

## **In the Interest of A.M. an Older Adult**

*Order under Older Adults Protective Services Act held not to violate older adult's constitutional rights. (Hunter – Incapacitated Persons 14).*

In the Orphans' Court Division of the Court of Common Pleas of Chester County. In the Interest of A.M. an Older Adult. No. 1 OA 2013.

*Timothy J. Holman*, for A.M.

*Scudder G. Stevens*, for Chester County Dept. of Aging Services.

OPINION BY TUNNELL, J., MARCH 19, 2013:

The Chester County Department of Aging Services (hereafter "Department") received a confidential report alleging that A.M. (the "older adult") was the subject of financial mismanagement or abuse. The Department is mandated to implement the provisions of the Older Adults Protective Services Act (hereafter "the Act"), the Act of November 6, 1987, P.L. 381, No. 79 (now 35 P.S. §10225.101, et seq.). As a consequence of that report, the Department initiated a confidential investigation assigning a responsible staff person, Douglas Bernard, as the investigator.

A.M. is an 82-year old woman who resides alone in her home. She has four adult children, Richard, Mark, Thomas and Lisa. In the last six months, A.M. has executed four powers of attorney.

The first and third named Richard as her agent. The second and fourth named Mark as her agent. The first three powers of attorney were prepared by attorney William McLaughlin, Esquire. The facts and circumstances of the preparation of these documents were very concerning. Additional information was received concerning withdrawals of sizable sums from A.M.'s financial accounts, the presence of a large amount of cash lying around the home, and the belief that her bills were not being paid.

Mr. Bernard was ultimately able to complete a home visit with the older adult, informing her of his role and function under the law, and that it was his duty to complete an investigation. He made several attempts to obtain consents from A.M. A.M. told him that she agreed to make an appointment to see her primary care physician, a Dr. Priem, but she did not follow through with this task. She refused to sign releases of information which would allow the investigator to obtain information from Wells Fargo and Vanguard where her financial accounts were maintained. Additionally, within a day or two A.M. revoked the release she had given with respect to medical information from Dr. Priem.

Subsequent attempts to do home visits by the investigator were unsuccessful, although he saw A.M. inside the home; she refused to answer the door. This caused the Department to send a letter to the older adult again seeking contact and various records, and informing her that otherwise the Department would be obligated to petition the court to get access to those records and to seek an involuntary intervention order.

The investigator, as mandated, continued with his investigation in order to reach a determination of either "substantiation" or "unsubstantiation." He contacted Robert W.

Priem, M.D. and learned that A.M. was diagnosed with dementia and hypertension, that she was scheduled for but had not kept a number of medical appointments, had moderately severe memory loss, was confused, and although he had not seen her for five months, he would opine that she was not capable of managing or revoking a power of attorney. Dr. Priem questioned her continued safety at home, and suggested she would do well in an assisted living environment. The investigator also learned from Dr. Priem that A.M. was not taking her dementia medicine.

Mr. Bernard also contacted A.M.'s attorney, William McLaughlin, Esquire, seeking information regarding the changes of the power of attorney. Mr. McLaughlin informed him that A.M. refused consent to disclose the requested information. Mr. Bernard made two additional attempts to reach the older adult at her home. They were unsuccessful, whereupon he Department filed an Emergency Petition for Involuntary Intervention pursuant to 35 P.S. §10225.307, et seq. of the Older Adults Protective Services Act. The petition related the facts set forth above.

The court scheduled a review hearing on January 24, 2013. The court met in chambers with counsel for the Department, the investigator Mr. Bernard, and William McLaughlin, esquire. Mr. McLaughlin indicated that he had not received a call back from his client and so could not make any particular representations or commitments. The court reviewed the facts set out in the petition, and concluded they were serious enough to warrant further action. The Department sought, and the court ordered, access to the older adult's person, and to her financial and medical records. In particular, the order required A.M. to attend and participate in a neuropsychiatric evaluation, the purpose of which was to determine her executive functioning. The court signed an emergency order and scheduled a review hearing for the following day, Friday, January 25, 2013. However, because of the difficulty in getting notice to the older adult, the protective services review hearing was extended to February 4, 2013.

The Department applied for and the court signed an emergency order to freeze assets on February 4, 2013 to protect A.M.'s financial accounts from any further diminishment. On the following day, February 5, 2013, the Department applied for a further continuation of the review hearing because a medical evaluation of A.M. had not yet occurred. The Department also requested, and the court ordered, one of A.M.'s sons to provide access to A.M.'s residence with a key that he had. Additionally, police assistance, if needed, was ordered, including breaking in the premises. A.M.'s attorney was apprised of all of these developments.

