

2011 WL 1664476 (Mass.App.Ct.) (Appellate Brief)  
Appeals Court of Massachusetts.

**ELDER** SERVICES OF MERRIMACK VALLEY, Appellee,

v.

Lillian SCHIAVONI, Appellant.

No. 2010-P-2003.

April 6, 2011.

**Appellant's Brief**

Lillian Schiavoni, 57 Willie Street, Haverhill, MA 01832, (978) 373-1873.

\*1 Now comes the Plaintiff, Lillian Schiavoni, requesting this Honorable Court (1) reverse the lower Court's decree of Guardianship of Nettie Carpinone; (2) reverse the lower Court's Declaratory Judgment violating the Appellant's right to property under the Constitution of the United States; (3).

**1. Authorities cited:** Guardianship of Smith - 43 ass. App. Ct. 490

**2. Durable Power of Attorney Act - 8A U.L.A. 48 Supp 1919**

**3. Sylvester (F.L. 201 B.S. 2 (b))**

**4. Article 1 of the Bill of Rights**

**5. Articles 1 & 2 of the IV Amendment of the United States Constitution**

**6. The XTV Amendment to the United States Constitution**

The Appellant hereby moves this Court to grant her relief based on the basis of what follows:

***I. ISSUES ON/GOUNDS FOR APPEAL***

\*2 1. Whether or not the lower court made errors of law or erred procedurally, or neglectfully, or by omission when it ordered this Guardianship with the following issues remaining un-adjudicated, overlooked, or pending:

(1) Lillian Schiavoni's Durable Power of Attorney

(2) Lillian Schiavoni's Health care proxy

(3) Lillian Schiavoni's half ownership in 67 Laurel Aenue in Bradford, MA (a two- apartment building.

(4) Lillian Schiavoni's right to rent the downstairs apartment, which she has been renting since the Appellant mother passed away in 1978d, Nettie Carpinone, (the called ward) has been living peacefully in the upstairs apartment while her sister Lillian Schiavoni had been renting the 1st floor of the building for being joint owner.

(5) Whether or not Lillian Schiavoni (91 years old) **exploited** her sister Nettie Carpinone (92 years old), since all of the bank accounts and assets are in joint names and no one knows for sure what money belongs to which of the sisters. These bank accounts go back for decades and **Elder** Services of Merrimack Valley made no effort to trace down what money belongs to whom.

(6) whether or not the judge erred in ordering a freeze on all joint bank accounts, leaving Lillian Schiavoni with no access to money, except for her monthly pension check.

(7) Whether or not the judge erred issuing several Court Orders forbidding Lillian Schiavoni to associate with whomever she wants to, including the Winfields, a Black family.

(8) Whether or not the judge erred in appointing a temporary prematurely, prior to d qualifying Lillian as the Attorney- in -Fact or making any effort or consideration to appoint Philip Schiavoni, Nettie Carpinone's nephew who is named as replacement to \*3 Lillian Schiavoni in cases something were to happen to Lillian.

(9) Whether or not the judge violated 19A through her multiple rulings

(10) Whether or not the judge erred in appointing Richard Carpinone as co-guardian, a man who has had nothing to do with Nettie Carpinone for at least 10 years,

(11) Did Judge Blake err in preventing Lillian Schiavoni from calling witnesses or presenting a case during the trial held in November 2009, more than a year after the petitioner filed in Court on behalf of Lillian's sister, Nettie Carpinone?

(12) Is Dr. Oberti allowed to issue multiple Medical Certificates over a one year period?

(13) Did Judge Blake err in allowing the petitioner to present a case at the November 09 trial, while preventing Lillian Schiavoni from presenting a case or calling witnesses?

(14) Did Judge Blake abuse her discretion in ruling that Philip Schiavoni shall not become the automatic attorney in fact in the even Lillian Schiavoni could not serve in that role, as provided in Nettie Carpinone's Durable Power of Attorney?

