Journal of Civil Rights and Economic Development

Volume 25, Fall 2010, Issue 1 Article 12

Social Justice in the Surrogate's Courts

Margaret Valentine Turano

SOCIAL JUSTICE IN THE SURROGATE'S COURTS

MARGARET VALENTINE TURANO

INTRODUCTION

When the *Journal of Civil Rights and Economic Development* put out a call to the St. John's faculty for papers for this symposium, I knew I wanted to participate. How interesting, I thought, to view our respective disciplines through the lens of racial, social and economic justice. My area of expertise is Trusts & Estates, and at first blush the link between Trusts & Estates and social justice may seem attenuated, but the Surrogate's Courts are always abuzz with fiduciary issues, where one person is entrusted to safeguard another's interests, and in that context issues of social justice bubble up regularly, especially because ours is an immigrant society with wildly varied and quickly changing demographics.

The scope of our task was narrow, so I have chosen two topics prompted by recent cases in the Surrogate's Courts that raise (and resolve) issues of social justice. One is how stringently a court should observe the requirement that a person seeking to serve as a fiduciary[1] in the Surrogate's Court speak English. The second is a fascinating bridge between federal immigration law and state guardianship law, where New York judges have

Professor of Law and Associate Academic Dean, St. John's University School of Law, Jamaica, NY.

[1] A fiduciary is faithful, trustworthy person or a trust company appointed by a court to manage a decedent's estate or trust or to serve as guardian for a minor child until she reaches 18. The personal representative of an estate is an executor (for the decedent who died with a will) or an administrator (for one who died without a will). N.Y. SURR. CT. PROC. ACT § 103(20) (Consol. 2006); N.Y. SURR. CT. PROC. ACT § 103(2) (Consol. 2010); N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (Consol. 2010); N.Y. SURR. CT. PROC. ACT § 1001 (Consol. 2010). The executor or administrator disposes of the decedent's property: that is, pays her debts, expenses and taxes and distributes the rest to her beneficiaries under her will or the intestacy statute, which gives the estate to the decedent's spouse and children or to other relatives if no spouse or children survived her. N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (Consol. 2010).

Guardianships are governed by N.Y. SURR. CT. PROC. ACT § 1701 *et seq.* (Consol. 2010). A child's parent is her preferred guardian, *see* Matter of Thorne, 148 N.E. 630, 631–32 (N.Y. 1925); Matter of Craig, N.Y.L.J., Oct. 23, 1989, at 27, col. 5 (Sur. Ct. Kings Co.), but in all cases the court appoints the person who serves the child's best interests. *See* Matter of LaFountain, 304 N.Y.S.2d 421 (App. Div. 3d Dep't 1969) (appointing grandparents instead of father).

been using a statute fashioned for a different reason to confer special immigrant status on young adults.

I. ENGLISH SKILLS AS PREREQUISITE FOR SERVING AS A FIDUCIARY

A court may refuse to appoint as fiduciary a person who cannot read and write English.[2] The court's power to appoint a non-English-speaking fiduciary has been discretionary since the nineteenth century,[3] and no statute has ever provided guidance to the court on how to exercise its discretion. Accordingly, some courts have permitted non-English-speaking persons to serve, and some have refused, the facts of the cases driving the outcomes. In *Matter of Haley*,[4] for example, the court refused to appoint the decedent's widow as fiduciary because she could neither speak English nor count money. In *Matter of Santoro*,[5] the court refused to appoint a blind fiduciary who could not read or write English, fearing that the blindness would cause her to delegate her executorial duties, which are non-delegable, to another. In *Matter of Pugarelli*,[6] the court, finding "no correlation between intelligence and education," granted letters to the decedent's widow, who could not read or write English but could speak and understand it and did not suffer from a "want of understanding." The widow intended to start a wrongful death lawsuit, and the court noted that the widow would likely benefit from being the plaintiff.[7]

Whereas the Surrogate's discretionary power has remained stable for almost a century and a half, other rights of persons who cannot read or write English have changed dramatically under federal, state and municipal

