8

In Re:
Guardianship of Catherine S. Samis

FILED
APR 17 2008
ORLEANS DISTRICT
PROBATE COURT

FINDINGS, DECISION AND ORDER

This matter came before the Court for hearing on several dates for hearing on the following motions:

1. The motions of Gregory Morcroft ("Gregory"), Guardian, for preliminary and permanent injunction;
2. The motions of the ward's spouse, Philip L. Samis ("Philip"), to set aside the June 6, 2007, stipulation and the June 7, 2007, decision approving the stipulation and appointing the guardian;
3. The motion of Philip for modification of the guardianship.

On August 10, 2007, Gregory filed a motion for an emergency temporary restraining order without notice to Philip which sought to restrain Philip from certain actions and behaviors toward Catherine S. Samis ("Catherine"), the ward. The Court granted the motion and scheduled hearing on the associated request for preliminary injunction. Commencement of the hearing was delayed by a motion filed by Mary Kehoe, new counsel for Philip, seeking the recusal of Gregory's attorney, Aaron Goldberg. The recusal motion was denied after hearing on September 27, 2007. Hearing has taken place over the course of several days since then on Gregory's motion for preliminary injunction and upon the above-referenced motions filed by Philip.

Based on the evidence presented at the hearings and the records and files of the Court, the Court finds as follows:

Catherine is resident in Irasburg, Vermont. She is an American citizen and is married to Philip who is a Canadian citizen. Philip formerly maintained a residence in Montreal but has recently relocated that residence to Toronto. The marriage between Catherine and Philip is a second marriage of about twenty-five years duration, However, they have always maintained separate legal residences and separate finances, with the exception that the home in Irasburg occupied by Catherine as her primary residence is owned by both spouses as tenants by the entirety. Philip does not have resident alien status in the United States and Catherine does not have landed immigrant status in Canada. Each spouse is dependent upon the medical care and payment system in his or her country of citizenship for such care and its funding. Catherine is enrolled in Medicare on a self-pay basis. She also has Part D coverage and an AARP supplemental policy. Until Catherine's health began to decline, Catherine and Philip divided their time between the two countries in a manner that preserved the

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LORRAINE A. GRAY, REGISTER
ORLEANS DISTRICT PROBATE COURT

residency and benefit status of both of them. Catherine is 77 years of age and Philip is 80 years old.

On April 6, 2007, Gregory, who is Catherine's son, petitioned the Court for appointment as guardian of Catherine and also requested appointment as temporary guardian on an ex parte basis. The temporary appointment was granted until the merits were heard and resolved. Philip was a required party at the commencement of this proceeding. VRPP 17. He entered his appearance through counsel, prior to the merits hearing.

The merits hearing was scheduled for June 7, 2007. The Court was presented at that time with a stipulation negotiated by Aaron Goldberg (Gregory's attorney), David Bookchin (counsel engaged by Philip) and Gregory Howe (court-appointed counsel for Catherine). Pursuant to the stipulation, Gregory was appointed as Catherine's guardian with total powers under 14 V.S.A. § 3069. The Court incorporated the terms of the stipulation into its order.

Among other matters, the stipulation provided that Gregory and Philip would cooperate in financial planning for Catherine's care, in Medicaid planning in anticipation that Catherine's resources might not ultimately be sufficient to provide for her care, and in retitling the Irasburg property from a tenancy by the entirety to a tenancy in common. The stipulation also indicated that Catherine and Philip would each be self-supporting, except that a plan for payment of shared costs of the Irasburg property was to be negotiated and implemented. The stipulation also provided that Philip would not receive services from Catherine's caregivers and would not interfere with the scheduling or delivery of caregiving services to Catherine. Further, the stipulation provided that Gregory would not interfere with "reasonable contacts being maintained" between Catherine and Philip.

Philip was represented by competent and actively involved counsel in connection with preparation for the June 7, 2007, merits hearing and negotiation of the stipulation entered into by the parties prior to that hearing. Philip concedes that he reviewed drafts of the stipulation that he received via fax, discussed its provisions with his attorney and that the final stipulation as executed encompasses points negotiated on his behalf. He testified that he specifically authorized the inclusion in the stipulation of the provision in which it is agreed that title to the Irasburg property is to be converted from a tenancy by the entirety to a tenancy in common. It is evident from his testimony that he understood the stipulation and its consequences.

