NOT FOR PUBLICATION
WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

In The Matter of COSTA NOVA, an Alleged Incapacitated Person	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION, PROBATE PART ESSEX COUNTY DOCKET NO.: ESX-CP-0196-10 **OPINION**

Decided: April 12, 2011

By: Walter Koprowski, Jr., J.S.C.

Costa Nova is a 99 year old gentleman who resides at home in Montclair. The Plaintiffs Abraham Riley, Jr. and Gail Winston are friends of Mr. Nova, and were formerly his attorneys in fact. Costa Nova signed an advanced directive for health care on November 26, 2008. He signed a durable healthcare power of attorney in favor of petitioner Abram Morton Riley, Jr. also on November 26, 2008. Finally, Nova signed a general power of attorney in favor of both petitioners, Abram Morton Riley, Jr. and Gail Winston on May 14, 2009. He also signed a will naming Abram Morton Riley, Jr. as his executor and Gail Winston as substitute executor on July 14, 2006.

Costa Nova revoked his prior power of attorney by formal revocation dated June 25, 2010. He executed a new power of attorney in favor of his attorney of over 20 years, Grant Gille, Esq. on June 25, 2010 and a new durable medical power of attorney in favor of Ms. Theresa Alaimo (his "roommate" and caregiver) under a document executed May 13, 2010. Ms. Alaimo is also the primary beneficiary under a new will executed June 25, 2010.

Petitioners filed their verified complaint and order to show cause on July 28, 2010. Motion to Dismiss was filed February 24, 2011. Dr. James Morgan examined Mr.

Nova on May 11, 2010 in connection with this guardianship petition. On June 25, 2010, Mr. Nova was voluntarily examined by his attending neurologist, Dr. Widdess-Walsh. His psychiatrist Dr. Peter Crain examined Mr. Nova on July 2, 2010. This Court signed an order compelling Mr. Nova to undergo another medical exam on November 12, 2010 pursuant to R. 4:86-4(c) by Dr. Carol Anekstein.

Anthony LaPorta, Esq. of the Rivkin Radler law firm was appointed to serve as guardian *ad litem* for Mr. Nova by order dated December 1, 2010. He submitted his report on January 18, 2011, in which he concluded the evidence does not clearly and convincingly support a conclusion that Costa Nova is incapacitated.

Several doctors have concluded Mr. Nova is not affected by significant cognitive dysfunction, and/or he is not fully incapacitated. Mr. Nova's neurologist, Dr. Widdess-Walsh concluded, "overall there is no clinical evidence of significant cognitive dysfunction." Mr. Nova's psychiatrist, Peter Crain, M.D. concluded Mr. Nova is mentally competent to manage his own affairs and person after an examination on July 2, 2010. Dr. Anekstein, the psychiatrist retained by the petitioners who examined Mr. Nova pursuant to court order found he "lacks full capacity to make informed decisions about his financial affairs or health, and is unable to care for himself independently." Counsel for the respondents points out to be declared incapacitated, a person needs to be fully incapacitated, not just lacking full capacity. Court appointed guardian *ad litem* Anthony LaPorta is of the view that Mr. Nova is not an incapacitated person. He writes, "It is our opinion Mr. Nova is not incapacitated. . . . [He] has consistently demonstrated clarity of thought . . . Although we agree Mr. Nova requires assistance, we do not believe his limitations rise to the level of incapacity."

Mr. Nova now moves to dismiss this petition. The major emphasis of Mr. Nova's motion is that former (or even current) attorneys in fact lack standing to bring guardianship actions. Mr. Nova cites a case with facts very similar to the matter presently before this court. In <u>In re Jane Tierney, an Alleged Mental Incompetent</u>, 175 N.J. Super. 614 (Ch. Div 1980), the Somerset County Chancery Court found a longtime friend, who had helped the alleged incapacitated person with her affairs and finances and was formerly her attorney in fact, lack standing to bring a guardianship action. In that case, the alleged incapacitated person was injured as a result of an automobile accident at the age of 55. <u>Id.</u> at 617. She had no spouse or children, and her parents predeceased the accident. <u>Id.</u> The Plaintiff was a childhood friend, and became the alleged incapacitated person's attorney in fact by a power of attorney executed in January of 1978. <u>Id.</u> On February 13, 1980, apparently over concerns that her finances were being mismanaged, Ms. Tierney revoked this power of attorney and executed a new power of attorney in favor of her attorney. <u>Id.</u> The guardianship action was filed six days later on February 19, 1980. <u>Id.</u> at 618.

In discussing the standing of the Plaintiff to bring a guardianship action, the Court noted that the statutory requirements that a complainant must state his relationship to the alleged incapacitated person, and if not spouse or next of kin, his interest, "reflects and substantiates the general rule that a proper complainant must be a relative or a person

with a legal or equitable interest in the subject of the action." Id. at 622. The court noted that a legal or equitable interest could mean a creditor of the alleged incapacitated person or an institution in which the person resides could bring a guardianship action. Id. In concluding that the Plaintiff lacked standing as friend or former attorney in fact to bring the guardianship action, the Court wrote, "The public policy which gave birth to the standing requirements as to incompetency actions is clearly to protect individuals from unwanted interference in their affairs; to shield an individual form the necessity of defending himself from frivolous or insidious incompetency charges. It is the opinion of this court that the general need for such protection has not diminished; certainly the situation presented in the instant case does not call for modification of the standing requirement." Id. at 623.