Following the issuance of that order of February 5, 2013, new counsel, Timothy J. Holman, Esquire, appeared for A.M., and sought an administrative conference with the court and the Department. This was granted. Mr. Holman shared his grave reservations about these proceedings. As set out in the Emergency Petition he filed to Vacate or Stay this Honorable Court's Emergency Orders, A.M. essentially disagreed with the information in possession of the Department, questioned the Department's authority to proceed and demanded a hearing to put the Department "to its proofs." At the end of the conference, the court requested that the parties brief the matter and scheduled oral argument. It signed an order March 1, 2013, temporarily staying its order dated February 5, 2013.

Oral argument occurred March 14, 2013. A.M. argued that there was no evidentiary support for any of the orders entered to date, including a decree that A.M.

was “incapacitated,” directing her to attend a neuropsychiatric evaluation, authorizing access to two years’ worth of her bank statements, receiving her entire medical file, and allowing the police to break and enter her home. No witness had testified, no document had been entered into evidence, and there was no record at all.

A.M. was insistent that a hearing be held to determine whether the Department had been denied access to her or her records. She wanted the Department to name any third person or caretaker who was responsible for blocking access. A.M. argued that she was never adjudicated as an incapacitated person under the guardianship statute at 20 Pa. C.S.A. §5501, et seq. Furthermore, she challenged the Department to show clear and convincing evidence of an imminent risk of death or serious bodily injury before any access was ordered.

In enacting the Older Adults Protective Services Act, the Legislature declared it to be a policy of the Commonwealth that older adults who lack the capacity to protect themselves and are at imminent risk of abuse, neglect, exploitation or abandonment shall have access to and be provided with services necessary to protect their health, safety and welfare. The Act is to be liberally construed to assure availability of protective services to all older adults in need of them. A uniform statewide reporting and investigative system for suspected abuse was created. See 35 P.S. §10225.102. Each area agency on aging is required to have a protective services plan, §10225.301(c), and must be able to receive reports of older adults in need of protective services 24 hours a day, 7 days a week: §10225.302(b). It is the responsibility of the agency to provide for an investigation of each report within 72 hours after receipt, and to determine whether the report is substantiated or unsubstantiated; if the latter, then the agency is to provide protective services pursuant to a service plan: 35 P.S. §10225.303. The Act is so structured that an older adult will ordinarily receive protective services voluntarily. The agency is to have access to all relevant records, and to the person of the older adult: §10225.304.

When an agency is denied access to an older adult reported to be in need of protective services before its investigation is completed, the agency may petition the court for an order requiring appropriate access “...when either of the following conditions apply: (1) the caretaker or third party has interfered with the completion of the investigation or the client assessment and service plan or the delivery of services; (2) the agency can demonstrate that the older adult reported to be in need of protective services is denying access because of coercion, extortion or justifiable fear of future abuse, neglect or exploitation or abandonment:” §10225.304(f).

It appeared to the court that, at least at this early stage of the investigation, the case bore classic features of need: the older adult was 88 years of age, carrying a diagnosis of dementia, with confusion. She had, according to her own physician, the cognitive inability to appreciate executing or revoking a power of attorney. There were four children, and the agent of the power of attorney was being changed back and forth between some of them, from which it can be inferred that the older adult was unable to resist being manipulated. Furthermore, she was unable to keep medical appointments, nor remember to take her medicine for her mental condition. She initially gave consent for the release of medical information, and made an appointment to see her physician, but this was abruptly cancelled, and contemporaneously the person of the older adult was nowhere to be found. Despite repeated attempts to contact her both personally and by

letter, the situation did not improve, in addition to which was the matter of potential financial exploitation.

The agency is mandated to protect the older adult's right to privacy by keeping all cases confidential as it performs its investigation. All reports and records "shall be maintained under regulations promulgated by the Department to safeguard confidentiality:"§10225.306(a).

It was clear enough to the court that someone was interfering with the completion of the investigation. The Department was perhaps unable to determine who it was but, in any event, the Department is not required to name that person or persons. Given that the Act is to be construed liberally in order to effectuate the legislative policy, the requirements of this section referring to access to the person were met in the court's estimation. The same rationale applies to the denial of access to the older adult's records under §10225.304(h), and were likewise met for the same reasons.

At this juncture, it was demonstrated that A.M. also met the definition of an "incapacitated older adult." The regulations promulgated by the Secretary, at 6 Pa. Code §15.2 define "incapacitated older adult" as an "older adult who, because of one or more functional limitation, needs the assistance of another person to perform or obtain services necessary to maintain physical or mental health. The definition of capacity or incapacity or competence or incompetence, as defined in 20 Pa. C.S. §§5501-5555 (relating to guardianship), does not apply to this definition.: This answers several of the objections of A.M.