2 N.Y. SURR. CT. PROC. ACT § 707(2) (Consol. 2010).

3 *See* L. 1867, ch. 782, §5; L. 1983, ch. 686, §2612(b), in which the New York legislature gave the Surrogate the power to refuse to grant letters testamentary, which authorize an executor to perform her duties *see* N.Y. SURR. CT PROC. ACT Art. 14 (Consol. 2010), and letters of administration, which authorize an administrator to perform his duties *see* N.Y. SURR. CT. PROC. ACT Art. 10 (Consol. 2010), to a person who could not read and write English. *See* Matter of Haley, 21 Misc. 777 (Sur. Ct. Erie County 1897) (decedent's widow could not serve because she could neither speak English nor count money). *See also* L. 1873, c. 79 (disqualifying a person who was "incompetent . . . by reason of . . . want of understanding"). The "want of understanding" is still a disqualifying criterion under New York law. *See* N.Y. SURR. CT. PROC. ACT § 707 (Consol. 2010).

4 *Haley*, 21 Misc. at 778–79.

5 191 N.Y.S.2d 173 (Sur. Ct. Nassau County 1959).

6 173 N.Y.S.2d 904 (Sur. Ct. Richmond County 1958).

7 The courts sometimes, but not always, favored widows who applied for letters. *Compare* Matter of Feciuch, 21 N.Y.S.2d 424 (Sur. Ct. Westchester County 1940) (holding that letters where the decedent's daughter alleged that the widow, who could not read or write English, had abandoned the decedent), and Matter of Cressieri, 176 N.Y.S. 700 (Sur. Ct. New York County 1919) (holding the widow renounced her right to serve as administrator and the court refused to reinstate her), *with* Matter of Bloom, 278 N.Y.S. 157 (Sur. Ct. Kings County 1935) (granting the widow letters, though she could neither speak nor write English, out of deference to widows).

statutes and under case law, especially since the 1960s.[8] For instance, the Voting Right Acts of 1965[9] required bilingual ballots for language minorities. In 1966, the Supreme Court held that New York's literacy tests effectively denied Puerto Ricans their right to vote.[10] In 1974, the Supreme Court held that the Civil Rights Act of 1964 guarantees a public education to students with limited English proficiency.[11] Federal agencies must develop systems to help non-English speakers to gain access to their services.[12]

Similar changes have occurred in New York State and City. The Court of Appeals ruled in 2003, for example, that all students are entitled to a sound education.[13] The Department of Health and Human Services requires health-care facilities to provide language assistance to insure that non-English-speaking persons have access.[14] State election workers are required to help voters with limited English,[15] and a non-English-speaking voter can get help from a relative as she votes.[16] The New York City Mayor's office issued an Executive Order in 2008[17] requiring all city service agencies to facilitate meaningful access to their services despite language differences. In 2006, the New York Unified Court System issued a pamphlet addressing the language needs of New Yorkers.[18] All New York public hospitals must develop programs to ensure that non-English-speaking patients have access to care.[19]

The New York County Surrogate recently plumbed both the ancient history and the flurry of more recent activities in a case in which a non-English-speaking petitioner sought to be appointed as fiduciary. In *Matter of Toribio*,[20] a little girl died in an arson fire. Her father sought letters of administration to commence a wrongful death lawsuit.[21] He could neither

8 *See generally* Cristina M. Rodriguez, *Language and Participation*, 94 CAL. L. REV. 687, 705–06 (2006).

9 42 U.S.C. § 1973aa-1a(c) (2010).

10 Katzenbach v. Morgan, 384 U.S. 641 (1966).

11 Lan v. Nichols, 414 U.S. 563 (1974).

12 *See* Improving Access to Services for Persons With Limited English Proficiency, 65 Fed. Reg. 50121 (Aug. 11, 2000).

13 Campaign for Fiscal Equity, Inc. v. State of New York, 801 N.E.2d 326 (N.Y. 2003).

14 Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 68 Fed. Reg. 4731-02.

