

## Westlaw.

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(Cite as: 286 A.D.2d 684)

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In re Albert S.  
N.Y.A.D. 2 Dept.,2001.

Supreme Court, Appellate Division, Second  
Department, New York.

In the Matter of ALBERT S. (Anonymous).  
Eleonor B. (Anonymous), Respondent;  
Elaine S.K. (Anonymous), et al., Appellants.  
Sept. 10, 2001.

Health care agents of terminally ill person appealed from a judgment of the Supreme Court, Queens County, Golia, J., which established a guardianship for the person and property of terminally ill person, and imposed upon them the condition that they forgo any steps to hasten his death unless and until it was imminent and inevitable. The Supreme Court, Appellate Division held that: (1) court improperly concluded that health care agents failed to establish by clear and convincing evidence that the living will of testator directed the withholding of certain medication; (2) court lacked authority under the Public Health Law to modify a living will; and (3) court improvidently exercised its discretion in establishing a guardianship.

Reversed and remitted.

West Headnotes

**[1] Health 198H ↪916**

198H Health

198HVI Consent of Patient and Substituted  
Judgment

198Hk913 Terminal Illness; Removal of Life  
Support

198Hk916 k. Competent Patients; Living  
Wills and Other Prior Indications. Most Cited Cases  
(Formerly 299k45 Physicians and Surgeons)

Court improperly concluded that health care agents failed to establish by clear and convincing evidence that the living will of testator directed the withholding of certain medication since living will demonstrated that testator held a firm and settled

commitment to the termination of life-supporting medicine that would only serve to artificially prolong his life.

**[2] Health 198H ↪916**

198H Health

198HVI Consent of Patient and Substituted  
Judgment

198Hk913 Terminal Illness; Removal of Life  
Support

198Hk916 k. Competent Patients; Living  
Wills and Other Prior Indications. Most Cited Cases  
(Formerly 299k45 Physicians and Surgeons)

Court lacked authority under the Public Health Law to modify a living will; thus, court improperly imposed upon health care agents the condition that they forgo any steps to hasten testator's death unless and until it was imminent and inevitable.

**[3] Guardian and Ward 196 ↪9.5**

196 Guardian and Ward

196II Appointment, Qualification, and Tenure of  
Guardian

196k9.5 k. Persons for Whom Guardians  
May Be Appointed. Most Cited Cases

Court improvidently exercised its discretion in establishing a guardianship for terminally ill person where a living will and a durable power of attorney were prepared; furthermore, because a trust was set up with sufficient funds to pay for his care, the establishment of a guardianship for his property was also an improvident exercise of discretion

**\*\*128** Hoguet, Newman & Regal, LLP, New York, N.Y. (Laura B. Hoguet and Luisa K. Hagemeyer of counsel), for appellants.

Ackerman, Levine, Cullen & Brickman, LLP, Great Neck, N.Y. (James A. Bradley of counsel), for respondent.

GABRIEL M. KRAUSMAN, J.P., SONDR

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MILLER, ROBERT W. SCHMIDT and THOMAS A. ADAMS, JJ.

\*684 In a proceeding pursuant to Mental Hygiene Law article 81 and Public Health Law § 2992, Elaine S.K. and Deborah S. appeal from so much of a judgment of the Supreme Court, Queens County (Golia, J.), dated March 20, 2001, as established a guardianship for the person and property of Albert S., imposed upon Elaine S.K. and Deborah S. the condition that they forgo any steps to hasten the death of Albert S. unless and until it was imminent and inevitable upon a determination that they violated the terms of his living will, and directed that attorneys' fees be paid from the assets of Albert S.

ORDERED that the judgment is reversed insofar as appealed from, on the law, with costs, the petition is denied, and the matter is remitted to the Supreme Court, Queens County, for further proceedings consistent herewith.

[1][2] The Supreme Court improperly concluded that the appellants failed to establish by clear and convincing evidence that the living will of Albert S. directed the withholding of certain medication (*see, Grace Plaza of Great Neck v. Elbaum*, 82 N.Y.2d 10, 16, 603 N.Y.S.2d 386, 623 N.E.2d 513; *Matter of Westchester County Med. Ctr. [O'Connor]*, 72 N.Y.2d 517, 531, 534 N.Y.S.2d 886, 531 N.E.2d 607; *Matter of Storar*, 52 N.Y.2d 363, 379, 438 N.Y.S.2d 266, 420 N.E.2d 64, *cert. denied* 454 U.S. 858, 102 S.Ct. 309, 70 L.Ed.2d 153). The living will demonstrates that he held a firm and settled commitment to the termination of life-supporting medicine that would only serve to artificially prolong his life. It is clear that his current condition is terminal, and that he would want his medical care to cease. Moreover, the Supreme Court improperly imposed upon the appellants, as his health care agents, the condition that they forgo any steps to hasten his death unless and until it was imminent and inevitable. There is no authority in the Public Health Law enabling a court to modify a living will.

[3] Under the circumstances, the Supreme Court improvidently exercised its discretion in

establishing a guardianship for the person of Albert S. A guardian is to be appointed solely as a last resort, where no available resources or other alternative will adequately protect the person (*see, Matter of O'Hear [Rodriquez]*, 219 A.D.2d 720, 722, 631 N.Y.S.2d 743; \*685 *Matter of Maher*, 207 A.D.2d 133, 140, 621 N.Y.S.2d 617; *Matter of Lowe*, 180 Misc.2d 404, 406, 688 N.Y.S.2d 389). Here, a living will and a durable power of attorney were prepared. Furthermore, because a trust was set up with sufficient funds to pay for his care, the establishment of a guardianship for his property was also an improvident exercise of discretion (*see, Matter of O'Hear [Rodriquez]*, *supra*; *Matter of Maher*, *supra*).

In light of our reversal, we remit the matter to the Supreme Court, Queens County, to determine the amount of the fees for the petitioner's attorney, the court evaluator, and the court-appointed attorney, to be paid by the petitioner (*see, Mental Hygiene Law §§ 81.09[f]; 81.10[f]; 81.16[f]; Matter of Petty*, 256 A.D.2d 281, 682 N.Y.S.2d 183; *Matter of Lyles*, 250 A.D.2d 488, 673 N.Y.S.2d 122).

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