



Contents

Features

- 6** Special Needs and Elder Law Update: A Rundown of Recent Court Decisions
Amy C. O'Hara
- 10** Chaos in the Courts: A Procedural Solution to Rein in Contested Article 81 Cases
Elizabeth A. Adinolfi
- 16** Will a Life Estate Deed Protect My Home From Medicaid?
Esther Zelmanovitz
- 19** Please Release Me, Let Me Go
Lori A. Sullivan and Lisa Fenech



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Regulars

- 3** Message From the Section Chair
Fern J. Finkel
- 5** Message From the Co-Editors
Lauren C. Enea and Katherine Carpenter
- 18** Adventures in a Busy Elder Law/T&E Office
Antony Eminowicz
- 22** Member Spotlight: Erica Berger-Hausthor
Lauren C. Enea
- 23** Section Committees and Chairs

Chaos in the Courts: A Procedural Solution to Rein in Contested Article 81 Cases

By Elizabeth A. Adinolfi

Contested Article 81 Guardianship cases are becoming both more frequent and more litigious, straining the resources of the court system, petitioners, and the Alleged Incapacitated Person (AIP)/Incapacitated Person (IP)'s estate. There is no other type of litigation where a person, who has done nothing that creates any legal liability, can be brought to court against their will, have their most personal and private information shared with multiple individuals, who often have no legal right to such information, be forced to litigate for months on end, and face the risk of having to pay for nearly all of the expenses of the proceeding. Petitioners, who often have nothing to gain by initiating an Article 81 proceeding, but do so to help a vulnerable friend or family member, can find themselves facing exorbitant legal bills, as well as the ongoing demands on their time as proceedings drag on for months and years.

A driving factor behind this increased litigiousness is the large number of Article 81 cases that involve participants other than those anticipated by the statute: the petitioner, the AIP, and the court evaluator.¹ Counsel for petitioners and AIPs are more frequently finding themselves faced with Cross-Petitions, sometimes from persons aligned with the AIP, sometimes from those with interests counter to the AIP. What can be even more disruptive are the non-parties who do not file Cross-Petitions but appear on the day of the hearing, with or without counsel, and are permitted to participate regardless of whether the non-party has a legally protected interest in the outcome of the proceeding. Courts refer to these participants in a variety of ways, including "interested parties," "interested persons," or "quasi-parties," but no matter what they are called, they are not parties and should not be permitted to participate in the proceeding unless called by a party as a witness. These parties often include paramours, siblings, and children, and at times entities like landlords, nursing homes, or creditors.

Practitioners faced with these individuals who interject themselves into Article 81 proceedings will find little instruction in Article 81 as to how they should respond. While Article 81 provides explicit procedures for initiating a proceeding, once the petition is filed, Article 81 proceedings can feel like the Wild West. I posit that one of the primary reasons for Article 81 cases frequently turning into multi-party, contested litigations is the tendency of the courts and practitioners to treat Article 81 as a stand-alone statute disembodied from the practices and procedures set forth in the New York State Civil Practice Law and Rules (CPLR). This article will focus on those provisions of the CPLR that provide practitioners and the courts with the greatest ability to maintain tight control

over who is allowed to participate in the proceeding, being Article 4, which provides the general rules governing special proceedings, and Article 10, which sets forth the procedures non-parties must follow if they wish to intervene in a proceeding.

Article 4: Special Proceedings

Article 4 of the CPLR governs special proceedings, including Article 81 Guardianships. Special proceedings are created or authorized by statute to provide, in theory, a "quick and inexpensive way to implement a right."² Special proceedings are intended to be resolved in a procedure more akin to motion practice than full-blown litigation. Article 4 accomplishes this, in part, by significantly curtailing matters such as joinder of parties and discovery by requiring leave of court.³

For Article 81 practitioners, the most important provision is CPLR 401, which provides that the only parties to a special proceeding are the petitioner and any adverse party the respondent. More importantly, "[a]fter a proceeding is commenced, no party shall be joined or interpleaded and no third-party practice or intervention shall be allowed, except by leave of court."⁴ It is at this point where many Article 81 proceedings begin to go off the rails, as practitioners, and sometimes the courts, ignore CPLR 401. This is due in large part to courts and practitioners misinterpreting the notice provision of MHL § 81.07(g) as giving the persons entitled to notice the equivalent of party status and the right to be heard and participate.

MHL § 81.07(g) does not confer party or "quasi-party" status on persons entitled to notice. The court in *Matter of Allen* provided a cogent analysis of the statute demonstrating that persons entitled to notice are not parties to Article 81 proceedings:

MHL § 81.07 was amended effective December 13, 2004 by Laws 2004 ch.438. The amendment removed the persons entitled to notice of guardianship proceeding (generally relatives, friends and persons holding a power of attorney or health care proxy from the AIP) from former subsection (d) and placed them in subsection (g). Former subsection (d) was entitled "Service," and provided in subparagraph (2)(iii) that the relatives, etc. "shall be personally served or served by mail." This created some confusion as to whether the persons listed in former subsection (d) were parties to the proceeding entitled to participate in the hearing for the appointment of a guardian.

New subsection (g) is entitled “Persons entitled to notice of the proceeding” and provides in subparagraph (2) that “Notice of the proceeding . . . shall be mailed to . . . the relatives, etc. This is clearly not the type of personal service of process that is required to make a person a party defendant or respondent in the proceeding.”⁵ The amendment of MHL § 81.07 effectively corrects statutorily any prior implication that the relatives, etc. entitled to notice of the proceeding are parties entitled to participate in the hearing, request adjournments, etc. Thus the persons listed in amended MHL § 81.07 (g), . . . , are not parties to the proceeding.⁶

As noted by the Law Revision Commission in its report recommending the 2004 amendments to Article 81, Section 81.07 was amended due to “concerns regarding unnecessarily disclosing intimate information regarding a person’s health and financial status to people who would not otherwise have access to such information and causing undue humiliation and embarrassment to the alleged incapacitated person.”⁷ Withholding the petition, and the information contained therein, further supports the *Allen* court’s conclusion that persons entitled to notice are not parties. CPLR 403(b) requires that “the petition and affidavits specified in the [order to show cause], shall be served on any adverse party.” But persons entitled to notice are not served with the petition and affidavits as required by CPLR 403(b), so they are not an “adverse party” under Article 4. If they are not adverse parties, they cannot satisfy CPLR 401’s requirement for being respondents.

Furthermore, the requirement that a person be provided with notice of the proceeding does not “provide a statutory entitlement to intervene in the proceeding, or to be considered an entity [or person] that will be affected by the outcome.”⁸ The notice provision of 81.07 is not intended to confer party status, rather it is to provide the individuals entitled to notice with “an opportunity to make an informed decision regarding [their] desired level of involvement therewith.”⁹ Counsel for petitioners should be careful when drafting the Notice of Proceeding not to refer to the person receiving notice as an “interested party” or otherwise suggest that the receipt of notice grants said individual the right to participate in the proceeding. A person entitled to notice, or any other person who becomes aware of a guardianship proceeding and wishes to participate, must still follow the procedures for intervention set forth in the CPLR.

The Problem of Standing

Another reason Article 81 proceedings can devolve into expensive, high conflict, multi-party litigations is the unrestricted nature of standing under Article 81. Due to the lack of

the usually required personal interest, standing in the ordinary sense is not required to serve as a petitioner in a guardianship case. “Interest, or the claim of interest, is the statutory test as to the right to be a party to legal proceedings almost without exception. Unless a party has some personal interest in the result he can have no standing in court. But anyone, even a stranger, can petition for a commission to inquire as to the sanity of any other person within the jurisdiction of the court. While this is now provided by statute it was also the rule at common law.”¹⁰

“From the moment of its institution, ‘the primary object of the proceeding is not to benefit any particular individual, but to see whether the fact of mental incapacity exists, so that the public, through the courts, can take control.’”¹¹ “The petitioner can derive no direct benefit from it. The advantage to him, if any, is only such as would result if any other person had first acted in the matter.”¹²

The expansive nature of standing under Article 81 invites chaos, as courts cannot look to the traditional standing doctrine when faced with multiple non-parties seeking to file cross-petitions or otherwise participate as quasi-parties/interested parties. Yet, the mere fact that everyone has standing to bring an Article 81 proceeding does not mean that once a petition is filed non-parties should, or must, be allowed to participate. There is no intervention as a matter of right in special proceedings under CPLR 401, and nothing in Article 81 confers such a right. Accordingly, Article 10 of the CPLR gives courts the power to exclude a person entitled to notice, or any other person with an interest in whether an AIP is placed under guardianship, from participating as a party in an Article 81 proceeding.

Article 10: Parties Generally

Article 10 governs the joinder of parties, as well as who may intervene in a proceeding as a matter of right, or with leave of the court. CPLR 401, however, is more restrictive than Article 10, and prohibits intervention except by leave of the court. If a non-party wishes to obtain party status to be heard and participate in an Article 81 proceeding, they must follow the procedures set out in CPLR 1013 and 1014. It is the failure of practitioners to follow these procedures, and courts failing to require compliance, that leads to the growing number of out-of-control Article 81 proceedings.

CPLR 1013 provides: Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person’s claim or defense and the main action have a common question of law or act. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party. CPLR 1014 provides: A mo-

Continued on page 14

tion to intervene shall be accompanied by a proposed pleading setting forth the claim or defense for which intervention is sought.

Under Article 10, a non-party who merely files a cross-petition, which has unfortunately become common practice, does not gain party status and should not be permitted to participate in the proceeding. Likewise, a non-party who makes a motion to intervene without including a proposed cross-petition cannot be granted party status.¹³ It is error for the court to even consider a motion to intervene that does not include a proposed pleading.¹⁴

Courts in Article 81 proceedings are faced with making decisions of profound importance and consequence. Given the gravity of these decisions, it is understandable that courts want to have as much information, and as many perspectives as possible. Yet, permitting the intervention of additional parties is not only unnecessary, it is often counter-productive and may interfere with the court's ability to render a decision in a timely manner or otherwise reach a resolution in the case.

Guardianship cases with multiple parties can often distract the court from the purpose of the proceeding: for the court to determine whether the AIP suffers from functional limitations that place the AIP at risk of harm, and if so, whether the appointment of a guardian is the least restrictive means of protecting the AIP from harm.¹⁵ Article 81 proceedings are not the place to work out sibling rivalries, conduct vendettas against stepparents, or for friends and neighbors with an inflated sense of importance and knowledge about the AIP to interject themselves.

When intervenors are permitted without the court closely scrutinizing their reasons for wanting to become a party, counsel for the AIP may find their ability to advocate for the AIP's wishes compromised and their litigation strategy disrupted by an intervenor who claims to know what the AIP wants but is acting in their own self-interests. Even intervenors acting in good faith who believes they know what the AIP wants, or what is in the AIP's best interests, may not know the AIP as well as they think.

Intervenors are undermining cases where the petitioner and the AIP may be able to reach a settlement and avoid the need for a contested proceeding. An AIP may be amenable to consenting to a guardianship to avoid the need for an adversarial hearing and the risk of being declared an Incapacitated Person. Likewise, a petitioner may be willing to accept a settlement involving a more limited guardianship and/or having another individual serve as guardian to avoid the damage to their relationship with the AIP that an adversarial hearing can cause. If the court finds the AIP has sufficient capacity to give consent, and the terms of the settlement provide sufficient protection for the AIP, the proceeding can be resolved without an adver-

sarial hearing. cross-petitioners, or quasi-parties, can thwart a settlement in service of their own interests, forcing the AIP to be put through an expensive and distressing adversarial hearing.

Even in cases where settlement is unlikely, every additional participant makes scheduling and completing the hearing in a timely manner more difficult. It can be a challenge to set the hearing date when taking into account the availability of the court, petitioner and petitioner's counsel, the AIP and the AIP's counsel, and the court evaluator. Now imagine a case where the AIP has three or four children, all of whom have retained counsel and expect to participate in the hearing. The court must try to set a hearing date while accommodating the schedules of a dozen or more individuals. If a hearing needs to be continued beyond the initial date, which becomes more likely as the number of participants increases, it can take months, even more than a year, to complete a process the Legislature intended to take a matter of weeks.

Courts should be hesitant to permit third parties to intervene both to avoid delay in reaching a resolution but also because of the financial burden this places on the AIP and the petitioner. A cross-petitioner is entitled to put on his or her own case, which can result in additional days of hearing. Quasi-parties may not be entitled to put on their own case, but they can add hours or days through conducting their own cross-examination of witnesses. If a cross-petitioner or quasi-party engages in motion practice that again drives up the costs to the AIP.

The permissiveness with which courts allow cross-petitioners and quasi-parties to intervene can have devastating financial impact on the AIP. MHL § 81.09(h) provides that the court may award the court evaluator reasonable compensation from the AIP's assets if a petition is granted, or if a petition is denied or dismissed, the court may order the petitioner or the AIP to pay the court evaluator's compensation or allocate the amount between petitioner and the AIP as the court deems appropriate. MHL § 81.10(f) provides that the court shall determine reasonable compensation for court appointed counsel for the AIP, and if the petition is granted, the compensation shall be paid by the IP unless the court finds they are indigent. If the petition is dismissed, the court can order the petitioner to pay the counsel fees for the AIP. And the court has the discretion to award counsel fees to a successful petitioner, payable from the AIP's resources.¹⁶ Few AIPs can bear such a financial burden, leading to court appointees going uncompensated or under-compensated, and petitioners personally bearing unexpectedly large legal fees.

These financial ramifications are yet another reason for courts to require any interested person who wants to participate to comply with CPLR 1013 and become a formal cross-petitioner. In the first instance, courts can prevent these financial costs by keeping additional participants out of these proceedings. If a potential cross-petitioner cannot present the court

with a proper motion to intervene, the court need not sign the Order to Show Cause, sparing petitioner and the AIP the expense of preparing responsive papers. But in cases where a court, after a proper CPLR 1013 motion is made, finds that the intervenor is an appropriate cross-petitioner, the cross-petitioner is now subject to the provisions of 81.09 and 81.10 and can be made to bear some of the financial burden resulting from their involvement if the court denies their cross-petition.

