

No. _____

**In The
Supreme Court of the United States**



IN THE MATTER OF THE GUARDIANSHIP OF IDA M.
AN INCAPACIATED PERSON.

ANN MERLINO, Ph.D., DR. LINA MERLINO,
and GINO MERLINO,

Petitioners,

-against-

CARA BUONINCONTRI, ESQ.,

Respondent.

**On Petition for a Writ of Certiorari to
the New York State Court of Appeals**

PETITION FOR A WRIT OF CERTIORARI

PAUL E. KERSON
LEAVITT, KERSON & SEHATI
Attorneys for Petitioners
118-35 Queens Blvd. 12th Fl.
Forest Hills, NY 11375
(718) 793-8822
(718) 520-8544 Fax
kersonpaul@aol.com
gd.leavittkerson@gmail.com

QUESTION PRESENTED

Is it a violation of the Due Process clauses of the *United States Constitution*, 5th Amendment and 14th Amendment for a State Court Judge to conduct a hearing/investigation on his own without counsel or the parties present?

LIST OF PARTIES

The parties to the proceeding are shown in the caption. Ida M. is an incapacitated person governed by a New York State Court appointed Guardian, Respondent Cara Buonincontri.

Petitioners Ann Merlino, Ph.D., Dr. Lina Merlino and Gino Merlino are the siblings and next-of-kin of Ida M.

Respondent Cara Buonincontri is the New York State Court Appointed Guardian for Ida M.

CORPORATE DISCLOSURE STATEMENT

There are no corporations as parties in this case.

DIRECTLY RELATED PROCEEDINGS

There are no directly related proceedings.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The October 22, 2019 Order denying Leave to appeal of the New York State Court of Appeals affirming the Decision and Order rendered by the Appellate Division, Second Department is reported at 34 N.Y. 3d 901, 2019 WL 5382418 and is reproduced as Appendix A.

The Appellate Division, Second Department's Decision and Order dated April 17, 2019 is reported at 171 A.D. 3d 1069, 96 N.Y.S. 3d 864 (2d Dept. 2019) and is reproduced as Appendix B.

The Decision and Order of the New York State Supreme Court for Richmond County dated June 19, 2018 is unreported and is reproduced herein as Appendix C.

JURISDICTION

The jurisdiction of this Court to review the determination of the New York State Court of Appeals and the Appellate Division, Second Department is invoked under 28 U.S.C. Section 2101(c) and Rule 13(1) of the Rules of this Court.

STATUTES INVOLVED

Fifth Amendment, *U.S. Constitution*

No person shall be... deprived of life, liberty, or property without due process of law...

Fourteenth Amendment, *U.S. Constitution*

Section 1... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Mental Hygiene Law (MHL) Section 81.35, Removal of Guardian

Upon motion, the court appointing a guardian may remove such guardian when the guardian fails to comply with an order, is guilty of misconduct, or for any other cause which to the court shall appear just. Notice of motion shall be served on the guardian and persons entitled to receive notice pursuant to paragraph three of subdivision (c) of section 81.16 of this article. The motion may be made by the person examining initial and annual reports pursuant to section 81.32 of this article, or by any person entitled to commence a proceeding under this article, including the incapacitated person. The court may fix the compensation of any attorney or person prosecuting the motion. It may compel the guardian to pay personally the costs of the motion if granted.

STATEMENT OF THE CASE

The Incapacitated Person in this case, Ida M., is now 99 years old. The Richmond County Supreme Court appointed a Guardian for her, Respondent Cara Buonincontri, Esq. The Guardian has neglected the needs of her ward, Ida M.

The Guardian only permits visitation by the siblings of Ida M. two hours each per week. The Petitioners herein, Dr. Lina Merlino, Ann Merlino, Ph.D. and Gino Merlino, siblings of Ida M., are all very upset and distressed that they can only visit their 99-year-old sister two hours per week. They have been a close family for nearly a century, and this separation is very painful to all of them.

Ida M. never married and has no children. The Petitioners are her closest living relatives. There are other brothers and sisters, but they are estranged.