In addition, the stipulation contemplated that Philip would have the opportunity to consult with competent counsel concerning Medicaid, estate and financial planning issues concerning his separate and joint assets. There is no evidence before the Court indicating whether he has ever done so with United States counsel as to those issues.

Subsequent to his appointment, Gregory, in his capacity as guardian of Catherine, filed a divorce action against Philip in the Orleans Family Court under Docket No. 134-8-07 OsDm.

It does not appear that Philip now objects to those aspects of the stipulation and subsequent court order finding that Catherine is a person in need of guardianship due to her dementia and inability to care for herself. His present objections to the stipulation and to Gregory's continuation as guardian of Catherine amount to little more than unhappiness with Gregory, the manner in which Gregory is carrying out his duties (specifically the divorce filing and injunction request), and the stipulated agreement concerning title to the Irasburg property.

To the extent that Philip's motions are based upon his objection to the divorce filing, he has undermined his position by his admissions that he had contemplated divorce prior to the initiation of the guardianship, had consulted counsel in that regard and had negotiated and documented his freedom from financial and virtually all other responsibility toward Catherine in the guardianship stipulation in contemplation of arranging his affairs essentially in terms of what amounts to a financial "divorce." However, this Court defers to the Orleans Family Court with regard to the question whether Vermont law allows a guardian to file a divorce action on behalf of an incompetent spouse and defers to the Family Court as to the ultimate propriety of such filing in this instance. The Family Court has held hearings on these issues and issued two orders pertaining to the guardian's authority to initiate divorce proceedings. This Court takes judicial notice of those orders, copies of which were annexed to a memorandum filed by counsel for Gregory on January 16, 2008.

Philip argues that the actions of the guardian in filing the divorce action and in seeking injunctive relief demonstrate that the stipulation was entered into in bad faith and should be set aside on that basis. As noted, this Court will defer to the Family Court with regard to the divorce action. Otherwise, the Court cannot find that Gregory has acted out of any motive other than protection of his mother. Appointment of temporary guardianship was issued prior to the merits hearing in part to preserve the then *status quo* as Philip had taken actions and made statements concerning his plans that reasonably led Catherine's family to question his motives and concern for Catherine's wellbeing. Further, Philip had stated his intention to return to Canada and to relocate his Canadian residence (he has since done so by moving from Montreal to Toronto so that he is now several hours further away from Irasburg). At times, Philip made contradictory statements about his intention to take Catherine to Canada with him notwithstanding that she would lose her Medicare and other health insurance benefits or his intention to return to Canada and essentially abandon Catherine in Irasburg. Philip was also reluctant to take the actions necessary to provide adequate care for Catherine so that she could remain in her Irasburg home, such as obtaining the services of home health workers and care providers, until Gregory and his siblings intervened. It was in the context of

Philip's inconsistent behavior, threats and failure to recognize and take appropriate steps to meet Catherine's needs that the stipulation was negotiated.

Philip also objects to the stipulation and to Gregory's service as guardian based upon the provision of the stipulation concerning retitling of the Irasburg property and the alleged resulting benefit to Catherine's children, including Gregory, at the expense of Philip's children. However, there has been no showing that a tenancy in common does anything other than benefit the children of both spouses equally upon death of the parents as there has obviously been no showing of the exact timing and sequencing of the deaths of Philip and Catherine. The tenancy in common is completely neutral in that regard. Further, the Irasburg property is Catherine's primary residence. Philip owns and maintains his primary residence in Toronto in which Catherine has no ownership interest. In addition, the tenancy in common was part of a larger plan to address long-term care and financial planning issues that are of benefit to both Philip and Catherine and are consistent with Philip's stated desire that he and Catherine be completely financially independent of each other. As noted, the stipulation anticipated that Philip would consult further with counsel concerning Medicaid and long-term planning issues. Such financial planning is well within the purview of a guardian acting on behalf of a ward.

As both parties have pointed out to the court, precedents in Vermont favor enforcement of settlement agreements, particularly where the parties are represented by counsel. Pope v. Birchwood Manor Corp., 134 Vt. 577, 580 (1976); Estate of Emilio v. St. Pierre, 146 Vt. 421, 424 (1985). Here, Philip has not shown that there is any basis for setting aside the stipulation, and the Court so concludes. Thus, as the stipulation is incorporated into the Court's order, it is enforceable by the Court.