How a Non-Party Can Participate

If the court denies a proposed cross-petitioner's motion to intervene, or if an interested person fails to make a motion in the first instance, that does not foreclose their involvement in the proceeding. All persons entitled to notice must be sent a Notice of Proceeding which lists the contact information for petitioner's counsel, counsel for the AIP, if counsel is appointed, and the court evaluator. Counsel for petitioners may want to add language to the Notice of Proceeding stating that a person entitled to notice is not a party, and in order to intervene in the proceeding they must comply with CPLR 1013 and 1014.

An interested person's first step, before incurring the expense of making a motion to intervene as a cross-petitioner, should be to contact counsel for the petitioner, if they believe the AIP requires a guardian, or counsel for the AIP if they do not think the AIP needs a guardian or that the AIP would accept them as a guardian over petitioner or a court appointee. Their participation as a witness for either party is far more likely to assist the court than their participation as a cross-petitioner or quasi-party without imposing extraordinary expense on the AIP.

In the Matter of J.J. is illustrative of circumstances where intervention is unnecessary. The IP's guardian brought an application to have him permanently placed in a skilled nursing care facility, to which the IP objected. The nursing home in which the IP was residing brought a motion to intervene to advocate in favor of permanent placement. The court denied the motion, finding *inter alia*, that the nursing home was not seeking to intervene in order to protect "any interest that is inadequately represented by either party." To the extent the nursing home asserted it was acting to protect the IP's well-being, the court held that it is the guardian's responsibility to act in the IP's best interests, which it was doing by seeking the permanent placement. The court also found that the nursing home was in conflict with the IP because it stood to benefit financially if the IP was permanently placed in the facility. Because the nursing home was seeking the same relief as the guardian, the court held that the nursing home's participation was unnecessary and denied the motion to intervene.

If an interested person's position does not align with either the petitioner or the AIP, they should speak to the court Evaluator. It may be that their intervention as a cross-petitioner would be appropriate under those circumstances, and the court

Evaluator would be in the best position to recognize whether there are interests at stake that are not adequately represented by either the petitioner or the AIP.

Conclusion

For Article 81 to work, practitioners and the courts must conduct the proceedings as the Legislature intended: as summary proceedings with two parties, absent compelling circumstances warranting the intervention of a third party. While it is understandable that the court wants as much information as possible before imposing guardianship on an AIP, it has become counterproductive and harmful to allow unfettered intervention of third parties.



Elizabeth A. Adinolfi is a partner with Phillips Nizer LLP where she concentrates her practice on guardianship and matrimonial law. She is a member of the Executive Committee of the Elder Law and Special Needs Section of the New York State Bar Association, and a former co-chair of the section's Guardianship Committee.

Endnotes

1. MHL § 81.07 §(1).
2. *Siegel*, NY Prac. § 547.
3. CPLR 401, 408.
4. CPLR 401.
5. CPLR 304, 306, 306-b and 308.
6. *See also* CPLR 401.
7. New York Bill Jacket, 2004 A.B. 8838, Ch. 438.
8. *In the Matter of J.J.*, 2011 NY Slip Op. 51329(U) [32 Misc 3d 1215(A)].
9. *In the Matter of Grace R.*, 12 A.D.3d 764, 766 (3d Dep't 2004).
10. *Hughes*, 71 Sickels at 73-74, 22 N.E. 446; *see also In re Kaltman*, 38 N.Y.S.2d at 623 ("Such an application may be presented by any person.")
11. *In re Kaltman*, 38 N.Y.S.2d 622 (1942) (quoting *Matter of Frank's Estate*, 283 N.Y. 106, 110, 27 N.E.2d 801, 802; *Hughes v. Jones*, 71 Sickels 67, 116 N.Y. 67, 22 N.E. 446 (1889).
12. *Hughes*, 71 Sickels at 77, 22 N.E. 446.
13. *Lamberti v. Metropolitan Transportation Authority*, 170 AD2d 224 (1st Dept 1991); accord *Zehnder v. State*, 266 AD2d 224, 224-25 (2d Dept 1999) (Supreme Court properly denied the motion to intervene in absence of proposed pleading); *Colonial Sand and Stone Co., Inc. v. Flacke*, 75 AD2d 894, 895 (2d Dept 1980) (court lacks power to grant a motion to intervene that fails to attach a proposed pleading).
14. *Rozewicz v. Ciminelli*, 116 AD2d 990 (4th Dept 1986).
15. MHL § 81.01.
16. MHL § 81.16(f).

Hon. Arthur M. Diamond



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Objective: to teach law related course to undergraduates at Farmingdale State University on an adjunct part time

January, 2004-present

Justice, New York State Supreme Court-have been assigned to matrimonial matters, MHL Article 9 and 81 matters; presently IAS assignment

Activities: contribute column in Nassau County Bar Association
Newspaper "Evidentially Speaking"; have lectured on evidence at the
Judicial Institute, White Plains; Nassau County Bar Association;
Hofstra University CLE program; Second Department Mandatory Training Attorney for Children

Co-editor, evidence chapter Bench Book for Trial Judges- New York 2012 revision
Member, Chief Judge Lippman's Trial Advisory Council

1999-appointed to fill County Court vacancy
2000-appointed to fill County Court vacancy

Nassau County District Attorney's Office
Mineola, New York

1979-1986

trial lawyer assigned to District Court, County Court and Major Offense Bureaus
Deputy Chief, Trial Bureau
tried approximately 40 felony cases including approximately 12 homicide trials
supervised approximately 20 trial attorneys as Deputy Chief of the Trial Bureau

1986-1998

President, Restaurant Strategies, Inc.;
Operator of LePeep Restaurant franchise in Edison and Paramus, New Jersey

Education

Rutgers University BA 1974
New Brunswick, New Jersey
co-captain, lacrosse team
political science major

DEBORA G. NOBEL

Debora G. Nobel is a *Magna Cum Laude* graduate of Yeshiva University Stern College for Women, 1972. She attended the New York University Wagner School of Public Service and received a Master's Degree in Public Administration with a concentration in health administration in 1974.

While working as a Public Health Administrator and as Acting Director of the Office of Health Systems Management of the New York State Department of Health, she earned a J.D. at New York Law School in 1979 and was admitted to the New York State Bar in 1980. Ms. Nobel devoted her legal career to medical malpractice defense litigation.

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EDUCATION

Touro College Jacob D. Fuchsberg Law Center, Huntington, N.Y., J.D., 1996, Valedictorian
Columbia University School of Social Work, New York, N.Y., M.S.S.W., 1975, GPA 3.69
State University of New York at Albany, B.A., History, 1973, Magna Cum Laude, GPA 3.61
University of Wisconsin at Madison, Madison, WI., Attended 1969-1971

AWARDS AND HONORS, LAW SCHOOL

Valedictorian, Summa Cum Laude
Dean's Fellow, All semesters
Dean's List, All semesters
Law Review
Judicial Clerkship Award
West Publishing Outstanding Scholastic Achievement Award

LEGAL EXPERIENCE

Solo Practitioner, 1997 to Present
Guardianship, Elder Law, Trusts and Estates, Residential Real Estate

SOCIAL WORK EXPERIENCE

Columbia University School of Social Work, New York, N.Y.
Adjunct Lecturer, Field Work Advisor, 1986-1992
Liaison between the school and the field for 8-16 students per year.

Family Life Clinic
Queensboro Society for the Prevention of Cruelty to Children, Jamaica, N.Y.
Administrative Director, 1981-1986
Established and directed the agency's mental health clinic.

NYC Department of Mental Health, Mental Retardation and Alcoholism Services
Senior Consultant/Coordinator of Project Review, 1978-1981

Health Systems Agency of New York City, 1976-1978

Rockaway Mental Health Services, 1975-1976

BAR ADMISSIONS, MEMBERSHIPS, AND OTHER ACTIVITIES

Admitted to the Supreme Court of the United States, February 25, 2014

Admitted to the Bar of the United States District Court, Eastern District of New York, 1998

Admitted to the Bar of the State of New York, February 19, 1997

Admitted to the Bar of the State of Connecticut, November 15, 1996

Member, New York State Bar Association, ongoing
Elder Law Section, Guardianship Committee

Member, Nassau County Bar Association, ongoing
Elder Law, Social Services, and Health Advocacy Committee
Vice Chairperson 2008-11
Community Relations and Public Education Committee
Conciliation Committee, Vice Chairperson 2014-15
Grievance Committee Mediation Panel

Member, Yashar – The Judges and Attorneys Chapter of Hadassah,
President, 2009-2011

New York State Certified Master Social Worker, #017226, registration lapsed

Revised October, 2024

GARY M. CARLTON

PROFESSIONAL EXPERIENCE:

NEW YORK STATE SUPREME COURT –January 1, 2024 - Present
Presently assigned to Civil & Guardianship Cases

DISTRICT COURT, NASSAU COUNTY –April 1, 2019 - December 31, 2023
Assigned to Civil 1 & L&T 2

GOLDBERG & CARLTON, PLLC. - 1984 – April 2019 Founding Partner

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Rockville Centre, New York 11570

Areas of specialization:

Representation of plaintiffs and defendants, as individuals, municipalities, corporations and insurance carriers in general negligence litigation, medical, dental, legal, and other professional errors and omissions cases; products liability, construction, auto, civil rights, insurance law and appeals.

TORT COUNSEL FOR THE VILLAGE OF VALLEY STREAM - 2010-2019

COMMUNITY INVOLVEMENT:

Civil Rights Litigation Pro Bono Counsel - 2013

North Woodmere Civic Association

Former Co-President- Pro Bono Counsel

North Woodmere Park Foundation

Founding Member, Former Director of Volunteers, Pro Bono Counsel

Central Synagogue/Beth Emeth

Former Vice President, Trustee-Leadership Council, Pro Bono Counsel 1995 - 2018

OWWR- SUNY OLD WESTBURY - Community Volunteer DJ- 2011-2022

Nassau County Bar- CLE Lecture- 2/5 Bridge the Gap

THEODORE ROOSEVELT AMERICAN INN OF COURT Officers & Directors- Co-Programming Chair- 22-June 2024

EDUCATION:

Lawrence High School, Lawrence, NY – Diploma- 1972

The George Washington University, Washington, D.C. - B.A., (Phi Beta Kappa), 1976

Union University-Albany Law School, Albany, NY - J.D., 1979

Admitted to Practice in New York- 1980

MITCHELL L. PITNICK

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PROFESSIONAL SUMMARY

Senior operations leader and legal counsel for several towns with large, diverse employee and constituent populations. Possesses expertise in strategic planning, crisis management, employee engagement, vendor management, budget oversight, legal/risk management, contract drafting and negotiation, and communications. Significant achievements managing and executing strategic, high-profile initiatives and projects, creating enterprise-wide programs and services, and developing and implementing policies and procedures. Talented at cultivating confidence and trust to gain buy-in with cross-functional stakeholders to achieve goals. Reputation as a manager who listens actively, excels at resolving interpersonal conflict between employees, and encourages a positive workplace atmosphere. Skilled at analyzing problems, staying composed under pressure, and gracefully handling difficult behavior and situations.

CORE COMPETENCIES

- | | | |
|--------------------------------|----------------------------------|--------------------------------|
| ▪ Operations Management | ▪ Project & Program Management | ▪ Budget Management |
| ▪ Organizational Effectiveness | ▪ Policy & Procedure Development | ▪ Business Administration |
| ▪ Strategic Planning | ▪ Crisis Management | ▪ Issue & Contract Negotiation |
| ▪ Legislative Relations | ▪ Team Leadership | ▪ Microsoft Office |

PROFESSIONAL EXPERIENCE

NEW YORK STATE UNIFIED COURT SYSTEM, Mineola, NY

2024 – Present

Principal Law Clerk to Hon. Gary M. Carlton

Research and draft legal decisions on motions, orders to show cause and trial-related issues. Conference cases with attorneys for all parties in attempt to resolve and narrow issues. Advise judge on legal issues for guardianship and civil cases.

TOWN OF NORTH HEMPSTEAD, Manhasset, NY

2022 – 2023

One of three towns in Nassau County, New York with a population of approximately 230,000 residents.

Counsel and Deputy Chief of Staff to Town Board Majority

Provided strategic and legal advice to elected officials on legislative and policy initiatives. Anticipated, identified, and troubleshoot issues that impacted residents and businesses within the town.

- Served on climate smart communities task force and tree advisory committee to propose and develop environmental programs for town-wide implementation.
- Served on budget team to draft and propose amendments to the tentative budget to benefit taxpayers.
- Drafted and negotiated amendments to the Town Board's rules of procedure which updated and clarified the rules to remove ambiguities.

Deputy Chief of Staff

2020 – 2021

Supported the Town Supervisor and Chief of Staff in managing day-to-day operations of the town, including oversight of building, public safety, town attorney, human resources, highways, public works, IT, community services, planning, and administrative services departments with a workforce of 400 civil servant and appointed employees. Provided long-term strategic and organizational planning; advised elected officials and other executive management on organizational, legislative, policy, and personnel issues.

- Served as chairperson of the Covid-19 Business Recovery Workgroup and oversaw implementation of policies and programs designed to assist local businesses in responding to the pandemic. This included drafting legislation to allow outdoor dining and other outdoor activities, managing road closure program to allow outdoor events and developing and directing business spotlight and social media to help businesses.
- Overcame residents' distrust of government on tree issues as well as opposing viewpoints and successfully negotiated with environmental and civic groups to draft and adopt updated tree legislation.
- Worked with representatives from various Native American organizations to retain a consultant to redesign the Town seal.

TOWN OF HEMPSTEAD, Hempstead, NY

2018 – 2019

One of three towns in Nassau County, New York with a population of 750,000 residents.