The physical and medical needs of the Incapacitated Person, Ida M., are being neglected by the Guardian. Ida M. does not have adequate hearing aids or adequate dentures. She has not been given her proper prescription eyeglasses during the four years she has been wrongfully confined to the Sunrise Nursing Home, a substandard facility in Brooklyn, NY.

Ida M. has been denied mail from family and friends through the U.S. Postal Service. Ida M. does not receive the photography industry trade magazines and correspondence from professional colleagues that were so important to her all of her life.

When, Petitioners, her siblings, visit her, Ida M. states “What did I do to deserve being in a place like this? I must have done something wrong. What did I do wrong?”

Ida M.’s sisters, Petitioners Dr. Lina Merlino and Ann Merlino Ph.D. are willing to serve as Co-Guardians of the person and property of the Incapacitated Person Ida M. Both are eminently capable of serving as Co-Guardians. Ann Merlino Ph.D. is a former Chair of the Department of Biology and Dean of the College of Staten Island of the City University of New York (CUNY). Ann Merlino Ph.D. is now retired.

Dr. Lina Merlino is a licensed physician of the State of New York, and a past President of the Richmond County Medical Society. Certainly, they are both in a much better position to serve as Co-Guardians of their sister, Ida M. than the current Guardian. The Merlino family has been in Staten Island, NY for nearly 100 years. The father of these parties, John Merlino, founded a photography studio and specialized in wedding portraits. Ida Merlino ran this business together with her father. After the passing of John Merlino, Ida Merlino continued to run this business. Petitioner Gino Merlino took the photographs. The family maintained a large residential and commercial property at 337-341 Port Richmond Avenue, Staten Island, NY 10302. Ida M.’s home is ready for her to return.

A Petition was filed in the Richmond County Supreme Court seeking to remove the Guardian pursuant to New York Mental Hygiene Law (MHL) 81.35. On the return date of the Petition, May 3,

2018, the Richmond County Supreme Court declined to take any testimony and declined to hold a hearing.

On June 19, 2018, the Richmond County Supreme Court issued a Decision and Order indicating that the Court conducted its own investigation and Hearing. The Court visited the Sunrise Nursing Home in Brooklyn, NY, on its own and conducted various interviews without notifying the parties or counsel, and without appointing counsel for Ida M.

There was no opportunity to examine witnesses under oath, to cross-examine witnesses under oath, to present arguments of counsel, or to present Briefs.

The Richmond County Supreme Court did not cite any cases or statutes in preparing its Decision and Order denying the Petition to remove the Guardian without benefit of any Hearing, testimony or arguments. See Appendix C the Decision and Order of the Richmond County Supreme Court dated June 19, 2018.

An Appeal was taken to the New York State Supreme Court, Appellate Division, Second Department. Said Appeal was denied on April 17, 2019. See Appendix B. A Motion was made for permission to Appeal to New York State Court of Appeals. Said Motion was denied on October 22 2019. See attached Appendix A.

REASONS FOR GRANTING THE WRIT

The Fifth Amendment to the *U.S. Constitution* clearly provides that “no person shall be ... deprived of life, liberty or property, without Due Process of Law.”

The Fourteenth Amendment to the U.S. Constitution applies the Fifth Amendment guarantee of Due Process to the several states:

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without Due Process of Law.”

The question in this case is as follows: Do these Constitutional Due Process guarantees apply to the parties in a Hearing to remove a Guardian pursuant to a Petition under the New York Mental Hygiene Law (MHL) Section 81.35?

A careful review of this Court’s jurisprudence on the nature and extent of the Due Process Constitutional guarantee in various types of Hearings indicates that the answer must be “YES.”

A careful review of this Court’s Due Process jurisprudence indicates that the right to be present, the right to counsel, and the right to examine and cross-examine witnesses is essential in a MHL Section 81.35 Hearing just as it is in numerous other contexts.

In *Powell v. State of Alabama*, 287 U.S. 45 (1932), this Court held that it was a denial of Due Process for a Defendant to be compelled

to stand Trial in a State Capital Criminal case without counsel.

In *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S 123 (1951), this Court held that it was a denial of Due Process for the U.S. Attorney General to place Petitioner's organization on a suspect list without a Hearing.