(15) Was the Court justified in approving over \$130,000 to be paid to the Guardian Ad Litem when such AGL was appointed by the lower Court on "State pay only?"

(16) Is the current independent third party guardian justified in paying thousands of dollars to various individuals, including the GAL, \$130,000 plus, the Court-appointed lawyer for the Ward, \$35,000, the Guardian upward of \$50 to 60,000 based on \*4 information and beliefs, a ESMV geriatric manager for the petitioner, upward of \$30,000 based on information and beliefs, and a hired hand to go the Ward house twice a day for one hour at a time? This is same individual who has been hostile to the Ward's sister and has tried on several occasions to keep the sister from entering the house of Ward.

## II. Guardianship of Smith 43 ass App. Ct 490

The Principal Nettie Carpinone, executed a legal Durable Power of Attorney under the Durable Power of Attorney Act 8A U.L.A 48 (Supp 19197) over 10 years ago. Since that time, **no one has ever declared Nettie Carpinone incompetent. The first time Nettie was declared incompetent was in Salem Probate and Family Court in September 2008.** Therefore, her sister, Lillian Schiavoni cannot be accused of **exploitation** since Nettie has never before been declared incompetent. The burden to prove that Nettie was incompetent 10 years ago rested with the petitioner, **Elder** Services of Merrimack Valley. Furthermore, **Elder** Services of Merrimack Valley did not even attempt to prove that Nettie Carpinone did not agree with all of her sister's

decisions over the past 10 years, because **Elder** Services cannot prove such a thing, since they were not involved in Nettie's life until September 2008 via a false report by someone who rented Lillian's basement and became abusive to Lillian forcing her to go to Court in order to obtain a Restraining Order to protect herself.

The Durable Power of Attorney executed by Nettie Carpinone provides that the powers of attorney in fact shall remain in effect until revoked by the Principle, and if such were to be the case, the powers of attorney shall automatically be transferred to Philip Schiavoni.

The Petitioner refused to admit the validity of the Durable Power of Attorney, Lillian Schiavoni's joint ownership in the house of 67 Laurel Ave -Bradford, MA, as well as her Health \*5 Care Proxi. In addition, 59B prohibits the Probate Court from declaring an **Elderly** person incompetent on the basis of age-related conditions.

The judge also refused to accept or even look at other independent psycho evaluation from 3 different doctors.

### III. Sylvester, supra, is identical to F.L. 201 B, s. 2(b)

Similar to this case brought by the petitioner, the allegations included charges that Adam was particularly unsuitable to serve as Smith's guardian, due to alleged illegal and immoral activities...

[Note 15] **General Laws c.201, s.13A**, incorporating by reference S. 6(a), as appropriate in St. 1985, s. 1, provides that "two or more relatives or friends" of the ward may petition for a guardian's removal.

[Note 16] Lillian Schiavoni's Durable Power of Attorney is in limbo; it has not been revoked, nor shall it be under the law. Since we have determined that Lillian Schiavoni were to be appointed guardian pursuant to the mandate of G.L.c.201B, s3 (b, we also hold that this existing guardianship put in place by Judge Blake is illegal, in error, and shall be reversed. Lillian Schiavoni has the rights to be disqualified prior to any outside guardian being appointed. In fact, to this day, Lillian has never been formally procedurally disqualified by the Probate Court.

### IV. OTHER CONTESTED ISSUES

1. Is Respondent, **Elder**, competent? **Elder** Nettie Carpinone is hard of hearing. In fact, by pure estimate, the **Elder** may suffer from 80 to 90% loss of hearing. Yet, neither the petitioner, nor the Court, nor Dr. Oberti who issued all of those medical certificates has made any effort to \*6 get the **Elder** tested for hearing loss, even though, such an extreme earring loss can alter the **Elder's** behaviors causing her to act abnormally.