Counsel to the Supervisor

Chief legal counsel and senior policy advisor to Town Supervisor holding a minority position on the Town Board.

Advised Town Supervisor and executive management and negotiated with representatives on behalf of the majority party to advance Town Supervisor's legislative and policy agenda. Had organizational oversight of the Office of the Town Attorney.

- Effectively negotiated with Counsel for the Town Board to reach bipartisan consensus on numerous initiatives, including ethics reform, revising procurement guidelines, and establishing employee whistleblower protections.
- Advised Town Supervisor on ongoing litigation, conducted legal research, and drafted local laws, ordinances, and resolutions.
- Served as a member of the Employee Grievance Review Board and Labor Advisory Council.
- Managed the Town's internship program in collaboration with partners that included Hofstra University and Molloy College for eight interns.

TOWN OF NORTH HEMPSTEAD, Manhasset, NY

2007 – 2018

Chief Deputy Town Attorney (2016 – 2018)

Advised elected officials, senior management, and other town employees on various legal issues. Managed seven attorneys and office staff. Drafted local laws, ordinances, and Town Board resolutions.

- Handled labor and employment matters, including drafting disciplinary charges, position statements, stipulations, and representing management at labor-management committee meetings.
- Negotiated collective bargaining agreement with CSEA for town-wide bargaining unit of up to 350 employees.
- Investigated approximately five discrimination and harassment complaints pursuant to the Town Code and relevant laws.
- Handled matters before the Unemployment Insurance Appeal Board. Defended civil claims against the Town from pleadings through trial.
- Prosecuted building, zoning, rental, and other violations of the Town Code. Served as counsel to the Board of Zoning Appeals.
- Drafted accusatory instruments, conferenced, and plea-bargained matters, drafted motion papers and appellate briefs, communicated with Town inspectors, investigated cases, and conducted trials.
- Drafted, negotiated, and oversaw execution of municipal contracts with various contractors including the renewal of an agreement for the municipal golf course.
- Represented Town Supervisor in cooperation with local municipalities to successfully establish a joint losap governing board.

Senior Deputy Town Attorney (2014 – 2016)

Deputy Town Attorney (2009 – 2014)

Assistant Town Attorney (2007 – 2009)

LAW OFFICES OF HEIDI FEYLER-MEJIAS, P.C., Huntington, NY

2006 – 2007

Law practice specializing in lender representation and residential real estate.

Associate

Supervised mortgage foreclosure litigation division. Implemented, maintained, and completed foreclosure actions brought against defaulting borrowers. Drafted pleadings and argued motions and handled landlord tenant matters.

EDUCATION

TOURO COLLEGE, JACOB D. FUCHSBERG LAW CENTER, Huntington, NY

Juris Doctor, cum laude, 2005

CALI Award for Academic Excellence (highest grade), Pre-Trial Litigation (Spring 2004)

STATE UNIVERSITY OF NEW YORK AT BUFFALO, Buffalo, NY

Bachelor of Arts in Communication, 2001

Dean's List, Spring and Fall 2001

PROFESSIONAL AFFILIATIONS & CERTIFICATIONS

Member, New York State Bar, 2006

Nassau County Bar Association, Municipal Law Committee, Co-Chair (2011 – 2012)

National Institute for Trial Advocacy, Trial Skills (2010) and Deposition Skills, 2014

NY CLS Men Hyg § 81.01

****Current through 2024 released Chapters 1-545****

New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.01. Legislative findings and purpose

The legislature hereby finds that the needs of persons with incapacities are as diverse and complex as they are unique to the individual. The current system of conservatorship and committee does not provide the necessary flexibility to meet these needs. Conservatorship which traditionally compromises a person's rights only with respect to property frequently is insufficient to provide necessary relief. On the other hand, a committee, with its judicial finding of incompetence and the accompanying stigma and loss of civil rights, traditionally involves a deprivation that is often excessive and unnecessary. Moreover, certain persons require some form of assistance in meeting their personal and property management needs but do not require either of these drastic remedies. The legislature finds that it is desirable for and beneficial to persons with incapacities to make available to them the least restrictive form of intervention which assists them in meeting their needs but, at the same time, permits them to exercise the independence and self-determination of which they are capable. The legislature declares that it is the purpose of this act to promote the public welfare by establishing a guardianship system which is appropriate to satisfy either personal or property management needs of an incapacitated person in a manner tailored to the individual needs of that person, which takes in account the personal wishes, preferences and desires of the person, and which affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993.

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New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.02. Power to appoint a guardian of the person and/or property; standard for appointment.

(a) The court may appoint a guardian for a person if the court determines:

1. that the appointment is necessary to provide for the personal needs of that person, including food, clothing, shelter, health care, or safety and/or to manage the property and financial affairs of that person; and
2. that the person agrees to the appointment, or that the person is incapacitated as defined in subdivision (b) of this section. In deciding whether the appointment is necessary, the court shall consider the report of the court evaluator, as required in paragraph five of subdivision (c) of [section 81.09](#) of this article, and the sufficiency and reliability of available resources, as defined in subdivision (e) of [section 81.03](#) of this article, to provide for personal needs or property management without the appointment of a guardian. Any guardian appointed under this article shall be granted only those powers which are necessary to provide for personal needs and/or property management of the incapacitated person in such a manner as appropriate to the individual and which shall constitute the least restrictive form of intervention, as defined in subdivision (d) of [section 81.03](#) of this article.

(b) The determination of incapacity shall be based on clear and convincing evidence and shall consist of a determination that a person is likely to suffer harm because:

1. the person is unable to provide for personal needs and/or property management; and
2. the person cannot adequately understand and appreciate the nature and consequences of such inability.

(c) In reaching its determination, the court shall give primary consideration to the functional level and functional limitations of the person. Such consideration shall include an assessment of that person's:

1. management of the activities of daily living, as defined in subdivision (h) of [section 81.03](#) of this article;
2. understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living;
3. preferences, wishes, and values with regard to managing the activities of daily living; and
4. the nature and extent of the person's property and financial affairs and his or her ability to manage them.

It shall also include an assessment of (i) the extent of the demands placed on the person by that person's personal needs and by the nature and extent of that person's property and financial affairs; (ii) any physical illness and the prognosis of such illness; (iii) any mental disability, as that term is defined in [section 1.03](#) of this chapter, alcoholism or substance dependence as those terms are defined in [section 19.03](#) of this chapter, and the prognosis of such disability, alcoholism or substance dependence; and (iv) any

§ 81.02. Power to appoint a guardian of the person and/or property; standard for appointment.

medications with which the person is being treated and their effect on the person's behavior, cognition and judgment.

- (d) In addition, the court shall consider all other relevant facts and circumstances regarding the person's:
1. functional level; and
 2. understanding and appreciation of the nature and consequences of his or her functional limitations.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993.

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New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.03. Definitions

When used in this article,

- (a)** “guardian” means a person who is eighteen years of age or older, a corporation, or a public agency, including a local department of social services, appointed in accordance with terms of this article by the supreme court, the surrogate’s court, or the county court to act on behalf of an incapacitated person in providing for personal needs and/or for property management.
- (b)** “functional level” means the ability to provide for personal needs and/or the ability with respect to property management.
- (c)** “functional limitations” means behavior or conditions of a person which impair the ability to provide for personal needs and/or property management.
- (d)** “least restrictive form of intervention” means that the powers granted by the court to the guardian with respect to the incapacitated person represent only those powers which are necessary to provide for that person’s personal needs and/or property management and which are consistent with affording that person the greatest amount of independence and self-determination in light of that person’s understanding and appreciation of the nature and consequences of his or her functional limitations.
- (e)** “available resources” means resources such as, but not limited to, visiting nurses, homemakers, home health aides, adult day care and multipurpose senior citizen centers, powers of attorney, health care proxies, trusts, representative and protective payees, and residential care facilities.
- (f)** “personal needs” means needs such as, but not limited to, food, clothing, shelter, health care, and safety.
- (g)** “property management” means taking actions to obtain, administer, protect, and dispose of real and personal property, intangible property, business property, benefits, and income and to deal with financial affairs.
- (h)** “activities of daily living” means activities such as, but not limited to, mobility, eating, toileting, dressing, grooming, housekeeping, cooking, shopping, money management, banking, driving or using public transportation, and other activities related to personal needs and to property management.
- (i)** “major medical or dental treatment” means a medical, surgical or diagnostic intervention or procedure where a general anesthetic is used or which involves any significant risk or any significant invasion of bodily integrity requiring an incision or producing substantial pain, discomfort, debilitation, or having a significant recovery period, or which involves the administration of psychotropic medication or electroconvulsive therapy; it does not include any routine diagnosis or treatment such as the administration of medications other than chemotherapy for non-psychiatric conditions or nutrition or the extraction of bodily fluids for analysis; dental care performed with a local anesthetic; and any procedures which are provided under emergency circumstances, pursuant to section two thousand five hundred four of the public health law.

§ 81.03. Definitions

- (j) “life sustaining treatment” means medical treatment which is sustaining life functions and without which, according to reasonable medical judgment, the patient will die within a relatively short time period.
- (k) “facility” means a facility, hospital, or school, or an alcoholism facility in this state as such terms are defined in [section 1.03](#) of this chapter, a substance abuse program as such term is defined in article nineteen of this chapter, an adult care facility as such term is defined in [section two of the social services law](#), or a residential health care facility or a general hospital as such terms are defined in section two thousand eight hundred one of the public health law.
- (l) “mental hygiene facility” means a facility, hospital, or school, or an alcoholism facility in this state as such terms are defined in [section 1.03](#) of this chapter.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993; amd, [L 2004, ch 438, § 1](#), eff Dec 13, 2004.

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****Current through 2024 released Chapters 1-545****

New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.04. Jurisdiction

(a) If after a hearing or trial in accordance with the provisions of this article it is determined that relief under this article is necessary, the supreme court, and the county courts outside the city of New York, shall have the power to provide the relief set forth in this article:

1. for a resident of the state;
2. for a nonresident of the state present in the state;
3. for a nonresident of the state pursuant to [section 81.18](#) of this article.

(b) Notwithstanding the provisions of subdivision (a) of this section, when it appears in any proceeding in the surrogate's court that a person interested in an estate is entitled to money or property as a beneficiary of the estate, or entitled to the proceeds of any action as provided in [section 5-4.1 of the estates, powers and trusts law](#), or to the proceeds of a settlement of a cause of action brought on behalf of an infant for personal injuries, and that the interested person is a resident of, is physically present, or has any property in, the county in which the proceeding is pending and is allegedly incapacitated with respect to property management under the provisions of this article, and the surrogate's court is satisfied after a hearing or trial in accordance with the provisions of this article that the interested person is incapacitated with respect to property management, the surrogate's court shall have the power to order relief for that person with respect to property management in accordance with the provisions of this article.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993; amd, [L 2004, ch 438, § 2](#), eff Dec 13, 2004.

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New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.05. Venue

(a) A proceeding under this article shall be brought in the supreme court within the judicial district, or in the county court of the county in which the person alleged to be incapacitated resides, or is physically present, or in the surrogate's court having jurisdiction pursuant to subdivision (b) of [section 81.04](#) of this article. If the person alleged to be incapacitated is being cared for as a resident in a facility, the residence of that person shall be deemed to be in the county where the facility is located and the proceeding shall be brought in that county, subject to application by an interested party for a change in venue to another county because of the inconvenience of the parties or witnesses or the condition of the person alleged to be incapacitated. If the person alleged to be incapacitated is not present in the state, or the residence of such person cannot be ascertained, the residence shall be deemed to be in the county in which all or some of such person's property is situated.

(b) After the appointment of a guardian, temporary guardian, special guardian, standby guardian, or alternate standby guardians, any proceeding to modify a prior order shall be brought in the supreme court, county court, or surrogate's court which granted the prior order. If, at the time of the application to modify a prior order, the incapacitated person is being cared for as a resident in a facility, the proceeding shall be brought in the county where the facility is located, subject to application by an interested party for a change in venue to the court which granted the prior order because of the inconvenience of the parties or witnesses or the condition of the incapacitated person.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993; amd, [L 2004, ch 438, § 3](#), eff Dec 13, 2004.

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New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.06. Who may commence a proceeding

- (a) A proceeding under this article shall be commenced by the filing of the petition with the court by:
1. the person alleged to be incapacitated;
 2. a presumptive distributee of the person alleged to be incapacitated, as that term is defined in subdivision forty-two of [section one hundred three of the surrogate's court procedure act](#);
 3. an executor or administrator of an estate when the alleged incapacitated person is or may be the beneficiary of that estate;
 4. a trustee of a trust when the alleged incapacitated person is or may be the grantor or a beneficiary of that trust;
 5. the person with whom the person alleged to be incapacitated resides;
 6. a person otherwise concerned with the welfare of the person alleged to be incapacitated. For purposes of this section a person otherwise concerned with the welfare of the person alleged to be incapacitated may include a corporation, or a public agency, including the department of social services in the county where the person alleged to be incapacitated resides regardless of whether the person alleged to be incapacitated is a recipient of public assistance;
 7. the chief executive officer, or the designee of the chief executive officer, of a facility in which the person alleged to be incapacitated is a patient or resident.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993; amd, [L 2004, ch 438, § 4](#), eff Dec 13, 2004 law,“.

