

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1443

CA 14-00843

PRESENT: SCUDDER, P.J., CENTRA, CARNI, AND SCONIERS, JJ.

IN THE MATTER OF THE APPLICATION OF WILLIAM MITCHELL, PETITIONER-RESPONDENT, FOR THE APPOINTMENT OF A GUARDIAN OF THE PERSON AND/OR PROPERTY OF DEBORAH A.L., AN ALLEGED INCAPACITATED PERSON, RESPONDENT-APPELLANT. (PROCEEDING NO. 1.)

MEMORANDUM AND ORDER

IN THE MATTER OF THE APPLICATION OF MICHAEL G. LANG, PETITIONER-RESPONDENT, FOR THE APPOINTMENT OF A GUARDIAN OF THE PERSON AND/OR PROPERTY OF DEBORAH A.L., AN ALLEGED INCAPACITATED PERSON, RESPONDENT-APPELLANT. (PROCEEDING NO. 2.)

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (JOHN D. CONNERS OF COUNSEL), FOR RESPONDENT-APPELLANT.

SHANLEY LAW OFFICES, OSWEGO (P. MICHAEL SHANLEY OF COUNSEL), FOR PETITIONER-RESPONDENT MICHAEL G. LANG.

RODAK LAW OFFICE, P.C., OSWEGO (JOSEPH G. RODAK OF COUNSEL), FOR PETITIONER-RESPONDENT WILLIAM MITCHELL.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered July 8, 2013 in proceedings pursuant to Mental Hygiene Law article 81. The order determined that respondent is an incapacitated person.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, and the matter is remitted to Supreme Court, Oswego County, for further proceedings in accordance with the following Memorandum: In these proceedings pursuant to Mental Hygiene Law article 81, respondent, an alleged incapacitated person (AIP), appeals from an order that determined that she is incapacitated and in need of a guardian. We agree with the AIP that Supreme Court erred in making that determination without considering "the 'sufficiency and reliability of available resources' (Mental Hygiene Law § 81.02 [a] [2]) to satisfy the AIP's personal needs and property management without the need for a guardian" (*Matter of Samuel S. [Helene S.]*, 96 AD3d 954, 957, lv dismissed 19 NY3d 1065). It is undisputed that the AIP had "available resources," i.e., a power of attorney and healthcare proxy (see Mental Hygiene Law § 81.03 [e]), and the court should therefore have inquired whether those advance directives were adequate to protect the AIP's personal and

property interests before determining that she is incapacitated and in need of a guardian (see *Samuel S.*, 96 AD3d at 956-957; *Matter of May Far C.*, 61 AD3d 680, 680; *Matter of Maher*, 207 AD2d 133, 140, lv denied 86 NY2d 703, rearg denied 86 NY2d 886).

We therefore remit the matter to Supreme Court for further proceedings on the petitions.

Entered: January 2, 2015

Frances E. Cafarell
Clerk of the Court