

Marquette Elder's Advisor

Volume 1
Issue 1 *Summer*

Article 6

Summer August 2012

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Repository Citation

Pinciss, Ann J. (2012) "A Tale of Two Women," *Marquette Elder's Advisor*. Vol. 1: Iss. 1, Article 6.
Available at: <https://scholarship.law.marquette.edu/elders/vol1/iss1/6>

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A Tale of Two Women

This is a tale of two women, one living her life to its fullest according to her own wishes, the other dependent upon the substituted judgment of another.

This tale is a cautionary tale, highlighting the challenges of balancing substituted judgment against the best interests of someone who, because of incapacity, cannot decide what is best for her.

By Ann J. Pinciss

Aunt Cookie

Returning to my office after spending the morning in court for a guardianship proceeding, I was told “Esther’s in the hospital.” As I must have at least half a dozen clients named Esther, I

asked my secretary to be more specific and learned that it was the Esther known as Aunt Cookie, my best friend Dana’s favorite relative and only living aunt. Because Dana lives in California and Aunt Cookie in New York, Dana had introduced me to her aunt a year before so that Aunt Cookie could have somebody “local” to whom she could turn in an emergency. Aunt Cookie was, at that time, 91 years old and fully competent.

Aunt Cookie is an extraordinary woman. A tiny lady with sparkling eyes and a sharp mind, she has to work very hard to keep her weight from falling below 100 pounds. She was an accomplished musician until arthritis deprived her of dexterity, but her true love was art. She has produced a prodigious body of work—mostly paintings and drawings—but also needlework, small sculptures, and tiles. Blessed with a wonderful sense of humor and of the absurd, she finds amusement and delight in her neighbors and area shopkeepers, listens to the news, and prefers a good book or conversation to television. Though most of her friends are gone and the neighborhood in which she has lived for more than 60 years has changed, she is comforted by frequent phone calls from her niece and visits from her neighbors and their children.

By the time I received the call from her niece, Aunt Cookie was “resting comfortably” after a mastectomy. We wondered why Dana had not heard directly from the doctor. It turns out that although I had taken great care to instruct Aunt Cookie to make sure her regular doctor had a copy of her health care proxy and living will (she had executed at least four sets so that everyone could have an “original”), she had not done so. She had simply filed them with all her other valuable papers—under the pink sheets in a chest in her bed-

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room. Fortunately, Aunt Cookie had called Dana after the diagnosis and was competent to accede to the procedure. It was, however, a close call, in that a frail woman could have been rushed or bullied into an unwanted or unnecessary procedure by overzealous medical staff.

Aunt Cookie was distraught after the surgery and refused to allow me to visit her. But, at my insistence, she agreed to allow my trusted geriatric care manager, Steve, to see her in order to gather some information for an assessment of her situation, hopefully, in preparation for her return home. Dana and I discussed the nursing home/home care question at great length and determined that, if at all possible, Aunt Cookie should continue living at home. Although I had done Aunt Cookie's will the preceding year, along with a durable power of attorney and health care proxy/living will, I did not really know the extent of her assets. Dana and I agreed, however, that her funds should be sufficient for her to stay at home at least for a while. With Steve's assistance, we brought Aunt Cookie home and hired Arlene, who lives in five days a week, and Gwen, who relieves Arlene on weekends. Aunt Cookie had lived alone since being widowed 30 years ago and liked it that way, but the transition was relatively painless.

As Aunt Cookie began to feel better, she told me that she simply could not face handling her financial affairs. In addition, the IRS was harassing her, and her accountant could not seem to solve the problem. Every time she received a letter from the IRS, she panicked. Aunt Cookie discussed her feelings of financial helplessness with Dana, and Dana asked me what could be done.

First, I asked Aunt Cookie to sign a power of attorney so that a new accountant could act in her behalf with respect to the IRS. Next, we had to figure out how to manage her financial affairs and get her bills paid without depriving her of her sense of autonomy. I suggested a living trust. Dana insisted that I be the trustee and she the successor. Understandably, Aunt Cookie was at first very nervous about transferring all her property to a living trust, but once she understood the concept, and because she trusted both Dana and me, she agreed that it would provide a worry-free solution. Dana and I had also talked about redoing Aunt Cookie's power of attorney and health care proxy so that *both* Dana and/or I could act in her behalf—again to resolve the long-distance problem.

Aunt Cookie signed all the papers, and I immediately went to her bank to move her accounts into the trust. I consolidated her cash and certificates of deposit into the trust checking account, but left her with a personal checking account with instructions to her bank to maintain a minimum balance at all times. I also cleared out the safe deposit box where she kept all her stock certificates. What a surprise! Aunt Cookie was sitting on a tidy nest egg of securities which had grown literally to millions of dollars by doing absolutely nothing for 30 years or more! I immediately opened a trust account for her at a brokerage house. I have opted not to trade any of Aunt Cookie's securities for two reasons: first, I believe Aunt Cookie would do the same, and second, all of her securities are the bluest of the blue chips which could be relied upon to yield generous returns over time. (Aunt Cookie, true to her artistic self, cannot seem to accept the value of her estate and still calls me periodically to ask if she can afford to send a check of \$500 or so to a good cause.)

Aunt Cookie is blessed that she has an involved, loving niece and that she has had the opportunity to make her wishes clear. Not everyone is so fortunate.