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New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.07. Notice

- (a) Proceeding. A proceeding under this article shall be commenced upon the filing of the petition.
- (b) Order to show cause. Upon the filing of the petition, the court shall:
1. set the date on which the order to show cause is heard no more than twenty-eight days from the date of the signing of the order to show cause. The court may for good cause shown set a date less than twenty-eight days from the date of the signing of the order to show cause. The date of the hearing may be adjourned only for good cause shown;
 2. include in the order to show cause the name, address, and telephone number of the person appointed as court evaluator in accordance with [section 81.09](#) of this article;
 3. require the order to show cause to be served together with a copy of the petition and any supporting papers upon the alleged incapacitated person, the court evaluator, and counsel for the alleged incapacitated person in the form and manner prescribed in this section; the court shall not require that supporting papers contain medical information; and
 4. require notice of the proceeding together with a copy of the order to show cause to be given to the persons identified in paragraph one of subdivision (e) of this section and in the form and manner prescribed in this section.
- (c) Form of the order to show cause. The order to show cause shall be written in large type, in plain language, and in a language other than English if necessary to inform the person alleged to be incapacitated of his or her rights, and shall include the following information:
1. date, time, and place of the hearing of the petition;
 2. a clear and easily readable statement of the rights of the person alleged to be incapacitated that are set forth in [section 81.11](#) of this article;
 3. the name, address, and telephone number of the person appointed as court evaluator pursuant to [section 81.09](#) of this article;
 4. the name, address, and telephone number of the attorney if one has been appointed for the person alleged to be incapacitated pursuant to [section 81.10](#) of this article; and
 5. a list of the powers which the guardian would have the authority to exercise on behalf of the person alleged to be incapacitated if the relief sought in the petition is granted.

(d)

Legend. The order to show cause shall also include on its face the following legend in twelve point or larger bold face double spaced type:

IMPORTANT

An application has been filed in court by who believes you may be unable to take care of your personal needs or financial affairs. is asking that someone be appointed to make decisions for you. With this

§ 81.07. Notice

paper is a copy of the application to the court showing why believes you may be unable to take care of your personal needs or financial affairs. Before the court makes the appointment of someone to make decisions for you the court holds a hearing at which you are entitled to be present and to tell the judge if you do not want anyone appointed. This paper tells you when the court hearing will take place. If you do not appear in court, your rights may be seriously affected.

You have the right to demand a trial by jury. You must tell the court if you wish to have a trial by jury. If you do not tell the court, the hearing will be conducted without a jury. The name and address, and telephone number of the clerk of the court are:

The court has appointed a court evaluator to explain this proceeding to you and to investigate the claims made in the application. The court may give the court evaluator permission to inspect your medical, psychological, or psychiatric records. You have the right to tell the judge if you do not want the court evaluator to be given that permission. The court evaluator's name, address, and telephone number are:

You are entitled to have a lawyer of your choice represent you. If you want the court to appoint a lawyer to help you and represent you, the court will appoint a lawyer for you. You will be required to pay that lawyer unless you do not have the money to do so.

(e) Service of the order to show cause.

1. The persons entitled to service of the order to show cause shall include:

- (i)** the person alleged to be incapacitated; and
- (ii)** the attorney for the person alleged to be incapacitated, if known to the petitioner; and
- (iii)** the court evaluator.

2. Manner of service.

(i) the order to show cause and a copy of the petition shall be personally delivered to the person alleged to be incapacitated not less than fourteen days prior to the hearing date of the order to show cause. However, the court may direct that the order to show cause and a copy of the petition be served on the person alleged to be incapacitated in a manner other than personal delivery when the petitioner demonstrates to the court's satisfaction that the person alleged to be incapacitated has refused to accept service.

(ii) the order to show cause and a copy of the petition shall be served upon the court evaluator and the attorney for the alleged incapacitated person, if there is one, by facsimile, provided that a facsimile telephone number is designated by the attorney for that purpose, or by delivering the papers personally or by overnight delivery service to the office of the court evaluator and the attorney for the alleged incapacitated person, if there is one, within three business days following the appointment of the court evaluator and the appointment of the attorney or the appearance of an attorney retained by the alleged incapacitated person.

3. The court may direct that the order to show cause be served within a time period less than the period required in paragraph two of this subdivision for good cause shown.

(f) Form of the notice of the proceeding. The notice of the proceeding shall substantially set forth:

- 1.** The name and address of the alleged incapacitated person to whom the guardianship proceeding relates;
- 2.** The name and address of the petitioner;
- 3.** The names of all persons to be given notice of the proceeding;
- 4.** The time when and the place where the order to show cause shall be heard;
- 5.** The object of the proceeding and the relief sought in the petition;

§ 81.07. Notice

6. The name, address and telephone number of the petitioner's attorney.

(g) Notice of the proceeding.

1. Persons entitled to notice of the proceeding shall include:

- (i)** the following persons, other than the petitioner, who are known to the petitioner or whose existence and address can be ascertained by the petitioner with reasonably diligent efforts: the spouse of the person alleged to be incapacitated, if any; the parents of the person alleged to be incapacitated, if living; the adult children of the person alleged to be incapacitated, if any; the adult siblings of the person alleged to be incapacitated, if any; the person or persons with whom person alleged to be incapacitated resides; and
- (ii)** in the event no person listed in subparagraph (i) of this paragraph is given notice, then notice shall be given to at least one and not more than three of the living relatives of the person alleged to be incapacitated in the nearest degree of kinship who are known to the petitioner or whose existence and address can be ascertained by the petitioner with reasonably diligent efforts; and
- (iii)** any person or persons designated by the alleged incapacitated person with authority pursuant to sections 5-1501, 5-1505, and 5-1506 of the general obligations law, or sections two thousand nine hundred five and two thousand nine hundred eighty-one of the public health law, if known to the petitioner; and
- (iv)** if known to the petitioner, any person, whether or not a relative of the person alleged to be incapacitated, or organization that has demonstrated a genuine interest in promoting the best interests of the person alleged to be incapacitated such as by having a personal relationship with the person, regularly visiting the person, or regularly communicating with the person; and
- (v)** if it is known to the petitioner that the person alleged to be incapacitated receives public assistance or protective services under article nine-B of the social services law, the local department of social services; and
- (vi)** if the person alleged to be incapacitated resides in a facility, the chief executive officer in charge of the facility; and
- (vii)** if the person alleged to be incapacitated resides in a mental hygiene facility, the mental hygiene legal service of the judicial department in which the residence is located; and
- (viii)** such other persons as the court may direct based on the recommendation of the court evaluator in accordance with subparagraph (xvii) of paragraph five of subdivision (c) of [section 81.09](#) of this article.

2. Notice of the proceeding together with a copy of the order to show cause shall be mailed to the persons identified in paragraph one of this subdivision not less than fourteen days prior to the hearing date in the order to show cause.

3. The court may direct that the notice of proceeding be mailed within a time period less than the period required in paragraph two of this subdivision for good cause shown.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993; amd, [L 1993, ch 32, §§ 1, 2](#), eff April 1, 1993; [L 2004, ch 438, § 5](#), eff Dec 13, 2004.

§ 81.07. Notice

End of Document

NY CLS Men Hyg § 81.08

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New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.08. Petition

(a) The petition shall be verified under oath and shall include the following information:

1. the name, age, address, and telephone number of the person alleged to be incapacitated;
2. the name, address, and telephone number of the person or persons with whom the person alleged to be incapacitated resides, if any, and the name, address and telephone number of any persons that the petitioner intends to serve with the order to show cause and the nature of their relationship to the alleged incapacitated person;
3. a description of the alleged incapacitated person's functional level including that person's ability to manage the activities of daily living, behavior, and understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living;
4. if powers are sought with respect to the personal needs of the alleged incapacitated person, specific factual allegations as to the personal actions or other actual occurrences involving the person alleged to be incapacitated which are claimed to demonstrate that the person is likely to suffer harm because he or she cannot adequately understand and appreciate the nature and consequences of his or her inability to provide for personal needs;
5. if powers are sought with respect to property management for the alleged incapacitated person, specific factual allegations as to the financial transactions or other actual occurrences involving the person alleged to be incapacitated which are claimed to demonstrate that the person is likely to suffer harm because he or she cannot adequately understand and appreciate the nature and consequences of his or her inability to provide for property management; if powers are sought to transfer a part of the alleged incapacitated person's property or assets to or for the benefit of another person, including the petitioner or guardian, the petition shall include the information required by subdivision (b) of [section 81.21](#) of this article;
6. the particular powers being sought and their relationship to the functional level and needs of the person alleged to be incapacitated;
7. the duration of the powers being sought;
8. the approximate value and description of the financial resources of the person alleged to be incapacitated and whether, to the best of the petitioner's knowledge, the person is a recipient of public assistance;
9. the nature and amount of any claim, debt, or obligations of the person alleged to be incapacitated, to the best of the petitioner's knowledge;
10. the names, addresses, and telephone numbers of presumptive distributees of the person alleged to be incapacitated as that term is defined in subdivision forty-two of [section one hundred three of the surrogate's court procedure act](#) unless they are unknown and cannot be reasonably ascertained;
11. the name, address, and telephone number of the petitioner;

§ 81.08. Petition

12. the name, address, and telephone number of the person or persons, if any, proposed as guardian and standby guardian, the relationship of the proposed guardian or standby guardian to the person alleged to be incapacitated, and the reasons why the proposed guardian or standby guardian is suitable to exercise the powers necessary to assist the person alleged to be incapacitated;
13. any relief sought pursuant to [section 81.23](#) of this article;
14. the available resources, if any, that have been considered by the petitioner and the petitioner's opinion as to their sufficiency and reliability;
15. any other information which in the petitioner's opinion will assist the court evaluator in completing the investigation and report in accordance with [section 81.09](#) of this article.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993; amd, [L 2004, ch 438, §§ 6, 7](#), eff Dec 13, 2004.

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New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.09. Appointment of court evaluator

(a) At the time of the issuance of the order to show cause, the court shall appoint a court evaluator.

(b)

1. the court may appoint as court evaluator any person including, but not limited to, the mental hygiene legal service in the judicial department where the person resides, a not-for-profit corporation, an attorney-at-law, physician, psychologist, accountant, social worker, or nurse, with knowledge of property management, personal care skills, the problems associated with disabilities, and the private and public resources available for the type of limitations the person is alleged to have. The name of the court evaluator shall be drawn from a list maintained by the office of court administration;

2. if the court appoints the mental hygiene legal service as the evaluator and upon investigation in accordance with section 81.10 of this article it appears to the mental hygiene legal service that the mental hygiene legal service represents the person alleged to be incapacitated as counsel, or that counsel should otherwise be appointed in accordance with section 81.10 of this article for the person alleged to be incapacitated, the mental hygiene legal service shall so report to the court. The mental hygiene legal service shall be relieved of its appointment as court evaluator whenever the mental hygiene legal service represents as counsel, or is assigned to represent as counsel, the person alleged to be incapacitated.

(c) The duties of the court evaluator shall include the following:

1. meeting, interviewing, and consulting with the person alleged to be incapacitated regarding the proceeding.

2. determining whether the alleged incapacitated person understands English or only another language, and explaining to the person alleged to be incapacitated, in a manner which the person can reasonably be expected to understand, the nature and possible consequences of the proceeding, the general powers and duties of a guardian, available resources, and the rights to which the person is entitled, including the right to counsel.

3. determining whether the person alleged to be incapacitated wishes legal counsel of his or her own choice to be appointed and otherwise evaluating whether legal counsel should be appointed in accordance with section 81.10 of this article.

4. interviewing the petitioner, or, if the petitioner is a facility or government agency, a person within the facility or agency fully familiar with the person's condition, affairs and situation.

5. investigating and making a written report and recommendations to the court; the report and recommendations shall include the court evaluator's personal observations as to the person alleged to be incapacitated and his or her condition, affairs and situation, as well as information in response to the following questions:

(i) does the person alleged to be incapacitated agree to the appointment of the proposed guardian and to the powers proposed for the guardian;

§ 81.09. Appointment of court evaluator

- (ii) does the person wish legal counsel of his or her own choice to be appointed or is the appointment of counsel in accordance with section 81.10 of this article otherwise appropriate;
- (iii) can the person alleged to be incapacitated come to the courthouse for the hearing;
- (iv) if the person alleged to be incapacitated cannot come to the courthouse, is the person completely unable to participate in the hearing;
- (v) if the person alleged to be incapacitated cannot come to the courthouse, would any meaningful participation result from the person's presence at the hearing;
- (vi) are available resources sufficient and reliable to provide for personal needs or property management without the appointment of a guardian;
- (vii) how is the person alleged to be incapacitated functioning with respect to the activities of daily living and what is the prognosis and reversibility of any physical and mental disabilities, alcoholism or substance dependence? The response to this question shall be based on the evaluator's own assessment of the person alleged to be incapacitated to the extent possible, and where necessary, on the examination of assessments by third parties, including records of medical, psychological and/or psychiatric examinations obtained pursuant to subdivision (d) of this section. As part of this review, the court evaluator shall consider the diagnostic and assessment procedures used to determine the prognosis and reversibility of any disability and the necessity, efficacy, and dose of each prescribed medication;
- (viii) what is the person's understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living;
- (ix) what is the approximate value and nature of the financial resources of the person alleged to be incapacitated;
- (x) what are the person's preferences, wishes, and values with regard to managing the activities of daily living;
- (xi) has the person alleged to be incapacitated made any appointment or delegation pursuant to section 5-1501, 5-1505, or 5-1506 of the general obligations law, section two thousand nine hundred sixty-five or two thousand nine hundred eighty-one of the public health law, or a living will;
- (xii) what would be the least restrictive form of intervention consistent with the person's functional level and the powers proposed for the guardian;
- (xiii) what assistance is necessary for those who are financially dependent upon the person alleged to be incapacitated;
- (xiv) is the choice of proposed guardian appropriate, including a guardian nominated by the allegedly incapacitated person pursuant to section 81.17 or subdivision (c) of section 81.19 of this article; and what steps has the proposed guardian taken or does the proposed guardian intend to take to identify and meet the current and emerging needs of the person alleged to be incapacitated unless that information has been provided to the court by the local department of social services when the proposed guardian is a community guardian program operating pursuant to the provisions of title three of article nine-B of the social services law;
- (xv) what potential conflicts of interest, if any, exist between or among family members and/or other interested parties regarding the proposed guardian or the proposed relief;
- (xvi) what potential conflicts of interest, if any, exist involving the person alleged to be incapacitated, the petitioner, and the proposed guardian; and
- (xvii) are there any additional persons who should be given notice and an opportunity to be heard.