In *Gideon v. Wainwright*, 372 U.S. 335 (1963), this Court held that the Fourteenth Amendment required that State Governments supply counsel to indigent Defendants facing criminal charges in State Courts.

In *Gideon v. Wainwright*, this Court famously said:

"The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." See *Gideon* 372 U.S. at 344.

Similarly, in this case Ida M. continues to be deprived of her liberty and property by a State Court appointed negligent Guardian. Certainly, Ida M. and her siblings, Petitioners herein, are all entitled to a Hearing with counsel to determine whether or not Ida M.'s liberty and property should continue to be confiscated by the Guardian despite the Guardian's completely negligent performance.

Ida M.'s loss of her liberty and property at the hands of a negligent State Court appointed Guardian is no less a loss of liberty and property than imprisonment in a State Criminal case. This Court's determination in *Gideon* must be extended to

Incapacitated Persons ruled over by negligent Guardians appointed by State Courts.

In the instant case, the Richmond County Supreme Court sought to and did interview Ida alone in the substandard nursing home in Brooklyn, NY without any parties, counsel, or testimony from anyone. The basic right of counsel and the right to cross-examination was denied to Ida M. and her siblings, Petitioners herein.

In *Boddie v. State of Connecticut*, 401 U.S. 371 (1971), this Court prohibited the State of Connecticut from denying indigents access to its matrimonial Courts because of inability to pay costs and fees.

In *Wolff v. McDonnell*, 418 U.S. 539 (1974), this Court held that the State of Nebraska was required to provide the right to call witness and present documentary evidence to its prisoners facing loss of a sentence reduction or the imposition of solitary confinement.

In *Tennessee v. Lane*, 541 U.S. 509 (2004), this Court upheld the right of disabled citizens to have access to the State of Tennessee's Courthouses.

This Court's Constitutional Due Process jurisprudence was carefully summarized by the Kings County, New York Surrogate's Court in *Matter of Zhuo*, 53 Misc. 3d 1121 (Kings Co. Surr. Ct. 2016). In *Matter of Zhuo*, the Kings County Surrogate's Court concluded that this Court's Constitutional Due Process jurisprudence required that an indigent adult had a Due Process right to assigned counsel in a Guardianship proceeding.

In the instant case, Ida M. is not indigent whatsoever. Her siblings, Petitioners herein, are prepared to spend significant resources to take care of her, if only the Guardian would permit the same.

Our Anglo-American adversary system of justice is at stake in this case. If a State Trial Court is permitted to conduct its own investigation and Hearing by itself, we have lost something very valuable that has taken centuries to accumulate. Our adversary system is better than any other system in producing a just result.

“Cross-Examination is beyond any doubt the greatest legal engine ever invented for the discovery of truth.” See 5 J. Wigmore, Evidence, Section 1367, Page 32 (J. Chadbourn Rev. 1974) quoted by this Court in *United States v. Salerno*, 505 U.S. 317 (1992) at Note 3.

In the leading book on the subject *The Art of Cross-Examination*, by Frances L. Wellman (the MacMillian Company New York 1931) it is stated:

““Cross-Examination, - the rarest, the most useful, and the most difficult to be acquired of all the accomplishments of the advocate ... it has always been deemed the surest test of truth and a better security than the oath” ... Cox (See page i)”

In the instant case there was no cross-examination of witnesses. If counsel for the Petitioners and counsel for Ida M. (had there been any) had the opportunity to cross-examine the Guardian, the Incapacitated person, and the nursing home staff of the Sunrise Nursing Home,

the results in this case would undoubtedly have been the opposite.

This Petition for a Writ of Certiorari should certainly be granted under these circumstances. It should also be granted for the following reason: our Nation's population is aging. People are living longer. More and more American Senior Citizens will be subject to Guardianships and confined in substandard facilities by their State-Court appointed Guardians, against the will of their family members as in the instant case.

Because our Nation's population is so aging, the fundamental rights of an Incapacitated Person subject to a State Court Guardianship must be further defined by this Court as the rights of other classes of American Citizens were so defined in this Court's prior Due Process Decisions listed above.