15 N. Y. ELEC. LAW § 3-412(1)(a) (Consol. 2010).

16 N. Y. ELEC. LAW § 5-216(2) (Consol. 2010).

17 City of New York Exec. Order No. 120 (July 22, 2008).

18 New York State Unified Court System, *Court Interpreting in New York: A Plan of Action* (April 2006), *available at www.courts.state.ny.us/courtinterpreter/pdfs/action_plan_040506.pdf.*

19 10 N.Y. C.R.R. § 405.7(a)(7).

20 885 N.Y.S.2d182 (Sur. Ct. New York County 2009) (decided by Surrogate Kristin Booth Glen).

21 *Toribio*, 885 N.Y.S.2d at 183. *See* N.Y. EST. POWERS & TRUSTS LAW § 5-4.1(1) (Consol. 2010)

speak, read nor write English, and the Surrogate could have denied him letters, but the real question, as the judge saw it, was "whether and how, in our multi-cultural, multi-lingual society, courts are obligated to maximize and facilitate participation in the justice system."[22] America, she said, is experiencing "a sea change . . . in our view of immigrants and others who lack English language competence."[23] She characterized New York City, 36% of whose population was born elsewhere[24] and whose school children speak 170 languages at home,[25] as "the world city."[26]

The court granted the decedent's father letters of administration to commence the wrongful death lawsuit, ruling that "English language proficiency should not, by itself, prevent appointment as fiduciary."[27] There is a difference between an inability to read or write English and a "want of understanding" of what it means to serve as a fiduciary.[28] The disqualifying status should perhaps be illiteracy, rather than a lack of English language skills.[29] The Office of Court Administration provides interpreters who can translate almost 150 languages.[30] The law favors family members as fiduciaries,[31] and the Surrogate ascertained that the decedent's father had a satisfactory relationship with his attorney and would be able to carry out his fiduciary duties. The judge concluded that if a petitioner for letters is otherwise competent, the court should deny him fiduciary status "only in those rare situations where no accommodations are available, or can reasonably be provided, to address any deficiency caused by lack of English competence."[32] "To serve as a fiduciary," she added, "is

(noting that a wrongful death action can be commenced only by a fiduciary: "The personal representative . . . of a decedent . . . may maintain an action . . . .").

22 *Toribio*, 885 N.Y.S.2d at 183.

23 *Id.* at 184.

24 New York City Department of City Planning, *The Newest New Yorkers* (2000), *available at* http://www.nyc.gov/html/dcp/html/census/nny_exec_sum.shtml.

25 *See* Leanna Stiefel, Amy Ellen Schwartz & Dylan Conger, *Language Proficiency and Home Languages of Students in New York City Elementary and Middle Schools*, TAUB URB. RES. CENTER – N.Y. UNIV., *available at* http://www.nyc.gov/html/dcp/html/census/nny_exec_sum.shtml.

26 *Toribio*, 885 N.Y.S.2d at 185 (quoting *The Newest New Yorkers*, *supra* note 24).

27 *Id.* at 186. Booth Glen based that generalization on "the commitment of our national, state, and city governments to provide access to our democratic institutions to non-English speakers, and the special responsibility and commitment of our court system to provide access and participation to the institutions of justice." *Id.* at 186.

28 N.Y. SURR. CT. PROC. ACT § 707(1)(e) (Consol. 2010).

29 In support of that proposition, the court pointed to *Matter of Pugarelli,* 173 N.Y.S.2d 904 (Sur. Ct. Richmond County 1958), discussed *supra*, note 6.

30 *Toribio*, 885 N.Y.S.2d at 185.

31 *See* N.Y. SURR. CT. PROC. ACT § 1001 (Consol. 2010) (administrators); N.Y. SURR. CT. PROC. ACT §1418 (Consol. 2010) (administrators c.t.a.).