In addition, the report and recommendations shall include any information required under subdivision (e) of this section, and any additional information required by the court.

§ 81.09. Appointment of court evaluator

6. interviewing or consulting with professionals having specialized knowledge in the area of the person's alleged incapacity including but not limited to developmental disabilities, alcohol and substance abuse, and geriatrics.
7. retaining an independent medical expert where the court finds it is appropriate, the cost of which is to be charged to the estate of the allegedly incapacitated person unless the person is indigent.
8. conducting any other investigations or making recommendations with respect to other subjects as the court deems appropriate.
9. attending all court proceedings and conferences.

(d) The court evaluator may apply to the court for permission to inspect records of medical, psychological and/or psychiatric examinations of the person alleged to be incapacitated; except as otherwise provided by federal or state law, if the court determines that such records are likely to contain information which will assist the court evaluator in completing his or her report to the court, the court may order the disclosure of such records to the court evaluator, notwithstanding the physician/patient privilege, the psychologist/patient privilege, or the social worker/client privilege as set forth in sections four thousand five hundred four, four thousand five hundred seven, and four thousand five hundred eight of the civil practice law and rules; if the court orders that such records be disclosed to the court evaluator, the court may, upon the court's own motion, at the request of the court evaluator, or upon the application of counsel for the person alleged to be incapacitated, or the petitioner, also direct such further disclosure of such records as the court deems proper.

(e) The court evaluator shall have the authority to take the steps necessary to preserve the property of the person alleged to be incapacitated pending the hearing in the event the property is in danger of waste, misappropriation, or loss; if the court evaluator exercises authority under this subdivision, the court evaluator shall immediately advise the court of the actions taken and include in his or her report to the court an explanation of the actions the court evaluator has taken and the reasons for such actions.

(f) When judgment grants a petition, the court may award a reasonable compensation to a court evaluator, including the mental hygiene legal service, payable by the estate of the allegedly incapacitated person. When a judgment denies or dismisses a petition, the court may award a reasonable allowance to a court evaluator, including the mental hygiene legal service, payable by the petitioner or by the person alleged to be incapacitated, or both in such proportions as the court may deem just. When the person alleged to be incapacitated dies before the determination is made in the proceeding, the court may award a reasonable allowance to a court evaluator, payable by the petitioner or by the estate of the decedent, or by both in such proportions as the court may deem just.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993; amd, [L 1993, ch 32, §§ 3, 4](#), eff April 1, 1993.; [L 2004, ch 438, § 8](#), eff Dec 13, 2004; [L 2011, ch 37, § 71](#), eff June 1, 2011.

NY CLS Men Hyg § 81.10

****Current through 2024 released Chapters 1-545****

New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.10. Counsel

(a) Any person for whom relief under this article is sought shall have the right to choose and engage legal counsel of the person's choice. In such event, any attorney appointed pursuant to this section shall continue his or her duties until the court has determined that retained counsel has been chosen freely and independently by the alleged incapacitated person.

(b) If the person alleged to be incapacitated is not represented by counsel at the time of the issuance of the order to show cause, the court evaluator shall assist the court in accordance with subdivision (c) of [section 81.09](#) of this article in determining whether counsel should be appointed.

(c) The court shall appoint counsel in any of the following circumstances unless the court is satisfied that the alleged incapacitated person is represented by counsel of his or her own choosing:

1. the person alleged to be incapacitated requests counsel;
2. the person alleged to be incapacitated wishes to contest the petition;
3. the person alleged to be incapacitated does not consent to the authority requested in the petition to move the person alleged to be incapacitated from where that person presently resides to a nursing home or other residential facility as those terms are defined in section two thousand eight hundred one of the public health law, or other similar facility;
4. if the petition alleges that the person is in need of major medical or dental treatment and the person alleged to be incapacitated does not consent;
5. the petition requests the appointment of a temporary guardian pursuant to [section 81.23](#) of this article;
6. the court determines that a possible conflict may exist between the court evaluator's role and the advocacy needs of the person alleged to be incapacitated;
7. if at any time the court determines that appointment of counsel would be helpful to the resolution of the matter.

(d) If the person refuses the assistance of counsel, the court may, nevertheless, appoint counsel if the court is not satisfied that the person is capable of making an informed decision regarding the appointment of counsel.

(e) The court may appoint as counsel the mental hygiene legal service in the judicial department where the residence is located.

(f) The court shall determine the reasonable compensation for the mental hygiene legal service or any attorney appointed pursuant to this section. The person alleged to be incapacitated shall be liable for such compensation unless the court is satisfied that the person is indigent. If the petition is dismissed, the court may in its discretion direct that petitioner pay such compensation for the person alleged to be incapacitated. When the person alleged to be incapacitated dies before the determination is made in the proceeding, the court may award reasonable compensation to the mental hygiene legal service or any attorney appointed

§ 81.10. Counsel

pursuant to this section, payable by the petitioner or the estate of the decedent or by both in such proportions as the court may deem just.

(g) If the court appoints counsel under this section, the court may dispense with the appointment of a court evaluator or may vacate or suspend the appointment of a previously appointed court evaluator.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993; amd, [L 1993, ch 32, § 5](#), eff April 1, 1993; [L 2004, ch 438, § 9](#), eff Dec 13, 2004.

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****Current through 2024 released Chapters 1-545****

New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.11. Hearing.

- (a) A determination that the appointment of a guardian is necessary for a person alleged to be incapacitated shall be made only after a hearing.
- (b) In a proceeding brought pursuant to this article any party to the proceeding shall have the right to:
1. present evidence;
 2. call witnesses, including expert witnesses;
 3. cross examine witnesses, including witnesses called by the court;
 4. be represented by counsel of his or her choice.
- (c) The hearing must be conducted in the presence of the person alleged to be incapacitated, either at the courthouse or where the person alleged to be incapacitated resides, so as to permit the court to obtain its own impression of the person's capacity. If the person alleged to be incapacitated physically cannot come or be brought to the courthouse, the hearing must be conducted where the person alleged to be incapacitated resides unless:
1. the person is not present in the state; or
 2. all the information before the court clearly establishes that (i) the person alleged to be incapacitated is completely unable to participate in the hearing or (ii) no meaningful participation will result from the person's presence at the hearing.
- (d) If the hearing is conducted without the presence of the person alleged to be incapacitated and the court appoints a guardian, the order of appointment shall set forth the factual basis for conducting the hearing without the presence of the person for whom the appointment is made.
- (e) If the hearing is conducted in the presence of the person alleged to be incapacitated and the person is not represented by counsel, the court shall explain to that person, on the record, the purpose and possible consequences of the proceeding, the right to be represented by counsel and the fact that the court will appoint an attorney to represent the person alleged to be incapacitated if the person wishes to be represented by counsel, and shall inquire of the person whether he or she wishes to have an attorney appointed. If the person refuses the assistance of counsel, the court may nevertheless appoint counsel if the court is not satisfied that the person is capable of making an informed decision regarding the appointment of counsel.
- (f) If on or before the return date designated in the order to show cause the alleged incapacitated person or counsel for the alleged incapacitated person raises issues of fact regarding the need for an appointment under this article and demands a jury trial of such issues, the court shall order a trial by jury thereof. Failure to make such a demand shall be deemed a waiver of the right to trial by jury.

History

§ 81.11. Hearing.

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993; amd, [L 2004, ch 438, § 10](#), eff Dec 13, 2004.

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****Current through 2024 released Chapters 1-545****

New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.12. Burden and quantum of proof

(a) A determination that a person is incapacitated under the provisions of this article must be based on clear and convincing evidence. The burden of proof shall be on the petitioner.

(b) The court may, for good cause shown, waive the rules of evidence. The report of the court evaluator may be admitted in evidence if the court evaluator testifies and is subject to cross examination; provided, however, that if the court determines that information contained in the report is, in the particular circumstance of the case, not sufficiently reliable, the court shall require that the person who provided the information testify and be subject to cross examination.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993.

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NY CLS Men Hyg § 81.13

****Current through 2024 released Chapters 1-545****

New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.13. Timing of hearing.

Unless the court, for good cause shown, orders otherwise, a proceeding under this article is entitled to a preference over all other causes in the court. Unless the court, for good cause shown, orders otherwise, the hearing or trial shall be conducted within the time set forth in subdivision (b) of [section 81.07](#) of this article. A decision shall be rendered within seven days after the hearing, unless for good cause shown, the court extends the time period for rendering the decision. In the event the time period is extended, the court shall set forth the factual basis for the extension. The commission shall be issued to the guardian within fifteen days after the decision is rendered.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993; amd, [L 1993, ch 32, § 6](#), eff April 1, 1993; [L 2004, ch 438, § 11](#), eff Dec 13, 2004.

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****Current through 2024 released Chapters 1-545****

New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.14. Record of the proceedings

- (a)** A record of the proceedings shall be made in all cases.
- (b)** The court shall not enter an order sealing the court records in a proceeding under this article, either in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interest of the public, the orderly and sound administration of justice, the nature of the proceedings, and the privacy of the person alleged to be incapacitated. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard. Court records shall include all documents and records of any nature filed with the clerk in connection with the proceeding. Documents obtained through disclosure and not filed with the clerk shall remain subject to protective orders under the civil practice law and rules.
- (c)** The court shall not exclude a person or persons or the general public from a proceeding under this article except upon written findings of good cause shown. In determining whether good cause has been shown, the court shall consider the interest of the public, the orderly and sound administration of justice, the nature of the proceedings, and the privacy of the person alleged to be incapacitated.
- (d)** At the time of the commencement of the hearing, the court shall inform the allegedly incapacitated person of his or her right to request for good cause that the court records be sealed and that a person, persons, or the general public be excluded from the hearing.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993.

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New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.15. Findings

(a) Where the court determines that the person agrees to the appointment and that the appointment is necessary, the court shall make the following findings on the record:

1. the person's agreement to the appointment;
2. the person's functional limitations which impair the person's ability to provide for personal needs or property management;
3. the necessity of the appointment of a guardian as a means of providing for personal needs and/or property management for the person;
4. the specific powers of the guardian which constitute the least restrictive form of intervention consistent with the person's functional limitations; and
5. the duration of the appointment.

(b) Where the petition requests the appointment of a guardian to provide for the personal needs for a person alleged to be incapacitated and the court determines that such person is incapacitated and that the appointment is necessary, the court shall make the following findings on the record:

1. the person's functional limitations which impair the person's ability to provide for personal needs;
2. the person's lack of understanding and appreciation of the nature and consequences of his or her functional limitations;
3. the likelihood that the person will suffer harm because of the person's functional limitations and inability to adequately understand and appreciate the nature and consequences of such functional limitations;
4. the necessity of the appointment of a guardian to prevent such harm;
5. the specific powers of the guardian which constitute the least restrictive form of intervention consistent with the findings of this subdivision;
6. the duration of the appointment; and
7. whether the incapacitated person should receive copies of the initial and annual report.

(c) Where the petition requests the appointment of a guardian for property management for the person alleged to be incapacitated, and the court determines that the person is incapacitated and that the appointment of a guardian is necessary, the court shall make the following findings on the record:

1. the type and amount of the property and financial resources of the person alleged to be incapacitated;
2. the person's functional limitations which impair the person's ability with respect to property management;

§ 81.15. Findings

3. the person's lack of understanding and appreciation of the nature and consequences of his or her functional limitations;
4. the likelihood that the person will suffer harm because of the person's functional limitations and inability to adequately understand and appreciate the nature and consequences of such functional limitations;
5. any additional findings that are required under [section 81.21](#) of this article;
6. the necessity of the appointment of a guardian to prevent such harm;
7. if so, the specific powers of the guardian which constitute the least restrictive form of intervention consistent with the person's functional limitations and the likelihood of harm because of the person's inability to adequately understand and appreciate the nature and consequences of such functional limitations;
8. the duration of the appointment; and
9. whether the incapacitated person should receive copies of the initial and annual report.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993; amd, [L 2004, ch 438, §§ 12, 13](#), eff Dec 13, 2004.

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****Current through 2024 released Chapters 1-545****

New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.16. Dispositional alternatives.

(a) Dismissal of the petition.

If the person alleged to be incapacitated under this article is found not to be incapacitated, the court shall dismiss the petition.

(b) Protective arrangements and single transactions. If the person alleged to be incapacitated is found to be incapacitated, the court without appointing a guardian, may authorize, direct, or ratify any transaction or series of transactions necessary to achieve any security, service, or care arrangement meeting the foreseeable needs of the incapacitated person, or may authorize, direct, or ratify any contract, trust, or other transaction relating to the incapacitated person's property and financial affairs if the court determines that the transaction is necessary as a means of providing for personal needs and/or property management for the alleged incapacitated person. Before approving a protective arrangement or other transaction under this subdivision, the court shall consider the interests of dependents and creditors of the incapacitated person, and in view of the person's functional level, whether the person needs the continuing protection of a guardian. The court may appoint a special guardian to assist in the accomplishment of any protective arrangement or other transaction authorized under this subdivision. The special guardian shall have the authority conferred by the order of appointment, shall report to the court on all matters done pursuant to the order of appointment and shall serve until discharged by order of the court. The court may approve a reasonable compensation for the special guardian; however, if the court finds that the special guardian has failed to discharge his or her duties satisfactorily in any respect, the court may deny or reduce the amount of compensation or remove the special guardian.

(c) Appointing a guardian.