Philip argues that Gregory has been hostile and adversarial from the inception of this matter and that such behavior requires Gregory's removal due to Gregory's unsuitability under 14 V.S.A. § 3077(a). As Gregory owes no duty or responsibility whatsoever to Philip, the issue is whether Gregory's actions demonstrate unsuitability to serve in the context of his duties to Catherine. Again, this Court defers to the Family Court with regard to the merits of the divorce filing. The Court is familiar with other guardianships in which a divorce was obtained during the pendency of the guardianship. The restraining order and injunctive relief request is addressed below. Otherwise, Philip has made no showing as to Gregory's unsuitability. The evidence before the Court indicates that Gregory is actively and aggressively advocating on behalf of his mother with regard to care and treatment for her condition, providing for 24 hour care for her in her own home, and working to create an atmosphere of consistency, stability and safety for her. She is receiving services from care providers that enable her to remain in the home and is under the care of personnel at The Memory Center in Burlington, as well as a primary care physician in Burlington. Philip has been afforded opportunities to become informed as to Catherine's condition directly from The

Memory Center but, with one exception, has not taken advantage of the standing offer in that regard.

Thus, the Court concludes that there is no basis for modification of the guardianship by removal of Gregory as guardian.

The initial issue before the Court concerning motion for injunctive relief is whether this Court has jurisdiction to issue the injunction, and if so, whether the guardian has stated a cause of action. The guardian's position is that the Court does have such jurisdiction by virtue of 4 V.S.A. §§ 219 and 311, VRPP 65 and 14 V.S.A. Chapter 111. Philip argues that the probate court is a court of limited jurisdiction and that, even if the court has jurisdiction, the guardian has failed to state a cause of action in that the requested relief is within the jurisdiction of other courts.

4 V.S.A. § 219 provides in part that the probate court has equitable powers in all civil matters which may come before the court. Among the matters within the probate court's jurisdiction are proceedings involving "the appointment of guardians, and of the powers, duties and rights of guardians and wards, ..." 4 V.S.A. § 311, 14 V.S.A. Chapter 111. Under VRPP 17, Philip was a required party at the commencement of this proceeding. He entered his appearance and actively participated in the negotiation of the stipulation, including provisions that are to his financial benefit. As a party to the stipulation, he is subject to its benefits and burdens. He cannot claim the financial benefits of the stipulation, on the one hand, and simultaneously claim that the Court has no jurisdiction over him. Like other courts in Vermont, the probate court does have the power to enforce its orders. *Id.* at § 363(a). In appropriate circumstances, this Court does have injunctive powers as an enforcement tool. VRPP 65, incorporating VRCP 65.

Although VRPP 65 is procedural in nature and does not create substantive causes of action or jurisdiction in the probate court of its own accord, that circumstance does not preclude the court from consideration of Gregory's motion for injunctive relief. The relief requested in the motion is in essence addressed to the matters agreed to in Paragraphs 9 and 13 of the stipulation and therefore incorporated in this Court's order of June 7, 2007. Paragraphs 9 and 13 provide as follows:

"9. Gregory B. Morcroft, as Guardian of Catherine S. Samis, is authorized, once appointed, after recording this Order, which shall be deemed a License to Convey from the Orleans County Probate Court to join Philip L. Samis in a deed to change the title to Catherine S. Samis's primary residence in Irasburg and adjoining realty from tenants by the entireties to equal tenants in common.

13. Philip L. Samis shall not have any financial responsibility for such temporary care, or the planning of such care, nor shall he receive services from the caregivers of Catherine S. Samis. The guardian will provide Philip L. Samis with the schedule of caregivers. Philip L. Samis will not interfere with the scheduling or delivering of caregiving by the caregivers to Catherine S. Samis. The Guardian shall not interfere with reasonable contacts being maintained between Catherine S. Samis and Philip L. Samis."

