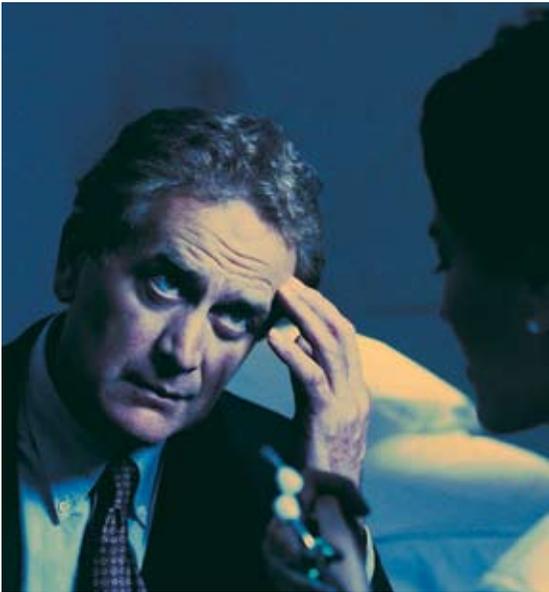


Healthcare Liability & Litigation

Volume 9 • Issue 2 • December 2007



From Hospital to Locked Ward to Civil Rights Action

Michael Kurs, Esquire
*Pullman & Comley LLC**
Hartford, Connecticut

His lawsuit says Daniel Gross, an eighty-six-year-old resident of New York, went to a Connecticut hospital for treatment of leg problems and ended up, as a result of a conservator's appointment, on a locked ward of a nursing home where he unnecessarily remained for almost ten months.¹

During that time, Gross charges that his assets were dissipated, visitation with his family restricted, and that he suffered abuse from his nursing home roommate. Gross' admission to the Connecticut hospital occurred on August 8, 2005. During his hospitalization, a hospital employee filed an application for a conservator, initiating a process akin to a guardianship proceeding in some states. The conservator's appointment followed a hearing before a Connecticut probate court judge. Court papers allege that the conservator put Gross' home in New York up for sale, Gross was signed out of a New York hospital against medical advice by the conservator, and his Long Island home was ransacked.

A court appointed attorney met with Gross before the conservatorship hearing. He described Gross as "alert" and as appearing to be "very intelligent." Still, a decree issued finding Gross incapable of managing his affairs and incapable of caring for himself by reason of dementia. The newly appointed conservator placed Gross in the nursing facility. Gross remained there, except for a brief visit to Long Island and hospitalization for chest pains, until July 12, 2006. That is when a Connecticut Superior Court judge declared the conservatorship null and void after a hearing on a writ of habeas corpus.

A federal civil rights action by Gross is now pending in the United States District Court for Connecticut. The federal lawsuit names as defendants the nursing facility, Connecticut Governor M. Jodi Rell, the former acting Connecticut long term care ombudsman, the probate judge who issued the conservatorship order, the conservator, and the attorney appointed to represent Gross in the conservatorship case. A May 2007 ruling dismissed the claims against the probate court judge on the ground of absolute judicial immunity.² Gross' attorney has filed a notice of appeal from a subsequent order denying a motion for reconsideration of the immunity ruling.

The claims against the nursing facility include conspiracy to deprive Gross of his civil and property rights, violations of Gross' right to privacy and familial integrity, the Omnibus Budget Reconciliation Act of 1989 (OBRA), the Americans with Disabilities Act (ADA), the Connecticut Patient's Bill of Rights, and

Table of Contents

From Hospital to Locked Ward to Civil Rights Action <i>Michael Kurs, Esq.</i>	1
Chair's Column <i>Jody Joiner, Esq.</i>	3
The Suspicious Physician—Legal Protections and Ramifications for the Medical Community in Identifying and Treating Munchausen Syndrome by Proxy <i>Corey Perman, Esq.</i>	4

intentional and negligent infliction of emotional distress. Among other averments, the complaint maintains the nursing home is required by the Social Security Act, 42 U.S.C. § 1396r(b)(2), to provide services to maintain the highest practicable physical, mental, and psychosocial well-being of its residents and that it failed to do so.