1. If the person alleged to be incapacitated is found to have agreed to the appointment of a guardian and the court determines that the appointment of a guardian is necessary, the order of the court shall be designed to accomplish the least restrictive form of intervention by appointing a guardian with powers limited to those which the court has found necessary to assist the person in providing for personal needs and/or property management.
2. If the person alleged to be incapacitated is found to be incapacitated and the court determines that the appointment of a guardian is necessary, the order of the court shall be designed to accomplish the least restrictive form of intervention by appointing a guardian with powers limited to those which the court has found necessary to assist the incapacitated person in providing for personal needs and/or property management.
3. The order of appointment shall identify all persons entitled to notice of all further proceedings.
4. The order of appointment shall identify the persons entitled to receive notice of the incapacitated person's death, the intended disposition of the remains of the decedent, funeral arrangements and final resting place when that information is known or can be reasonably ascertained by the guardian.
5. The order of appointment may identify the person or persons entitled to notice of the incapacitated person's transfer to a medical facility.

§ 81.16. Dispositional alternatives.

6. The order of appointment may identify the persons entitled to visit the incapacitated person, if they so choose. However, the identification of such persons in the order shall in no way limit the persons entitled to visit the incapacitated person.
- (d) The court shall direct that a judgment be entered determining the rights of the parties.
- (e) The order and judgment must be entered and served within ten days of the signing of the order. A copy of the order and judgment shall be personally served upon and explained to the person who is the subject of the proceedings in a manner which the person can reasonably be expected to understand by the court evaluator, or by counsel for the person, or by the guardian.
- (f) When a petition is granted, or where the court otherwise deems it appropriate, the court may award reasonable compensation for the attorney for the petitioner, including the attorney general and the attorney for a local department of social services.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993; amd, [L 1993, ch 32, § 7](#), eff April 1, 1993; [L 2004, ch 438, § 14](#), eff Dec 13, 2004; [L 2016, ch 98, § 2](#), effective July 21, 2016.

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****Current through 2024 released Chapters 1-545****

New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.17. Nomination of guardian

In the petition, or in a written instrument duly executed, acknowledged, and filed in the proceeding before the appointment of a guardian, the person alleged to be incapacitated may nominate a guardian.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993.

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****Current through 2024 released Chapters 1-545****

New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.18. Foreign guardian for a person not present in the state

Where the person alleged to be incapacitated is not present in the state and a guardian, by whatever name designated, has been duly appointed pursuant to the laws of any other country where the person alleged to be incapacitated resides to assist such person in property management, the court in its discretion, may make an order appointing the foreign guardian as a guardian under this article with powers with respect to property management within this state on the foreign guardian's giving such security as the court deems proper. In its discretion, the court may utilize the provisions of article eighty-three of this title.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993; amd, [L 2004, ch 438, § 15](#), eff Dec 13, 2004; [L 2013, ch 427, § 3](#), eff April 21, 2014.

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****Current through 2024 released Chapters 1-545****

New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.19. Eligibility as guardian

(a)

1. Any individual over eighteen years of age, or any parent under eighteen years of age, who is found by the court to be suitable to exercise the powers necessary to assist the incapacitated person may be appointed as guardian, including but not limited to a spouse, adult child, parent, or sibling.
2. A not-for-profit corporation organized to act in such capacity, a social services official, or public agency authorized to act in such capacity which has a concern for the incapacitated person, and any community guardian program operating pursuant to the provisions of title three of article nine-B of the social services law which is found by the court to be suitable to perform the duties necessary to assist the incapacitated person may be appointed as guardian, provided that a community guardian program shall be appointed as guardian only where a special proceeding for the appointment of a guardian under this article has been commenced by a social services official with whom such program was contracted.
3. A corporation, except that no corporation (other than as provided in paragraph two of this subdivision) may be authorized to exercise the powers necessary to assist the incapacitated person with personal needs.

(b) The court shall appoint a person nominated as the guardian in accordance with the provisions of [section 81.17](#) of this article unless the court determines the nominee is unfit or the alleged incapacitated person indicates that he or she no longer wishes the nominee to be appointed.

(c) In the absence of a nomination in accordance with [section 81.17](#) of this article, the court shall appoint a person nominated by the person alleged to be incapacitated orally or by conduct during the hearing or trial unless the court determines for good cause that such appointment is not appropriate.

(d) In making any appointment under this article the court shall consider:

1. any appointment or delegation made by the person alleged to be incapacitated in accordance with the provisions of section 5-1501, 5-1601 or 5-1602 of the general obligations law and sections two thousand nine hundred sixty-five and two thousand nine hundred eighty-one of the public health law;
2. the social relationship between the incapacitated person and the person, if any, proposed as guardian, and the social relationship between the incapacitated person and other persons concerned with the welfare of the incapacitated person;
3. the care and services being provided to the incapacitated person at the time of the proceeding;
4. the powers which the guardian will exercise;
5. the educational, professional and business experience relevant to the nature of the services sought to be provided;
6. the nature of the financial resources involved;
7. the unique requirements of the incapacitated person; and

§ 81.19. Eligibility as guardian

8. any conflicts of interest between the person proposed as guardian and the incapacitated person.

(e) Unless the court finds that no other person or corporation is available or willing to act as guardian, or to provide needed services for the incapacitated person, the following persons or corporations may not serve as guardian:

1. one whose only interest in the person alleged to be incapacitated is that of a creditor;
2. one, other than a relative, who is a provider, or the employee of a provider, of health care, day care, educational, or residential services to the incapacitated person, whether direct or indirect.

(f) Mental hygiene legal service may not serve as a guardian.

(g)

1. In making an appointment or considering a revocation of an appointment under this article, the court also may obtain and consider, and may authorize a court evaluator to review the same and report to the court concerning, any of the following information regarding the guardian or proposed guardian, and, if the incapacitated person resides or will reside with such guardian or proposed guardian, any person eighteen years or older residing in the guardian or proposed guardian's household:

(i) a criminal history record check of such person or persons; and in furtherance thereof, the court shall be authorized to: (1) obtain a set of such person's fingerprints; (2) direct that the division of criminal justice services promptly provide to the court a criminal history record, if any, with respect to such person or a statement that such person has no criminal record; and (3) direct the submission of such person's fingerprints by the division of criminal justice services to the federal bureau of investigation for purposes of a nationwide criminal history record check pursuant to and consistent with public law 92-544 to determine if such person has a criminal history in any state or federal jurisdiction;

(ii) reports for such person or persons from the sex offender registry established and maintained pursuant to [section one hundred sixty-eight-b of the correction law](#);

(iii) indicated reports for such person or persons from the statewide central register of child abuse and maltreatment established and maintained pursuant to [section four hundred twenty-two of the social services law](#), upon a finding by the court, pursuant to paragraph e of subdivision four of such section, that such information is necessary for the court to determine whether to make or continue an appointment pursuant to this article;

(iv) reports for such person or person from the statewide computerized registry of orders of protection established and maintained pursuant to [section two hundred twenty-one-a of the executive law](#); and

(v) related decisions in court proceedings initiated pursuant to article ten of the family court act and related warrants issued under the family court act.

2. The court shall obtain and consider records and reports specified in paragraph one of this subdivision between the time the judge executes the order to show cause and the hearing date of the order to show cause if a guardian or guardians are proposed in the petition or, as soon as a guardian or guardians are proposed by a party to the proceeding or nominated by the person alleged to be incapacitated, during a proceeding under this article.

3. Upon consideration of all factors bearing on the best interests of the incapacitated person including consideration of all relevant factors in [section seven hundred fifty-three of the correction law](#), the records and reports specified in paragraph one of this subdivision, and the court evaluator's report thereon, and after notifying counsel involved in the proceeding, or in the event of a self-represented party notifying such party, the court may appoint, refuse to appoint or revoke the appointment of any person as guardian pursuant to this article.

4. Where the court requests a criminal history record for a person pursuant to this section, the court shall provide the subject of the request with a copy of his or her criminal history record, if any, a

§ 81.19. Eligibility as guardian

reasonable time before consideration of such record under this subdivision and inform such person of his or her right to seek correction of any incorrect information contained in such record pursuant to regulations and procedures established by the division of criminal justice services.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993; amd, [L 1993, ch 32, §§ 8, 9](#), eff April 1, 1993; [L 2012, ch 475, § 2](#), eff April 1, 2013.

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NY CLS Men Hyg § 81.20

****Current through 2024 released Chapters 1-545****

New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.20. Duties of guardian

(a) Duties of guardian generally.

1. a guardian shall exercise only those powers that the guardian is authorized to exercise by court order;
2. a guardian shall exercise the utmost care and diligence when acting on behalf of the incapacitated person;
3. a guardian shall exhibit the utmost degree of trust, loyalty and fidelity in relation to the incapacitated person;
4. a guardian shall file an initial and annual reports in accordance with sections 81.30 and 81.31 of this article;
5. a guardian shall visit the incapacitated person not less than four times a year or more frequently as specified in the court order;
6. a guardian who is given authority with respect to property management for the incapacitated person shall:
 - (i) afford the incapacitated person the greatest amount of independence and self-determination with respect to property management in light of that person's functional level, understanding and appreciation of his or her functional limitations, and personal wishes, preferences and desires with regard to managing the activities of daily living;
 - (ii) preserve, protect, and account for such property and financial resources faithfully;
 - (iii) determine whether the incapacitated person has executed a will, determine the location of any will, and the appropriate persons to be notified in the event of the death of the incapacitated person and, in the event of the death of the incapacitated person, notify those persons;
 - (iv) use the property and financial resources and income available therefrom to maintain and support the incapacitated person, and to maintain and support those persons dependent upon the incapacitated person;
 - (v) at the termination of the appointment, deliver such property to the person legally entitled to it;
 - (vi) file with the recording officer of the county wherein the incapacitated person is possessed of real property, an acknowledged statement to be recorded and indexed under the name of the incapacitated person identifying the real property possessed by the incapacitated person, and the tax map numbers of the property, and stating the date of adjudication of incapacity of the person regarding property management, and the name, address, and telephone number of the guardian and the guardian's surety; and
 - (vii) perform all other duties required by law.

§ 81.20. Duties of guardian

7. a guardian who is given authority relating to the personal needs of the incapacitated person shall afford the incapacitated person the greatest amount of independence and self-determination with respect to personal needs in light of that person's functional level, understanding and appreciation of that person's functional limitations, and personal wishes, preferences and desires with regard to managing the activities of daily living.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993.

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NY CLS Men Hyg § 81.21

****Current through 2024 released Chapters 1-545****

New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.21. Powers of guardian; property management

(a) Consistent with the functional limitations of the incapacitated person, that person's understanding and appreciation of the harm that he or she is likely to suffer as the result of the inability to manage property and financial affairs, and that person's personal wishes, preferences, and desires with regard to managing the activities of daily living, and the least restrictive form of intervention, the court may authorize the guardian to exercise those powers necessary and sufficient to manage the property and financial affairs of the incapacitated person; to provide for the maintenance and support of the incapacitated person, and those persons depending upon the incapacitated person; to transfer a part of the incapacitated person's assets to or for the benefit of another person on the ground that the incapacitated person would have made the transfer if he or she had the capacity to act.

Transfers made pursuant to this article may be in any form that the incapacitated person could have employed if he or she had the requisite capacity, except in the form of a will or codicil.

Those powers which may be granted include, but are not limited to, the power to:

1. make gifts;
2. provide support for persons dependent upon the incapacitated person for support, whether or not the incapacitated person is legally obligated to provide that support;
3. convey or release contingent and expectant interests in property, including marital property rights and any right of survivorship incidental to joint tenancy or tenancy by the entirety;
4. exercise or release powers held by the incapacitated person as trustee, personal representative, guardian for minor, guardian, or donee of a power of appointment;
5. enter into contracts;
6. create revocable or irrevocable trusts of property of the estate which may extend beyond the incapacity or life of the incapacitated person;
7. exercise options of the incapacitated person to purchase securities or other property;
8. exercise rights to elect options and change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value;
9. exercise any right to an elective share in the estate of the incapacitated person's deceased spouse;
10. renounce or disclaim any interest by testate or intestate succession or by inter vivos transfer consistent with paragraph (d) of [section 2-1.11 of the estates, powers and trusts law](#);
11. authorize access to or release of confidential records;
12. apply for government and private benefits;
13. marshal assets;
14. pay the funeral expenses of the incapacitated person;

§ 81.21. Powers of guardian; property management

15. pay such bills as may be reasonably necessary to maintain the incapacitated person;
16. invest funds of the incapacitated person as permitted by [section 11-2.3 of the estates, powers and trusts law](#);
17. lease the primary residence for up to three years;
18. retain an accountant;
19. pay bills after the death of the incapacitated person provided the authority existed to pay such bills prior to death until a temporary administrator or executor is appointed; and
20. defend or maintain any judicial action or proceeding to a conclusion until an executor or administrator is appointed.

The guardian may also be granted any power pursuant to this subdivision granted to committees and conservators and guardians by other statutes subject to the limitations, conditions, and responsibilities of the exercise thereof unless the granting of such power is inconsistent with the provisions of this article.