32 *Toribio*, 885 N.Y.S.2d at 186.

one of the last services a family member can perform for a loved one who has passed away."[33]

II. A GUARDIANSHIP PROCEEDING AS A PREDICATE FOR IMMIGRATION STATUS

Immigrants were also the catalyst for a bold judicial decision in *Matter of KB*,[34] where the Surrogate used her jurisdiction over an adult immigrant as a predicate for conferring upon her a special immigrant status. Other courts have followed suit,[35] and the Appellate Division has reversed the decisions of the lower courts that have declined to do.[36]

KB was a child from the Republic of Trinidad. After her mother contracted cancer, mother and child[37] moved to New York to stay with KB's grandmother. The cancer treatments failed, the mother died in New York, and KB remained with her grandmother. She prospered, excelled in high school, and was offered partial scholarships to college. Because she was undocumented, however, she could not apply for financial aid, and because she did not have a social security number, she could not get a job.

Federal law has created a category of immigrant with "Special Juvenile Immigrant Status"[38] ("SJIS"), which can be granted when an alien "has been declared dependent on a juvenile court,"[39] if a judge decides that "the child's reunification with one or both parents is not viable due to abuse, neglect [or] abandonment" and that it "would not be in the alien's best interests to be returned to the alien's or parent's previous country of nationality . . . ."[40]

A juvenile court is a United States court that has jurisdiction to determine the custody and care of juveniles. State law determines this jurisdiction. In New York, the Surrogate's Court has jurisdiction over the

33 *Id.* at 186.

34 N.Y.L.J., Aug. 25, 2008, at 19, col. 1 (Sur. Ct. Kings County).

35 *See* Matter of M.C., N.Y.L.J., March 4, 2010, at 25, col. 3 (Sur. Ct. Suffolk County); Matter of Dwight A., N.Y.L.J., Jan. 2, 2009, at 43, col. 3 (Sur. Ct. Kings County).

36 *See* Trudy-Ann W. v. Joan W., 73 A.D.3d 792, 901 N.Y.S.2d 296 (2d Dep't 2010); Jisun L. v. Young Sun P., 2010 WL 2674441 (N.Y.A.D. 2d Dep't 2010); Matter of Antowa McD., 50 A.D.3d 507, 856 N.Y.S.2d 576 (1st Dep't 2008).

37 Matter of K.B., N.Y.L.J., Aug. 25, 2008, at 19, col. 1 (Sur. Ct. Kings County) (KB's father had abandoned the family).

38 8 U.S.C. § 1101(a)(27)(J) (2010); Aliens and Nationality, 8 C.F.R. § 204.11(a) (2010).

39 Aliens and Nationality, 8 C.F.R. § 204.11(a) (2010).

40 8 U.S.C. § 1101(a)(27)(J)(ii) (2010). Before 2008, the petitioner had to prove that she was "deemed eligible for long-term foster care due to abuse, neglect or abandonment." 8 U.S.C. § 1101(a)(27)(J)(i) (amended by Pub. L. No. 110-457 (2008)).

person and property of an infant,[41] defined as a person under 18.[42] If an infant meets the federal requirements (that he is not returnable to his parents and that it does not serve his best interests to return to his homeland), the court can confer SJIS on him.[43] Had KB been an infant, she could have been "declared dependent on" the Surrogate's Court, which would have permitted her to petition for SJIS.[44]

The federal statute and regulations do not specify that the alien must be under 18, but rather that she be "dependent on a juvenile court." Until 2006, the Surrogate's Court had jurisdiction over a child only until she reached the age of 18. Once she turned 18, the guardianship terminated. If a person over 18 petitioned for a guardian, the court had no power to appoint one.