A.M. also complains that she was not given proper notice of the proceedings and therefore her rights to due process were violated. The relations further provide that when an agency petitions the court for emergency involuntary intervention the agency "shall make sure the older adult has the opportunity to be represented by counsel at all stages of the proceedings. If the older adult has an attorney known to the agency, the agency shall attempt to notify that attorney before it files a petition for emergency involuntary intervention...Notification to counsel shall include a copy of the petition with the affidavits attached, as well as the time, date and place of presentation of the petition..." 6 Pa. Code §15.71. The investigator complied with this provision to the letter. Even prior to the presentation of the emergency involuntary intervention petition, Mr. Bernard contacted Mr. McLaughlin and apprised him of the investigation. Mr. McLaughlin attended the proceedings until he was replaced by Mr. Holman. Mr. Holman was contacted by one of A.M.'s children who apparently did not recognize, or was not satisfied with, Mr. McLaughlin's appearance. But nothing occurred *ex parte*.

A.M. insists that she is not incapacitated. She nonetheless refuses to meet with her doctor, release medical information that will bear upon her mental and physical health, and refuses to voluntarily participate in a neuropsychiatric exam. All of this frustrates the purpose of the investigation and essentially halts it in its tracks. The Department cannot determine whether the report it received was substantiated or not, and if substantiated provide protective services. The Department had no alternative other than to file an emergency petition, as it informed A.M. it would, pursuant to §10225.307(a). That section provides that "where there is clear and convincing evidence that if protective services are not provided, the person to be protected is at imminent risk of death or serious physical harm, the agency may petition the court for an emergency order to provide the necessary services." Forcible entry is specifically authorized upon a

court order if it should become necessary to get access to the premises: §10225.307(d). Under the facts set out above, the court was satisfied that the older adult was at the point of serious physical harm, given that she was not seeing her doctors, taking her medicines for impaired cognition, and not paying her bills. Taking these together, A.M. no longer had the executive functioning required to provide for even her most basic needs.

Nor was this the first case of its kind the court had ever experienced.

Counsel for A.M. seemed to be particularly appalled by the portion of the court's order allowing forcible entry. The short answer to this is to ask who would not break down someone's door if they suspected an elderly person inside might be in danger by fire or other peril.

As to A.M.'s argument that her constitutional rights were violated, this question was addressed by the Commonwealth Court in *In the Interest of M.B., an Older Adult*, 686 A.2d 877 (Pa. Cmwlth. 1996). The issue there was whether the agency, proceeding under §7(h)(2) (now 35 P.S. §10225.304(h)(2)) due to denial of access to records, was first required to go to a hearing and prove the incompetence of the older adult. M.B. contended that the grant of access without notice and a hearing violated her constitutional right to privacy and deprived her of due process of law. Citing *Stenger v. Lehigh Valley Hospital Center*, 530 Pa. 426, 609 A.2d 796 (1992), the Commonwealth Court acknowledged that under the United States and Pennsylvania Constitutions there was a right to privacy, in this case a right to avoid disclosure of personal information. The Commonwealth Court noted that this right is not absolute and can be abridged in order to further a compelling state interest. The Commonwealth Court concluded that the Commonwealth's interest in protecting older adults from abuse, neglect, exploitation, or abandonment was "certainly compelling." Accordingly, it held that when the circumstances outlined in §10225.304(h)(2) exist, the court may grant an agency access to personal records without offending the Constitutions of the United States or the Commonwealth: *Id.*, 881. Procedurally, the agency is required to file a petition with the court. Nonetheless, the use of the word "demonstrate" in this section indicates that a hearing is not required in all cases: *Id.*

This court believes that the term "demonstrate" falls somewhere between a simple averment on the one hand, and a full evidentiary hearing on the other. This court believes that the Department met its burden to "demonstrate" when it produced its investigator and a quantum of facts, all as related above, before the court and the older adult's attorney in chambers. It is true that no record was made, but in emergent situations, similar to special injunctions, a record may not be made.

Instead of filing an answer to the petition, as the Commonwealth Court envisioned would next occur, here the older adult filed her own emergency motion to vacate, challenging the court to put the Department "to its proofs" now. The court believes that this puts the rabbit in the hat, and is calculated to stymie the Department by demanding proof out of what is still a nascent investigation, and a confidential one to boot. Few investigations will proceed far if interrupted in this fashion.

After the older adult files an answer, the Commonwealth Court envisioned that there would be court-ordered discovery regarding disputed issues of fact, evidentiary hearings and argument by the parties: *Id.* 882. Procedural due process is thus assured.

Accordingly, this court holds that A.M.'s constitutional rights have not been violated, and will re-impose its prior order dated February 5, 2013.