(b) If the petitioner or the guardian seeks the authority to exercise a power which involves the transfer of a part of the incapacitated person's assets to or for the benefit of another person, including the petitioner or guardian, the petition shall include the following information:

1. whether any prior proceeding has at any time been commenced by any person seeking such power with respect to the property of the incapacitated person and, if so, a description of the nature of such application and the disposition made of such application;
2. the amount and nature of the financial obligations of the incapacitated person including funds presently and prospectively required to provide for the incapacitated person's own maintenance, support, and well-being and to provide for other persons dependent upon the incapacitated person for support, whether or not the incapacitated person is legally obligated to provide that support; a copy of any court order or written agreement setting forth support obligations of the incapacitated person shall be attached to the petition if available to the petitioner or guardian;
3. the property of the incapacitated person that is the subject of the present application;
4. the proposed disposition of such property and the reasons why such disposition should be made;
5. whether the incapacitated person has sufficient capacity to make the proposed disposition; if the incapacitated person has such capacity, his or her written consent shall be attached to the petition;
6. whether the incapacitated person has previously executed a will or similar instrument and if so, the terms of the most recently executed will together with a statement as to how the terms of the will became known to the petitioner or guardian; for purposes of this article, the term "will" shall have the meaning specified in [section 1-2.19 of the estates, powers and trusts law](#) and "similar instrument" shall include a revocable or irrevocable trust:
 - (i)** if the petitioner or guardian can, with reasonable diligence, obtain a copy, a copy of the most recently executed will or similar instrument shall be attached to the petition; in such case, the petition shall contain a statement as to how the copy was secured and the basis for the petitioner or guardian's belief that such copy is a copy of the incapacitated person's most recently executed will or similar instrument.
 - (ii)** if the petitioner or guardian is unable to obtain a copy of the most recently executed will or similar instrument, or if the petitioner or guardian is unable to determine whether the incapacitated person has previously executed a will or similar instrument, what efforts were made by the petitioner or guardian to ascertain such information.
 - (iii)** if a copy of the most recently executed will or similar instrument is not otherwise available, the court may direct an attorney or other person who has the original will or similar instrument in his or her possession to turn a photocopy over to the court for its examination, in camera. A photocopy of the will or similar instrument shall then be turned over by the court to the parties in such proceeding

§ 81.21. Powers of guardian; property management

unless the court finds that to do so would be contrary to the best interests of the incapacitated person;

7. a description of any significant gifts or patterns of gifts made by the incapacitated person;
 8. the names, post-office addresses and relationships of the presumptive distributees of the incapacitated person as that term is defined in subdivision forty-two of [section one hundred three of the surrogate's court procedure act](#) and of the beneficiaries under the most recent will or similar instrument executed by the incapacitated person.
- (c) Notice of a petition seeking relief under this section shall be served upon:
- (i) the persons entitled to notice in accordance with paragraph one of subdivision (e) of [section 81.07](#) of this article;
 - (ii) if known to the petitioner or guardian, the presumptive distributees of the incapacitated person as that term is defined in subdivision forty-two of [section one hundred three of the surrogate's court procedure act](#) unless the court dispenses with such notice; and
 - (iii) if known to the petitioner or guardian, any person designated in the most recent will or similar instrument of the incapacitated person as beneficiary whose rights or interests would be adversely affected by the relief requested in the petition unless the court dispenses with such notice.
- (d) In determining whether to approve the application, the court shall consider:
1. whether the incapacitated person has sufficient capacity to make the proposed disposition himself or herself, and, if so, whether he or she has consented to the proposed disposition;
 2. whether the disability of the incapacitated person is likely to be of sufficiently short duration such that he or she should make the determination with respect to the proposed disposition when no longer disabled;
 3. whether the needs of the incapacitated person and his or her dependents or other persons depending upon the incapacitated person for support can be met from the remainder of the assets of the incapacitated person after the transfer is made;
 4. whether the donees or beneficiaries of the proposed disposition are the natural objects of the bounty of the incapacitated person and whether the proposed disposition is consistent with any known testamentary plan or pattern of gifts he or she has made;
 5. whether the proposed disposition will produce estate, gift, income or other tax savings which will significantly benefit the incapacitated person or his or her dependents or other persons for whom the incapacitated person would be concerned; and
 6. such other factors as the court deems relevant.
- (e) The court may grant the application if satisfied by clear and convincing evidence of the following and shall make a record of these findings:
1. the incapacitated person lacks the requisite mental capacity to perform the act or acts for which approval has been sought and is not likely to regain such capacity within a reasonable period of time or, if the incapacitated person has the requisite capacity, that he or she consents to the proposed disposition;
 2. a competent, reasonable individual in the position of the incapacitated person would be likely to perform the act or acts under the same circumstances; and
 3. the incapacitated person has not manifested an intention inconsistent with the performance of the act or acts for which approval has been sought at some earlier time when he or she had the requisite capacity or, if such intention was manifested, the particular person would be likely to have changed such intention under the circumstances existing at the time of the filing of the petition.

§ 81.21. Powers of guardian; property management

(f) Nothing in this article imposes any duty on the guardian to commence a special proceeding pursuant to this article seeking to transfer a part of the assets of the incapacitated person to or for the benefit of another person and the guardian shall not be liable or accountable to any person for having failed to commence a special proceeding pursuant to this article seeking to transfer a part of the assets of the incapacitated person to or for the benefit of another person.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993; amd, [L 1993, ch 32, §§ 10, 11](#), eff April 1, 1993; [L 2004, ch 438, § 16](#), eff Dec 13, 2004; [L 2010, ch 27, § 3](#), eff Jan 1, 2011; [L 2015, ch 243, § 1](#), effective September 25, 2015.

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New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.22. Powers of guardian; personal needs

(a) Consistent with the functional limitations of the incapacitated person, that person's understanding and appreciation of the harm that he or she is likely to suffer as the result of the inability to provide for personal needs, and that person's personal wishes, preferences, and desires with regard to managing the activities of daily living, and the least restrictive form of intervention, the court may grant to the guardian powers necessary and sufficient to provide for the personal needs of the incapacitated person. Those powers which may be granted include, but are not limited to, the power to:

1. determine who shall provide personal care or assistance;
2. make decisions regarding social environment and other social aspects of the life of the incapacitated person;
3. determine whether the incapacitated person should travel;
4. determine whether the incapacitated person should possess a license to drive;
5. authorize access to or release of confidential records;
6. make decisions regarding education;
7. apply for government and private benefits;
8. (i) for decisions in hospitals as defined by subdivision eighteen of [section twenty-nine hundred ninety-four-a of the public health law](#), act as the patient's surrogate pursuant to and subject to article twenty-nine-CC of the public health law, and (ii) in all other circumstances, to consent to or refuse generally accepted routine or major medical or dental treatment, subject to the decision-making standard in subdivision four of [section twenty-nine hundred ninety-four-d of the public health law](#);
9. choose the place of abode; the choice of abode must be consistent with the findings under [section 81.15](#) of this article, the existence of and availability of family, friends and social services in the community, the care, comfort and maintenance, and where appropriate, rehabilitation of the incapacitated person, the needs of those with whom the incapacitated person resides; placement of the incapacitated person in a nursing home or residential care facility as those terms are defined in section two thousand eight hundred one of the public health law, or other similar facility shall not be authorized without the consent of the incapacitated person so long as it is reasonable under the circumstances to maintain the incapacitated person in the community, preferably in the home of the incapacitated person.

(b) No guardian may:

1. consent to the voluntary formal or informal admission of the incapacitated person to a mental hygiene facility under article nine or fifteen of this chapter or to a chemical dependence facility under article twenty-two of this chapter;

§ 81.22. Powers of guardian; personal needs

2. revoke any appointment or delegation made by the incapacitated person pursuant to sections 5-1501, 5-1601 and 5-1602 of the general obligations law, sections two thousand nine hundred sixty-five and two thousand nine hundred eighty-one of the public health law, or any living will.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993; amd, [L 1993, ch 32, § 12](#), eff April 1, 1993; [L 1999, ch 558, § 37](#), eff Oct 5, 1999 (see 1999 note below); [L 2004, ch 438, § 17](#), eff Dec 13, 2004; [L 2010, ch 8, § 25](#), eff June 1, 2010 (see 2010 note below).

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New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.23. Provisional remedies

(a) Temporary guardian.

1. At the commencement of the proceeding or at any subsequent stage of the proceeding prior to the appointment of a guardian, the court may, upon showing of danger in the reasonably foreseeable future to the health and well being of the alleged incapacitated person, or danger of waste, misappropriation, or loss of the property of the alleged incapacitated person, appoint a temporary guardian for a period not to extend beyond the date of the issuance of the commission to a guardian appointed pursuant to this article. The powers and duties of the temporary guardian shall be specifically enumerated in the order of appointment and are limited in the same manner as are the powers of a guardian appointed pursuant to this article. Prior to the expiration of the term of appointment, the temporary guardian shall report to the court all actions taken pursuant to the order [of] appointment. The court may approve a reasonable compensation for the temporary guardian; however, if the court finds that the temporary guardian has failed to discharge his or her duties satisfactorily in any respect, the court may deny or reduce the amount of compensation or remove the temporary guardian.
2. Notice of the appointment of the temporary guardian shall be given to the person alleged to be incapacitated and to any person having custody or control over the person or property of the person alleged to be incapacitated in such manner as the court may prescribe.
3. The authority and responsibility of a temporary guardian begins upon the issuance of the commission of temporary guardianship.
4. The court may require the temporary guardian to file a bond in accordance with [section 81.25](#) of this article.

(b) Injunction and temporary restraining order.

1. The court may, at any time prior to or after the appointment of a guardian or at the time of the appointment of a guardian with or without security, enjoin any person, other than the incapacitated person or the person alleged to be incapacitated from selling, assigning, or from disposing of property or confessing judgment which may become a lien on property or receiving or arranging for another person to receive property from the incapacitated person or the person alleged to be incapacitated or doing or suffering to be done any act or omission endangering the health, safety or welfare of the incapacitated person or the person alleged to be incapacitated when an application under this article seeks such an injunction and it satisfactorily appears from the application, affidavits, and other proofs that a person has done, has suffered to be done or omitted to do, or threatens to do or is about to do an act that endangers the health, safety or welfare of the incapacitated person or the person alleged to be incapacitated or has acquired or is about to acquire any property from the incapacitated person or person alleged to be incapacitated during the time of that person's incapacity or alleged incapacity without adequate consideration. Such order shall be made upon an order to show cause or upon the initiative of the court and may, upon the application for the appointment of a guardian, in the discretion

* The bracketed word has been inserted by the Publisher.

§ 81.23. Provisional remedies

of the court, be continued for ten days after the appointment of a guardian. Notice of any injunction shall be given to any person enjoined, to the incapacitated person or the person alleged to be incapacitated, and to any person having custody or control over the person or property of the incapacitated person or the person alleged to be incapacitated in such manner as the court may prescribe.

2. A temporary restraining order may be granted with or without security when an application seeks an injunction under paragraph one of this subdivision and where the court is satisfied that in the absence of such restraining order, the property of the incapacitated person or person alleged to be incapacitated would be dissipated to that person's detriment or that the health, safety or welfare of the incapacitated person or the person alleged to be incapacitated would be endangered. Notice of the temporary restraining order shall be given to any person restrained, to the incapacitated person or the person alleged to be incapacitated, and to any person having custody or control over the person or property of the incapacitated person or person alleged to be incapacitated in such manner as the court may prescribe. Such temporary restraining order shall neither be vacated nor modified except upon notice to the petitioner and to each person required to receive notice of the petition pursuant to paragraph one of subdivision (g) of [section 81.07](#) of this article.

3. When the court is satisfied that the interest of the incapacitated person or person alleged to be incapacitated would be appropriately served, the court may provide in a temporary restraining order that such temporary restraining order shall have the effect of:

- (i) a restraining notice when served in a manner and upon such persons as the court in its discretion shall deem appropriate;
- (ii) conferring information subpoena power upon the attorney for the petitioner when the court in its discretion shall deem appropriate.

4. Where such a temporary restraining order provides for a restraining notice a person having custody or control over the person or property of the incapacitated person or the person alleged to be incapacitated is forbidden to make or suffer any sale, assignment, transfer or interference with any property of the incapacitated person or the person alleged to be incapacitated except pursuant to the order of the court.

5. Where such a temporary restraining order provides the petitioner's attorney with information subpoena power, service of a copy of the order together with an information subpoena shall require any person so subpoenaed to provide petitioner's attorney with any information concerning the financial affairs of the incapacitated person or the person alleged to be incapacitated.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993; amd, [L 2004, ch 438, § 18](#), eff Dec 13, 2004.

NY CLS Men Hyg § 81.24

****Current through 2024 released Chapters 1-545****

New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.24. Notice of pendency

The petitioner shall, prior to judgment, file a notice of pendency if real property or any interest therein is or may be affected by the proceeding.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993.

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****Current through 2024 released Chapters 1-545****

New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.25. Filing of bond by guardian

- (a) Before the guardian, or special guardian appointed under this article, or a trustee of a trust created pursuant to this article, enters upon the execution of his or her duties, the court may require or dispense with the filing of a bond.
- (b) The court may require or dispense with the filing of a bond by the temporary guardian. If the temporary guardian is required to file a bond, such bond must be filed within ten days after the issuance of the temporary guardian's commission.
- (c) If the value of the estate of the person for whom a guardian, special guardian, temporary guardian, or trustee is appointed is so great or for other sufficient reason the court deems it inexpedient to require security in the full amount prescribed by law it may direct that all or part of the assets of the estate be delivered subject to the further order of the court to the county treasurer, or other proper fiscal officer, the clerk of the court or a trust company, bank or safe deposit company or otherwise restrict the authority of the guardian or trustee. The court may thereupon fix the amount of the bond taking into consideration the value of the remainder only of the estate. The assets so deposited shall not be withdrawn from the custody of the depository and no person other than the proper fiscal officer of such county or depository shall receive or collect any principal or income or other benefits derived from such assets without order of the court.
- (d) Notwithstanding any other provision of this section, any community guardian program operating pursuant to the provisions of title three of article nine-B of the social services law, appointed as guardian pursuant to subdivision (a) of [section 81.19](#) of this article, may file with the clerk of the court before the thirty-first day of January of each year, a consolidated undertaking up to the amount of one million five hundred thousand dollars, in lieu of filing individual undertakings for each incapacitated person for whom it serves as guardian, as required by subdivision (a) of this section. To the extent of the aggregate value of such consolidated undertaking, the community guardian program will certify to the clerk of the court faithful discharge of the trust imposed upon it, obey all directions of the court in regard to the trust, and make and render a true account of all properties received by it and the application thereof and of its acts in the administration of its trust whenever so required to do by the court. At such time as the aggregate amount of the individual bonds, fixed by the court pursuant to subdivision (a) of this section for persons for whom the community guardian program is appointed guardian, shall exceed the consolidated bond filed by such program, the program shall before entering upon the execution of its duties, file with the clerk of the court individual undertakings, in the amounts fixed by the court, that it will faithfully discharge the trust imposed upon it.
- (e) If the court requires the filing of a bond, the guardian or special or temporary guardian, or trustee, appointed under this article shall file with the clerk of the court by which such guardian was appointed a bond that he or she will faithfully discharge the powers granted by the court to the guardian or special or temporary guardian, or trustee, obey all directions of the court in regard to the powers, and make and render a true account of all properties received by him or her and the application thereof and a true report of his or her acts in the administration of his or her powers, whenever so required to do by the court. The amount of the bond shall be fixed by the court. If the guardian, special or temporary guardian, or trustee,

§ 81.25. Filing of bond by guardian

receives after-acquired property not covered by the bond, such guardian, special or temporary guardian, or trustee, shall immediately have such acquisition approved by the court and file a further bond.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993; amd, [L 2004, ch 438, § 19](#), eff Dec 13, 2004.