The facts of this case warrant a similar conclusion. The Plaintiffs are friends or now "former friends" of Costa Nova. They are also former attorneys in fact under a revoked power of attorney. Even if the Plaintiffs were current attorneys in fact under a valid power of attorney document, they still would not have standing. A power of attorney does not give one a "legal or equitable interest" in either the assets or person of the principal. A power of attorney is an "instrument in writing whereby one person, as principal, appoints another as his [or her] agent and confers authority to perform certain specified acts or kinds of acts on behalf of principal." D.D.B. Interior Contr., Inc. v. Trends Urban Renewal Ass'n, Ltd., 176 N.J. 164, 168 (N.J. 2003) (citing Black's Law Dictionary 1171 (6th ed.1990)); *see also* N.J.S.A. 46:2B-8.2a (defining power of attorney as "written instrument by which an individual known as the principal authorizes another individual . . . known as the attorney-in-fact to perform specified acts on behalf of the principal as the principal's agent").

Plaintiffs advance two main arguments in defense of their standing to bring this action. First, they challenge the revocation of the powers of attorney which made them Mr. Nova's attorneys in fact. They failed to challenge those revocations in the complaint, and now seek to amend the complaint to include claims challenging the revocations. However, if those revocations were invalid, and the Plaintiffs were still attorneys in fact, Plaintiffs would still not have standing to bring a guardianship action, because they do not have any equitable or legal interest in Mr. Nova's property. The second argument they make is premised on N.J.S.A. 3B:12-25, which governs individuals who may serve as guardians of an incapacitated person. The statute reads:

> "The Superior Court may determine the incapacity of an alleged incapacitated person and appoint a guardian for the person, guardian for the estate or a guardian for the person and estate. Letters of guardianship shall be granted to the spouse or domestic partner . . . if the spouse is living with the incapacitated person as man and wife or as a domestic partner . . . at the time the incapacitation arose, or to the incapacitated person's heirs, or friends, or thereafter first consideration shall be given to the Office of the Public Guardian for Elderly Adults in the case of adults within the statutory mandate of the office, or if none of them will accept the letters or it is proven to the court that no appointment from

> among them will be to the best interest of the incapacitated person or the estate, then to any other proper person as will accept the same, and if applicable, in accordance with the professional guardianship requirements of P.L.2005, c.370 (C.52:27G-32 et al.). . . The Office of the Public Guardian for Elderly Adults shall have the authority to not accept guardianship in cases determined by the public guardian to be inappropriate or in conflict with the office.

That statute merely lays out the priority order of who may serve as the guardian. It does not establish who may institute a guardianship action, nor does its reference to "some other person" serving as the guardian mean that anyone may file an action for guardianship. Neither of the Plaintiffs' arguments is convincing. The motion to dismiss for lack of standing is granted.

Plaintiff also seeks a variety of relief by way of cross motion. All forms of requested relief are moot in light of Plaintiffs lack of standing. First, Plaintiff seeks leave to amend its complaint to include a challenge to the revocations of Mr. Nova's previous power of attorney document. Under N.J. Court Rule 4:9-1, "A party may amend any pleading as a matter of course at any time before a responsive pleading is served. . .Thereafter, a party may amend a pleading only by written consent of the adverse party or by leave of court which shall be freely given in the interest of justice." Leave to amend should be liberally granted, without consideration of the ultimate merits of the amendment. Jersey City v. Hague, 18 N.J. 584, 602 (1955). Further, the broad power of amendment may be literally exercised at any stage of the proceedings unless undue prejudice would result. Zacharias v. Whatman PLC, 345 N.J. Super. 218, 226 (App. Div. 2001). However, the power to grant a motion to amend a pleading remains within the Court's discretion, and a motion to amend is properly denied where allowing the amendment would unduly protract the litigation. Cutler v. Dorn, 196 N.J. 419, 441 (2008); Franklin Med. Associates v. Newark Public Schools, 362 N.J. Super. 494, 506 (App. Div. 2003); Fisher v. Yates, 270 N.J. Super. 458, 467 (App. Div. 1994). In deciding whether to grant leave to amend, the Court may consider both merit of the claim, Fox v. Mercedes-Benz Credit Corp., 281 N.J. Super. 476 (App. Div. 1995), and the lateness of a motion for leave to amend, Globe Motor Car Co. v. First Fidelity Bank, N.A., 291 N.J. Super. 428 (App. Div. 1996).

In this case, responsive pleadings have long been filed. Therefore, amendment may only be allowed by consent of the adverse party or by leave of Court. While leave to amend pleadings is generally liberally granted, it remains within the Court's discretion to deny leave, particularly in cases where the proposed claim lacks or merit or where leave to amend is requested at a late juncture in the case. Amending the complaint in this case would be both futile and unduly delaying of the litigation. Even assuming *arguendo* that the powers of attorney naming the Plaintiffs as attorneys in fact were valid, they would still not have standing to bring this action. Also, this guardianship action, in which numerous doctors and the court-appointed guardian *ad litem* have come to the conclusion that Mr. Nova is not incapacitated and does not require a guardian, has been in litigation for more than half a year. To allow amendment of the complaint at this late juncture, for

the purpose of challenging revocations of power of attorney, is a waste of the court's time because the plaintiffs do not have standing in any event.

Plaintiffs also seek to compel a video-taped deposition of Mr. Nova, and an "accounting" of his finances since May of 2010. These remedies are inappropriate at this time, in view of this decision.

Anthony J. LaPorta, Esq., guardian *ad litem* for Mr. Nova, seeks counsel fees in the amount of $11,275.00. I find his hourly rate in the amount of $250.00 is in accordance with the fee customarily charged in Essex County for court appointed attorneys in guardianship proceedings. I find 45.10 hours were necessary in view of the questions involved. I find expenses in the amount of $71 were necessary. Mr. LaPorta's fee application is approved.