2. Was this guardianship necessary or might it cause more harm than good?

3. Should this Permanent Guardianship have been dissolved and vacated so that the **Elder** would Have lived her life the way she had made clear that she wished to live her final years by executing a Durable of Attorney

4. Did they lower Court have any ground for violating the Durable Power of Attorney Act?

5. Did the lower Court violate the Appellant's right by ceasing the Appellant's joint Accounts and Assets under her name and her sister?

6. Did the lower Court violate the Appellant's right by ceasing the Appellant's property jointly owned by her and her sister?

Does the lower Court have any ground for preventing the Appellant from entering her property after the Appellant's sister deceased almost less than a month ago, a family home purchased by the Appellant's parents over 80 years ago, and transferred by deed to the Appellant and her sister?

#### IV. Facts

1. In November 2008, **Elder** Services of Merrimack Valley filed a protective Order in Salem Probate Court against the Appellant and on behalf of the Appellant's older Sister, a 93 year-old **elderly** woman. In obtaining this Protective Order, **Elder** Services accused the Plaintiff of **exploiting** her sister of one year apart, even though both sisters set up joint bank accounts and stocks and bonds for decades. **Elder** Services to this day has not offered any prove that the money that went \*7 into those bank or investment accounts had not been both sisters' fund deposits.

2. In January 2009, the Court issued a decree declaring the Appellant's **Elder** sister Ward of the State. This was done in violation of 93A provisions and numerous Court ruling prohibiting the Probate Court from taking such action once the principal put in place a legal Durable Power of Attorney. The Court of Appeals has ruled time and time again that it is the wish of the principal that should prevail once Court proceedings have been initiated, unless the Court finds extra-ordinary circumstances. In this case, the Petitioner nor the Court have not only have not proven **exploitation** they also have found no extra-ordinary circumstances. Note that the Appellant was given Durable Power of Attorney by her sister and was made her sister's health care proxy. In addition, prior to these Court events, the Plaintiff had been taking care of sister and watching over her since the 1970's.

3. The declaration of the; Appellant's sister Ward of the State by the Probate Court was made solely on the basis that the Appellant's sister is hard of hearing and suffered "mild non-progressive dementia." The law provides that 'a person cannot be found incompetent solely on the basis of old age or age-related conditions.' However, the Probate Court judged abused its discretion to violate the law in order to satisfy the Petitioner, namely, **Elder** Services of Merrimack Valley, Inc.

4. During the year-long proceeding in the Probate Court, the Judge promised time and time again that she would not separate the two sisters. And as a result, she made the Appellant, Guardian of the Person, while appointing a temporary Guardian of the Estate for the Appellant's sister.

5. As the Court appointed an AGL to conduct an investigation into allegations that the Appellant had used money from a joint account with her sister and investigate the Appellant's the worth of the Plaintiff's sister's assets, the GAL, assuming that the Plaintiff's sister was rich, run up a \*8 \$130,000.00 legal bill within a period of 9 months. This happened, even though originally, the Court appointed the GAL on State pay, which is standardized to up to \$500.00.

6. Not the GAL or **Elder** Services have proved that the money in the joint account, which was opened in the 1960's did not belong jointly to both sisters, neither did any of the parties proved who made deposits into the joint account or when or at what rate.

7. Also numerous CDs, and investment accounts, which had been owned jointly by both sisters had not been litigated by the Probate Court in order to determine who exactly invested what or when. Rather, at the end of the AGL's \$130,000 investigation, GAL Cordell did nothing but speculating, opining, and guessed in concluding that somehow the Appellant must have engaged in misappropriation with regards to her sister's funds, assuming all of the joint accounts must have belonged to the Appellant's sister singularly.

8. Furthermore, at the end of the trial, the Appellant was removed as Guardian of the Person, despite of the Appellant's Durable Power of Attorney over her sister. In addition, the Court also revoked the Appellant as the Health Care Proxy for her sister, even though no one knows the Appellant's sister better than the Appellant does.