Marlena

Marlena was a widow of ten years with no known relatives at the time of the guardianship proceeding. She had no will, health care proxy/living will, or durable power of attorney. To complicate matters, there was a man who claimed to be her common-law husband, a status not recognized in New York.

Marlena had gone to the hospital complaining of abdominal pain and was treated accordingly. Following an endoscopy, she went into cardiac arrest, and CPR was administered for 24 minutes. I found Marlena curled up in a fetal position, in a persistent vegetative state. Nothing has changed for more than a year.

Marlena, fortunately, had several good friends and neighbors who were able to help me. Through one of them, I learned that Ben, the man claiming to be Marlena's husband, was someone she had met at a senior citizen center where she often went for lunch. Although Ben had lived with Marlena briefly, Marlena had recently sent him away; he just happened to be visiting when Marlena took ill. He continued to live in her apartment, not paying

rent, and sometimes making a nuisance of himself to the other tenants. There was no question of the need for a guardian to look after Marlena's home and property.

The court evaluator (sometimes called guardian *ad Litem* in other jurisdictions) for the guardianship proceeding did a great job in sorting out the key facts from the fiction. Because the court evaluator had uncovered some assets, I was able to almost immediately move Marlena to a nursing home with 24-hour care. I found a niece-by-marriage in Virginia who was able to assist me in learning about Marlena. For instance, she was able to tell me that Marlena's husband had been a classical musician. We now constantly keep her Bose™ radio on and tuned to a classical music station. Over the ensuing months, Marlena's body has relaxed and she occasionally opens her eyes in response to familiar voices. Her health aides turn her every half hour and suction her respiratory tract every few hours.

I next turned to the matter of Marlena's property. In assessing the extent of her assets, I discovered that, like Aunt Cookie, Marlena had more than one million dollars! At the same time, I was able to persuade Ben to leave the apartment on threat of eviction and assorted other dire consequences. I also negotiated with Ben's daughter for the return of Marlena's property, which the daughter had helped Ben remove from the apartment. I suspected that most of what had been taken had been purloined, but since I had no proof, I had to be satisfied with what was returned.

Marlena has no will. I was extremely concerned that if no relatives were found, Marlena's entire estate would go to the State of New York at her death. At Christmas, she received several cards, and I contacted those people whom I could identify in the United States. To date, I have found a first cousin on the paternal side and several first cousins once removed. With regard to the maternal side, I have written some letters to Germany that I hope will bear fruit. When there is no will and the decedent's relatives cannot be readily determined, New York State requires a kinship proceeding before distribution. To that end, during the summer I made a trip to see the 76-year-old step-mother of the first cousin to take her affidavit of kinship because I feared that she might not be available when Marlena dies.

At this writing, Marlena is in the hospital with a respiratory infection; I hope to move her to a new nursing home with ventilating capabilities as soon as the infection is under control. I am told that Marlena's medical condition is not likely to improve very much due to her inability to fight off invasive bacteria.

The Lesson

Marlena, unlike Aunt Cookie, never discussed the possibility of a diminished quality of life with her friends. I therefore have no idea of what she would choose for herself. She never made a will, nor a health care proxy/living will, nor executed a durable power of attorney. She did no advance planning. As her guardian, I have only the power to act "in her best interests." In comparison, Aunt Cookie's situation is far less ambiguous because she has given me specific instructions, her niece is extremely supportive, and her doctor is "in the loop."

After we determined the value of Aunt Cookie's estate, she chose to redo her will to provide a supplemental needs trust for her younger brother, who is himself elderly and not well, with his children as ultimate beneficiaries of his share. Also, when I first did Aunt Cookie's will in 1996, she insisted that all her artwork be destroyed at her death because she said it was created only for her own enjoyment. Although she still insists that she prefers her works of art be destroyed, after discussion with Dana and me, she has agreed to allow Dana, her executrix, to use her discretion as to their disposition. How helpless I feel that I cannot do the same for Marlena! I know the value of her assets, but all I can do is conserve them and spend them wisely for her benefit and comfort.

My prayers for Aunt Cookie are not only that she may live many more life-filled years, but also that when the time comes, she will die as she has lived—gracefully. But what about Marlena? Should I, as guardian, continue to fight the infections with antibiotics, or should I just insist that she be made comfortable and let nature take its course? Where is the line between best interests and substituted judgment? How can I know what is in her best interests? Is it not *my judgment* when I decide what is in Marlena's best interests, and, therefore, have I not substituted my judgment for hers? Should I then authorize what I can to keep her alive on the outside chance that she will someday be able to communi-

cate? Must I suspend my own belief in a person's right to die with dignity? Is Marlana's right to die with dignity in her best interests? Does incapacity void that "right" because there is no legal right to die with dignity and, absent evidence of a choice on Marlana's part, I cannot make that choice for her? Perhaps, Marlana will fight off the bacteria this time, allowing me to put off my decision for another day.

The tale of these two women has become a convincing cautionary illustration for my clients. I

now make my clients promise faithfully to give their advance directives to their agents and doctors, and, if they are ambulatory, to carry a copy with them at all times. It is clear that if your client's wish is not to leave their final—and probably most meaningful—decisions in the hands of a stranger, you, as their lawyer, should encourage them to use the tools available—durable powers of attorney, health care proxies, living wills—to avoid this result.