In 2006, a development arose in New York that had nothing to do with SJIS issues. Certain hard-to-place adopted children qualify for adoption subsidies, which ordinarily continue until the child turns 21. Before 2006, if such an adopted child's parents died after she reached 18, the subsidies would stop. The legislature therefore amended Social Services Law §453[45] to allow adoption-subsidy payments to continue until age 21 even if the child's parents had died. A problem persisted, however. One of the persons who could petition for those benefits was the child's legal guardian, and because guardianships lasted only until the child turned 18, the adopted child between the ages of 18 and 21 could lose her benefits. When the legislature amended Social Services Law §453, therefore, it simultaneously amended SCPA 1707 to permit a child between the ages of 18 and 21 to petition for a guardian. Two years later it made the same rule for the Family Court.[46]

The court predicated its jurisdiction over a guardianship proceeding for Ms. KB on those amendments. The Surrogate's Court was now the "juvenile court" upon whom KB was dependent; the federal statute was

41 N.Y. SURR. CT. PROC. ACT § 1701 (Consol. 2010).

42 N.Y. EST. POWERS &TRUSTS LAW § 1-2.9-a (Consol. 2010).

43 *See, e.g.*, Matter of M.C., N.Y.L.J., Mar. 4, 2010, at 25, col. 3 (Sur. Ct. Suffolk County).

44 *See* Matter of Antowa McD., 50 A.D.3d 507, 856 N.Y.S.2d 576 (1st Dep't 2008).

45 2006 N.Y. Laws 518, §1. Under certain circumstances where the Department of Social Services deems the 18-21-year-old adopted child responsible enough, the payment can be made directly to him, or to a payee designated by the D.S.S. for his benefit. *Id.*

46 N.Y. FAM. CT. ACT §661 (Consol. 2010) (as amended by 2008 N.Y. Laws 404, § 4). Before 2008, the Family Court lacked jurisdiction of minors between the ages of 18 and 21, and the court in Matter of Vanessa D., 858 N.Y.S.2d 687 (2d Dep't 2008), denied the guardianship petition. The 2008 amendment gave the Family Court concurrent jurisdiction with the Surrogate's Court over guardianship proceedings for persons between 18 and 21. *Memorandum in Support*, 2008 McKinney's Sessions Laws of New York at 2329–30.

triggered; and the court was able to examine the facts and determine that Ms. KB's father had abandoned her and that returning her to Trinidad, where she knew no one, would not serve her best interests.[47]

The 2006 amendments to the Surrogate's Court Procedure Act and Social Services Law and to the Family Court Act in 2008 were intended to help adopted children when their parents died and their adoption subsidy funds dried up.[48] These amendments were not intended to deal with matters of immigration.[49] However, when it debated the 2006 and 2008 amendments, the legislature knew that the loss of that adoption-subsidy money for the 18-21 year old could "have long-term consequences for [her] career prospects and/or educational opportunities," language that precisely states Ms. K.B's plight and the rationale for allowing her Special Juvenile Immigrant Status.

CONCLUSION

The law of Trusts & Estates seems staid and stolid. It deals with people, however: a constant stream of people from the current of society who face life and death questions. It is no surprise, therefore, that the issues facing that society surface in the Surrogate's Courts. In *Toribio* and *KB*, and the cases that followed them, the judges have, with creativity and agility, served justice.

47 *Accord*, Jisun L. v. Young Sun P., 2010 WL 2674441 (N.Y.S.D. 2d Dep't 2010); Matter of Dwight A., N.Y.L.J., Jan. 2, 2009, at 43, col. 3 (Sur. Ct. Kings County). For a Family Court case granting SJIS, *see* Delmi Y. v. Carmen Y., 886 N.Y.S.2d 66 (Fam. Ct. Nassau County 2009).

48 *See Memorandum in Support*, 2006 McKinney's Sessions Laws of New York at 1995–96 (the amendment "allow[s] the payments to continue when a child loses one or both adoptive parents").

49 In fact, at least one court granting SJIS has noted that state courts have no jurisdiction over immigration issues, and that although "the juvenile court is placed in a unique position to affect immigration proceedings normally within the exclusive domain of the federal courts . . .," it described its role as solely "to make determinations which are in the best interests of the child and in the case of a request for 'special findings', to determine if the requisite elements of 8 U.S.C.A. §1101(a)(27)(J)(i) apply." Matter of M.C., N.Y.L.J., March 4, 2010, at 25, col. 3 (Sur. Ct. Suffolk County).