9. When the Appellant filed a motion with the Probate Court to get an attorney appointed to represented the Plaintiff's sister. The Judge appointed an attorney, but again on the assumption that the Appellant's sister was rich. Now, this attorney has run

up a legal bill in the amount of \$22,000.00. This does not take into account the Permanent Guardian's bill, which is now up to over \$30,000.

10. Worse of all, once the trial was over, the Permanent Guardian took a Restraining Order against \*9 the Appellant in order to prevent the Appellant from seeing her sister. This RO was so extreme that it prevented the Appellant from visiting her sister, calling her sister on the phone, or driving on the street where her sister lives, where the Appellant happens to own the house jointly with her sister.

11. While the Appellant's sister has a life-long estate in the upstairs apartment, the Appellant had been renting the downstairs apartment since the 1970's. However, once the Protective Order was granted, the Guardian rented the downstairs apartment and has not given a dime to the Appellant since the apartment was rented in April 2010.

12. To make matters worse, the Probate Court judge presiding in the case has frozen all joint accounts held together between the Appellant and her sister, thereby depriving the Appellant of any livelihood above the poverty level.

13. The last straw was drawn two weeks ago, when the Court granted the Motions to remove the Appellant's name from the jointly owned property, which belonged to her since the sisters' parents passed away in the 1970's.

The Court did this in order to pay the over \$200,000.00 in lawyer fees that is now due, plus over a dozen care takers and day care bills that the Guardian has been squandering the Appellant's sister assets on only because she does not want to cooperate with the Appellant.

14. The Appellant is fully capable of taking care of her sister, even if the Guardian wanted to hire a couple of care takers to help the Appellant.

15. Rather, after two justices ordered the Restraining Order Vacated, the Guardian/Conservator decided to restrict the Appellant's visit with her sister to one hour per day, and while there, the Plaintiff is not allowed to look around her sister's apartment, bring her sister any meal or desert, not even some candies. This is going on even though prior to all of this, the Appellant's routine was to \*10 take her sister to the Haverhill Senior Citizen Center every day, take her to social events, and then bring her to the Appellant's house for a change of scenery.

16. At this point, the Appellant's sister is being held a virtual prisoner in her own home. Visitors are not allowed, not old friends or relatives. Anyone who shows up at the door is turned away by order of the Guardian and co-Guardians under threat of arrest for trespassing.

17. Every day that the Appellant visits with her sister for the one hour that she is permitted, the Appellant's sister begs her to stay with her longer, to sleep over, and asks the Appellant when she is going to take her out. Almost each morning, the Appellant's sister calls the Appellant in panic and tells the Appellant that she needs the Appellant to come over and be with her. Sadly after the guardianship was put into place the Appellant was prevented from seeing her sister, spending any time with her even though Judge Blake entered an Order in the Guardianship Decree and stated in Court several times that she would not separate the two sisters and the Appellant's sister had name her to serve as her health care proxy in a legal document.

## V. PARTIES

1. Lillian Schiavoni, Plaintiff- 92 years old of 57 Willie Street, Haverhill, Appellant
2. **Elder** Services of Merrimack Valley, Inc., Petitioner, Defendant - Lawrence, MA, Petitioner
3. Susan Hubbard, Esq., Guardian/ Conservator

4. Richard Carpinone, Co - Guardian (resigned at this time)

5. Mark Pelosky, Defendant - Court-appointed attorney for the Plaintiff's sister (not a party at this Time)

**BASED ON THE FOREGOING, the Appellant requests this Honorable Court to dissolve and vacate the guardianship on record. The Appellant further requests this Court considers this matter open in the Probate and \*11 Family Court on the basis of the most recent Declaratory Judgment stripping the Appellant of her right to title on the property jointly owned by the Appellant and her sister. This property is located at 67 Laurel Avenue in Bradford, Massachusetts.**

Whereof, the Appellant requests this Honorable Court uses its extra-ordinary jurisdictional and powers to grant the Appellant the relief sought in the recently filed Emergency Interlocutory Motion for Relief filed and entered by this Court on April 6, 2011.

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