CONCLUSION

For all of the above stated reasons, the
Petition for a Writ of Certiorari should be granted.

Dated: December 9, 2019
Forest Hills, NY

Respectfully submitted,
s/ Paul E. Kerson
PAUL E. KERSON
Leavitt, Kerson & Sehati
Attorneys for Petitioners
Ann Merlino Ph.D., Dr. Lina Merlino
and Gino Merlino
118-35 Queens Blvd, 12th floor
Forest Hills, New York 11375
(718) 793-8822
Fax: (718) 520-8544
E-mail: kersonpaul@aol.com
gd.leavittkerson@gmail.com

**State of New York
Court of Appeals**

*Decided and Entered on the
twenty-second day of October, 2019*

Present, Hon. Janet Difiore, *Chief Judge, presiding.*

Mo. No. 2019-639
In the Matter of Ida M.-

Gino M., et al.,
Appellants;

Cara Buonincontri, &c.,
Respondent;

et al.,
Nonparty Respondents.

Appellants having moved for leave to appeal
to the Court of Appeals in the above cause;

Upon the papers filed and due deliberation,
it is

ORDERED, that the motion is denied.



John P. Asiello
Clerk of the Court

**Supreme Court of the State of New York
Appellate Division:
Second Judicial Department**

D58941

G/htr

___AD3d ___

Argued - January 24, 2019

REINALDO E. RIVERA, J.P.

RUTH C. BALKIN

LEONARD B. AUSTIN

ROBERT J. MILLER, JJ.

2018-10284

DECISION & ORDER

In the Matter of Ida M.

(Anonymous).

Gino M. (Anonymous), et al.,

petitioners-appellants;

Cara Buonincontri, etc.,

respondent-respondent,

et al., nonparty-respondents.

(Index No. 800085/12)

Leavitt & Kerson, Forest Hills, NY (Paul E.
Kerson of counsel), for petitioners- appellants.

Cara Buonincontri, Staten Island, NY,
respondent-respondent pro se.

In a proceeding pursuant to Mental Hygiene
Law article 81, the petitioners appeal from an order
of the Supreme Court, Richmond County (Thomas P.
Aliotta, J.), dated June 19, 2018. The order, insofar

as appealed from, denied the petitioners' motion pursuant to Mental Hygiene Law § 81.35 to remove Cara Buonincontri as guardian of the person and property of Ida M.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The Supreme Court providently exercised its discretion in denying the petitioners' motion pursuant to Mental Hygiene Law § 81.35 to remove Cara Buonincontri as guardian of the person and property of Ida M. The petitioners' conclusory allegations did not provide a basis for removal (*see Matter of Solomon R. [Michael R.]*, 123 AD3d 934, 935; *Matter of Carmen H. [Thomas H.—Grace H.]*, 90 AD3d 1049; *Matter of Mary Alice C.*, 56 AD3d 467, 468).

The petitioners' remaining contentions are without merit.

RIVERA, J.P., BALKIN, AUSTIN and MILLER, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court

April 17, 2019

MATTER OF M. (ANONYMOUS), IDA

At an IAS Part 12G of the
Supreme Court of the State of
New York, held in and for the
County of Richmond, at the
Courthouse, located at 26 Central
Avenue, Staten Island, NY 10301
on the 19 day of June, 2018.

PRESENT:

THOMAS P. ALIOTTA,
J.S.C.

DECISION AND ORDER
Index No. 80085/12
Motion Sequence #008

In the Matter of the Guardianship of
IDA MERLINO,
An Incapacitated Person.

Recitation, as required by C.P.L.R. §2219(a), of the
papers considered on the review of this motion
submitted on the 3rd day of May, 2018.