Most of the relief requested in the motion for injunctive relief is aimed squarely at Philip's behavior, demeanor, threatened courses of action and their impact upon Catherine. Although some of Philip's behavioral lapses cited by Gregory are relatively trivial when considered in isolation, their cumulative effect is significant. Some of the specific instances were denied or minimized by Philip while others were readily conceded to have occurred as described. Philip frequently reminded the Court of his careers as a professional hockey player and dentist. Although neither career has any direct bearing on the matters at issue, Philip's behaviors and seeming lack of insight into Catherine's condition are noteworthy when considered in the context of the need for a dentist to interact with patients in a wide range of circumstances while maintaining a professional demeanor. His behavior during his testimony demonstrated that he has a temper and can be rude and dismissive of those who disagree with him or act in a manner other than he wishes. By his own admission, he is not well informed as to Catherine's present condition, prognosis and treatment plan as he has not kept up to date with information available from Catherine's doctors and other care providers, even though that information has been and continues to be available to him. Taken as a whole, the evidence before the Court indicates that Philip demonstrates a remarkable lack of common courtesy and concern for the impact that his behaviors, attitude and lack of insight have upon Catherine, which in turn fuels what sometimes appears in isolation to be oversensitivity on Gregory's part.

Although the relief sought in the request for injunction places restrictions upon the nature of contacts between Philip and Catherine, it would not prohibit personal contact. All that is required is advance notice to enable supervision and to avoid conflicts with medical appointments and the like. Taken as a whole, the restrictions sought in the injunction request are consistent with the goals of the overall approach to Catherine's care with respect to consistency and predictability. By his own admission, Philip has refrained from visiting at all notwithstanding that there is no such restriction in place.

It is evident from testimony at the hearing that the other points addressed by the motion for injunctive relief either originate in specific behaviors and actions by Philip which are detrimental to Catherine in the context of her condition and needs or pertain to the need for appropriate planning to assure that Catherine receives the benefits to which she is entitled without jeopardizing her Medicare

coverage. In isolation, some of the matters would seem to be obvious common sense items. However, Philip, as indicated above, has demonstrated a pattern of behavior that renders the cumulative effect of the matters at issue significant.

Based upon the foregoing, it is ORDERED that:

1. The motions of Philip L. Samis to set aside the June 6, 2007, stipulation and the June 7, 2007, decision approving the stipulation and appointing the guardian are DENIED;

2. The motion of Philip L. Samis for modification of the guardianship is DENIED; and

3. The motion of Gregory Morcroft, Guardian, for injunctive relief is GRANTED as follows:

A. Philip Samis is prohibited from arriving at the primary residence of Catherine S. Samis without forty-eight (48) hours advance notice to Gregory B. Morcroft and to the caregiver of Catherine S. Samis, such notice being a material provision of this order;

B. Philip Samis is prohibited from making suggestions to Catherine S. Samis that her children are engaged in fraudulent schemes to take her money;

C. Philip Samis is prohibited from countermanding the care instructions of the Guardian to the caregivers for the care of Catherine S. Samis;

D. Philip Samis is prohibited from leaving his own medications unsupervised and available to Catherine S. Samis;

E. Philip Samis is prohibited from screaming obscenities to Catherine S. Samis' family members or to her caregivers;

F. Philip Samis is prohibited from suggesting to Catherine S. Samis that she should leave the State of Vermont with Philip Samis;

G. Philip Samis is required to be dressed appropriately at all times when staying at the primary residence of Catherine S. Samis;

H. Philip Samis is prohibited from visiting Catherine S. Samis without supervision;

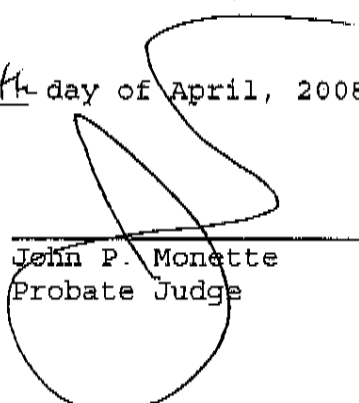
I. Philip Samis is prohibited from driving Catherine S. Samis;

J. Philip Samis is prohibited from all telephone contact with Catherine S. Samis, unless and until her primary care physician recommends otherwise; and

K. Philip Samis is ordered to sign the deed and transfer tax return between the parties, changing title to tenants-in-common, pursuant to the stipulation of the parties.

L. This order shall be binding upon the parties to this matter, their officers, agents, servants, employees, invitees, guests, attorneys, and upon those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise.

Dated at Newport City, Vermont this 17th day of April, 2008.



John P. Monette
Probate Judge