The complaint also describes the nursing home, at the conservator's direction, as having restricted Gross' visits with his daughter, forbidding him from exchanging written materials with his daughter, or reading the newspaper. It says the home also interfered with Gross' calls and visits with family members and counsel. Gross did not have use of his personal needs allowance, or an additional allowance due him because of his veteran's status. His roommate assaulted him on one occasion and continued to intimidate Gross during his stay at the home. Gross charges that the home did not report the assault to the police or protective services.

The allegations against Governor Rell, in her official capacity only, include that she has subjected persons with disabilities to unnecessary segregation in institutional settings, including nursing facilities, in violation of the United States Supreme Court ruling in *Olmstead v. L.C. ex rel. Zimring*.³ However, the tenor of the complaint suggests that, besides seeking redress for the injuries Gross allegedly sustained, Gross' suit has targeted Connecticut's probate courts and their handling of conservator proceedings for reform. It seeks a permanent injunction requiring Connecticut to appoint a court monitor to oversee the operation of its probate courts to ensure compliance with the orders sought from the District Court.

The federal lawsuit looks to have a long way to go before the full story of what happened to Gross comes to light. The result in the state habeas proceeding reportedly turned on a determination that the probate court never had jurisdiction over Gross because Gross resided in New York, not Connecticut. A memorandum in the federal case on behalf of the probate court judge disagrees that a basis of residence for jurisdictional purposes did not exist. The memorandum notes that the conservatorship application indicated that Gross resided with his daughter at a Waterbury, Connecticut, address.

The application referred to Gross living "under abuse." Apparently, Gross' daughter had brought him to stay with her in Connecticut while he was very ill, but Gross wanted to return to New York.

Did the conservator have Gross placed on a locked ward of a nursing home to prevent his return to New York before his physical circumstances allowed? Did the restrictions on visitation and communication described in the complaint relate to a legitimate concern that Gross' family had subjected him to abuse? Did the nursing home mishandle Gross' financial resources or did it simply abide by the instructions of a duly appointed conservator?

Gross' lawsuit says that, since his release from confinement, he has been living independently in his Long Island home. He comes to Connecticut to visit with his daughter and great-granddaughter. Did the hospital mistakenly describe Gross' Waterbury living situation as abusive?

Hospitals and nursing homes regularly face decisions that call upon them to judge their older adult patients' capacity for independent decision-making. They often look to the courts to assist them in the process. Due process mechanisms have evolved to avoid unnecessary deprivation of a respondent's rights.

Gross' lawsuit questions the adequacy of the due process afforded by Connecticut probate courts and the actions of his lawyer and conservator in handling his affairs.

His OBRA, ADA, and *Olmstead* allegations challenge the adequacy of the systems intended to see that care is appropriate and not illegally confining. Since the lawsuit, Connecticut has adopted a new law concerning conservators and their appointment.⁴ The law contains new standards of incapacity, among other safeguards.⁵

Whether the lawsuit will foster other changes remains to be seen.

* With thanks to his partner and fellow AHLA member Elliott B. Pollack, Esquire, for his comments and suggestions.



¹ The facts described in this article derive from the pleadings, memorandum, and decisions to date. For the most part, the truth of the allegations and facts described remain to be determined in the pending lawsuit, *Gross v. Rell*, No. 3:06cv1703 (VLB), United States District Court for the District of Connecticut.

² United States District Court Judge Alvin W. Thompson issued the immunity rulings prior to the case's reassignment to another judge in the district.

³ 527 U.S. 581 (1999).

⁴ Connecticut Public Act No. 07-116.

⁵ Under the new law, a person must be unable, even with appropriate assistance, to meet essential requirements for personal needs or to perform, even with appropriate assistance, the functions inherent in managing his affairs before a conservator may be appointed.