PAPERS

NUMBERED

Notice of Motion & Affirmation of Paul E.
Kerson, Esq., dated March 22, 2018.
Affidavits of Lina Merlino, dated February
13, 2018, Ann Merlino dated February 12,
2018, and Gino Merlino dated February 12,
20181,2,3,4

Answer of Cara Buonincontri, Esq., dated April 20, 2018.....	5
Supplemental Answer of Cara Buonincontri, Esq., dated May 2, 2018.....	6

This guardianship case was commenced in 2012, by Ann Merlino, who petitioned to be appointed as guardian for her older sister, Ida Merlino (“Ida”). Since that time, Ann Merlino has brought no less than three (3) motions to remove Cara Buonincontri, Esq., the Court appointed Guardian of the person and property for Ida with motions in between for unrestricted visitation and disclosure of financial reports, and an appeal to the Appellate Division, Second Department, all of which were denied, as well as an Order to Show Cause to remove the same Guardian which this Court declined to sign.

For a short period of time during 2014-2015, Ann Merlino, successfully recruited a nephew of Ida Merlino, John Merlino, Jr., Esq., to serve as personal needs Guardian for Ida. He soon begged to be relieved based upon the difficulty of dealing with Ida’s siblings, namely; Ann Merlino, Lina Merlino and Gino Merlino (the Merlino siblings), who called him daily to complain.

The instant motion made by the Merlino siblings is once again for the removal of Cara Buonincontri, Esq., as Guardian of the person and property for Ida. Their application is predicated upon allegations that; there has been a deterioration

in the relationship between the Guardian and Ida, that the Guardian has committed financial improprieties, that Ida Merlino is living in an abusive environment in a substandard nursing home without her hearing aids or reading glasses, and that she is kept on a ward with severely mentally disturbed people who are screaming and yelling all the time.

This Court has appointed a certified public accountant from OCA's Part 36 list to assist the Guardian in the filing of Ida's tax returns and preparation of her annual accountings. The accountant is working along with the Court Examiner designated by the Appellate Division, Second Department to bring the examinations current. Therefore, any claims of financial impropriety are baseless.

Ida Merlino, the Incapacitated Person, is almost 98 years of age. She resides in Sunrise Assisted Living Facility, located in the Sheepshead Bay section of Brooklyn. This Court directed the Guardian to place her on or about February 25, 2016, based upon a letter received from Ann Merlino, who had filed complaints with the New York State Department of Health (NYSDOH) against the home care agency asserting what she alleged to be substandard home care given to her sister. She further alleged there were unsafe conditions existing in the Merlino family home where Ida had resided from the time of her birth.

This Court has, on more than one occasion taken testimony from the Merlino siblings and found them to be repetitious, confused at times and less than credible. Accordingly, the Court reserved decision after argument on the instant motion and decided to personally visit Ida Merlino at Sunrise Assisted Living in Brooklyn. That visit occurred on May 7, 2018.

What was revealed during that visit was that Ida Merlino is residing in a lovely assisted living facility (not a nursing home), where she is clearly thriving. Ida does not appear to have lost weight, she remains well-groomed with her hair dyed and fingernails meticulously manicured. She greeted our entourage with enthusiasm from her wheelchair. She shook hands, was alert and pleasant. She invited us to gaze out the window and view the impressive mansions of Manhattan Beach located across Sheepshead Bay. When questioned about her Guardian, hearing aids and eyeglasses she responded very positively and unequivocally that she is happy there, has everything she needs or wants and that she eats well because the food is good.

In addition, she stated that although she has hearing aids she does not always use them and she does not need eyeglasses for reading. She enjoys going for walks along the bay and watching the boats with her private aide. Her healthy complexion evidences that she spends time outdoors in the fresh air. Finally, a tour of her tidy, immaculate private apartment consisting of a bedroom, sitting room,

kitchenette and bathroom revealed that she receives cards, letters and flowers from various members of her large family who regularly visit her. The allegations of Ida being on a ward in a nursing home with severely mentally disturbed people who are screaming and yelling all the time are unfounded. Any concerns this Court may have had are completely alleviated.

Accordingly, it is hereby

ORDERED, that the motion to remove Cara Buonincontri, Esq., as Guardian of the Person and Property of Ida Merlino, is denied in its entirety; and it is further

ORDERED, that all further motions in this proceeding shall require prior approval of the Court and the failure to obtain such approval may result in the imposition of costs and sanctions.

ENTER



HON. THOMAS P. ALIOTTA, J.S.C.