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§ 81.26. Designation of clerk to receive process

No commission shall issue nor shall any order which in itself constitutes a commission become effective until an instrument executed and acknowledged by the guardian has been filed with the clerk of the court designating the clerk and the clerk's successor in office as a person on whom service of any process may be made in like manner and with like effect as if it were served personally upon the guardian whenever the guardian cannot, with due diligence, be served within the state.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993.

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New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.27. Commission to guardian

Within five days after the guardian has filed a designation under [section 81.26](#) of this article, and has filed a bond in accordance with the provisions of [section 81.25](#) of this article unless the court has waived the filing of the bond or unless the guardian's appointment is pursuant to [section 81.23](#) of this article, the clerk of the court shall issue a commission which shall state:

1. the title of the proceeding and the name, address, and telephone number of the incapacitated person; and
2. the name, address, and telephone number of the guardian and the specific powers of such guardian; and
3. the date when the appointment of the guardian was ordered by the court; and
4. the date on which the appointment terminates if one has been ordered by the court.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993.

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§ 81.28. Compensation of guardian.

(a) The court shall establish, and may from time to time modify, a plan for the reasonable compensation of the guardian or guardians. The plan for compensation of such guardian must take into account the specific authority of the guardian or guardians to provide for the personal needs and/or property management for the incapacitated person, and the services provided to the incapacitated person by such guardian.

(b) If the court finds that the guardian has failed to discharge his or her duties satisfactorily in any respect, the court may deny or reduce the compensation which would otherwise be allowed.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993; amd, [L 2004, ch 438, § 20](#), eff Dec 13, 2004.

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[NY CLS Men Hyg § 81.29](#)

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§ 81.29. Effect of the appointment on the incapacitated person.

- (a) An incapacitated person for whom a guardian has been appointed retains all powers and rights except those powers and rights which the guardian is granted.
- (b) Subject to subdivision (a) of this section, the appointment of a guardian shall not be conclusive evidence that the person lacks capacity for any other purpose, including the capacity to dispose of property by will.
- (c) The title to all property of the incapacitated person shall be in such person and not in the guardian. The property shall be subject to the possession of the guardian and to the control of the court for the purposes of administration, sale or other disposition only to the extent directed by the court order appointing the guardian.
- (d) If the court determines that the person is incapacitated and appoints a guardian, the court may modify, amend, or revoke any previously executed appointment, power, or delegation under section 5-1501, 5-1505, or 5-1506 of the general obligations law or section two thousand nine hundred sixty-five of the public health law, or section two thousand nine hundred eighty-one of the public health law notwithstanding section two thousand nine hundred ninety-two of the public health law, or any contract, conveyance, or disposition during lifetime or to take effect upon death, made by the incapacitated person prior to the appointment of the guardian if the court finds that the previously executed appointment, power, delegation, contract, conveyance, or disposition during lifetime or to take effect upon death, was made while the person was incapacitated or if the court determines that there has been a breach of fiduciary duty by the previously appointed agent. In such event, the court shall require that the agent account to the guardian. The court shall not, however, invalidate or revoke a will or a codicil of an incapacitated person during the lifetime of such person.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993; amd, [L 2004, ch 438, § 21](#), eff Dec 13, 2004; [L 2008, ch 176, § 1](#), eff July 7, 2008; [L 2010, ch 8, § 26](#), eff June 1, 2010 (see 2010 note below).

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§ 81.30. Initial report

(a) No later than ninety days after the issuance of the commission to the guardian, the guardian shall file with the court that appointed the guardian a report in a form prescribed by the court stating what steps the guardian has taken to fulfill his or her responsibilities. Proof of completion of the guardian education requirements under [section 81.39](#) of this article must be filed with the initial report.

(b) To the extent that the guardian has been granted powers with respect to property management, the initial report shall contain a verified and complete inventory of the property and financial resources over which the guardian has control, the location of any will executed by the incapacitated person, the guardian's plan, consistent with the court's order of appointment, for the management of such property and financial resources, and any need for any change in the powers authorized by the court.

(c) To the extent that the guardian has been granted powers regarding personal needs, the initial report shall contain a report of the guardian's personal visits with the incapacitated person, and the steps the guardian has taken, consistent with the court's order, to provide for the personal needs of that person, the guardian's plan, consistent with the court's order of appointment, for providing for the personal needs of the incapacitated person, a copy of any directives in accordance with sections two thousand nine hundred sixty-five and two thousand nine hundred eighty-one of the public health law, any living will, and any other advance directive, and any necessary change in the powers authorized by the court. The plan for providing for the personal needs of the incapacitated person shall include the following information:

1. the medical, dental, mental health, or related services that are to be provided for the welfare of the incapacitated person;
2. the social and personal services that are to be provided for the welfare of the incapacitated person;
3. any physical, dental, and mental health examinations necessary to determine the medical, dental, and mental health treatment needs; and
4. the application of health and accident insurance and any other private or government benefits to which the incapacitated person may be entitled to meet any part of the costs of medical, dental, mental health, or related services provided to the incapacitated person.

(d) If the initial report sets forth any reasons for a change in the powers authorized by the court, the guardian shall make an application within ten days of the filing of the report on notice to the persons entitled to such notice in accordance with paragraph one of subdivision (d) of [section 81.07](#) of this article for such relief. If the initial report sets forth any reasons for a change in the powers authorized by the court and the guardian fails to act under this subdivision, any person entitled to commence a proceeding under this article may petition the court for a change in such powers on notice to the guardian and the persons entitled to such notice in accordance with paragraph one of subdivision (d) of [section 81.07](#) of this article for such relief.

(e) The guardian shall send a copy of the initial report to the incapacitated person by mail unless the court orders otherwise pursuant to paragraph seven of subdivision (b) and paragraph nine of subdivision (c) of [section 81.15](#) of this article.

§ 81.30. Initial report

- (f) The guardian shall send a copy of the initial report to the court evaluator and counsel for the incapacitated person at the time of the guardianship proceeding unless the court orders otherwise pursuant to paragraph seven of subdivision (b) and paragraph nine of subdivision (c) of [section 81.15](#) of this article.
- (g) The guardian shall send a copy of the initial report to the court examiner.
- (h) If the incapacitated person resides in a facility, the guardian shall send a duplicate of such report to the chief executive officer of that facility.
- (i) If the incapacitated person resides in a mental hygiene facility, the guardian shall send a duplicate of such report to the mental hygiene legal service of the judicial department in which the residence is located.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993; amd, [L 2004, ch 438, § 22](#), eff Dec 13, 2004.

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NY CLS Men Hyg § 81.31

****Current through 2024 released Chapters 1-545****

New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.31. Annual report

- (a) Filing of annual report. Every guardian shall file a report annually in the month of May, or at any other time upon motion or order of the court.
- (b) The report shall be in a form prescribed by the court and shall include the following information:
1. the present address and telephone number of the guardian.
 2. the present address, and telephone number of the incapacitated person; if the place of residence of the incapacitated person is not his or her personal home, the name, address, and telephone number of the facility or place at which the person resides and the name of the chief executive officer of the facility or person otherwise responsible for the person's care.
 3. any major changes in the physical or mental condition of the incapacitated person and any substantial change in medication.
 4. the date that the incapacitated person was last examined or otherwise seen by a physician and the purpose of that visit.
 5. a statement by a physician, psychologist, nurse clinician, or social worker, or other person that has evaluated or examined the incapacitated person within the three months prior to the filing of the report regarding an evaluation of the incapacitated person's condition and the current functional level of the incapacitated person.
 6. to the extent the guardian is charged with providing for the personal needs of the incapacitated person:
 - (i) a statement of whether the current residential setting is best suited to the current needs of the incapacitated person;
 - (ii) a resume of any professional medical treatment given to the ward in the preceding year;
 - (iii) the plan for medical, dental, and mental health treatment, and related services in the coming year;
 - (iv) information concerning the social condition of the incapacitated person, including: the social and personal services currently utilized by the incapacitated person; the social skills of the incapacitated person; and the social needs of the incapacitated person.
 7. to the extent the guardian is charged with property management, information required by the provisions of the surrogate's court procedure act prescribing the form of papers to be filed upon the annual accounting of a general guardian of an infant's property.
 8. where the guardian has used or employed the services of the incapacitated person or where moneys have been earned by or received on behalf of such incapacitated person an accounting of any moneys earned or derived from such services.
 9. a resume of any other activities performed by the guardian on behalf of the incapacitated person.

§ 81.31. Annual report

10. facts indicating the need to terminate the appointment of the guardian, or for any alteration in the powers of the guardian and what specific authority is requested or what specific authority of the guardian will be affected.

11. any other information which the guardian may be required to file by the order of appointment.

(c) The guardian shall send a copy of the annual report to the incapacitated person by mail unless the court orders otherwise pursuant to paragraph seven of subdivision (b) and paragraph nine of subdivision (c) of [section 81.15](#) of this article, shall send a copy of the annual report to the court examiner, and shall file a copy of the annual report as provided herein. If the incapacitated person resides in a facility, the guardian shall send a duplicate of such report to the chief executive officer of that facility. If the incapacitated person resides in a mental hygiene facility, the guardian shall send a duplicate of such report to the mental hygiene legal service of the judicial department in which the residence is located. If mental hygiene legal service was appointed as court evaluator or as counsel for the incapacitated person at the time of the guardianship proceeding, the guardian shall send a duplicate of such report to the mental hygiene legal service of the judicial department where venue of the guardianship proceeding was located if so ordered by the court.

(d) The report shall be filed in the office of the clerk of the court which appointed the guardian.

(e) If the annual report sets forth any reasons for a change in the powers authorized by the court, the guardian shall make an application within ten days of the filing of the report on notice to the persons entitled to such notice in accordance with paragraph three of subdivision (c) of [section 81.16](#) of this article for such relief. If the annual report sets forth any reasons for a change in the powers authorized by the court, and the guardian fails to act in accordance with this subdivision, any person entitled to commence a proceeding under this article may petition the court for a change in such powers on notice to the guardian and the persons entitled to such notice in accordance with paragraph three of subdivision (c) of [section 81.16](#) of this article for such relief.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993; amd, [L 2004, ch 438, § 23](#), eff Dec 13, 2004.

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NY CLS Men Hyg § 81.32

****Current through 2024 released Chapters 1-545****

New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.32. Examination of initial and annual reports

(a) Examination of reports generally.

1. Initial report. Within thirty days of the filing of the initial report, the initial report filed by a guardian under this article shall be examined.
2. Annual examination. Within thirty days after the filing of the annual report of the preceding year, the annual reports filed by guardians under this article shall be examined to determine the condition and care of the incapacitated person, the finances of the incapacitated person, and the manner in which the guardian has carried out his or her duties and exercised his or her powers.

(b) Examiners. The presiding justice of the appellate division in each department, or a justice of the supreme court or a special referee designated by a majority of the justices of the appellate division in each department at the request of the presiding justice, shall examine, or cause to be examined by persons designated by the presiding justice or the justices as examiners, all such reports.

(c) Failure to report.

1. If a guardian fails to file his or her initial or annual report, the person authorized to examine the report shall demand that the guardian file the report within fifteen days after the service of the demand upon him or her. A copy of the demand shall be served upon the guardian or his or her resident agent by certified mail.
2. Upon failure to comply with such demand, the court, may upon the motion of the court examiner, enter an order requiring compliance with the demand and may deny or reduce the amount of the compensation of the guardian, or remove the guardian pursuant to [section 81.35](#) of this article absent a showing that the guardian has acted in good faith.

(d) Incomplete report.

1. If the person authorized to examine the report is of the opinion that a more complete or satisfactory report should be filed, the person authorized to examine the report shall demand that the guardian file a revised report or proof of any item in the report. A copy of the demand shall be served upon the guardian or his or her resident agent by certified mail.
2. Upon failure to comply with such demand, the court, may upon the motion of the court examiner, enter an order requiring compliance with the demand and may deny or reduce the amount of the compensation of the guardian, or remove the guardian pursuant to [section 81.35](#) of this article absent a showing that the guardian has acted in good faith.

(e) Duty of examiners. The person examining the report may examine the guardian and other witnesses under oath and reduce their testimony to writing. The person examining the report, on five days notice to the guardian, shall file a report in the form and manner prescribed by the order appointing the examiner.

(f) Expenses of examination. The expenses of the examination shall be payable out of the estate of the incapacitated person examined if the estate amounts to five thousand dollars or more, or, if the estate

§ 81.32. Examination of initial and annual reports

amounts to less than this sum, by the county treasurer of the county or, within the city of New York by the comptroller of the city of New York, out of any court funds in his or her hands.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993; amd, [L 1993, ch 32, §§ 13–15](#), eff April 1, 1993.

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****Current through 2024 released Chapters 1-545****

New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.33. Intermediate and final report

(a) A guardian may move in the court of his or her appointment for an order permitting him or her to render an intermediate report to the date of the filing thereof in a form prescribed by the court which shall include the same information as is required under [section 81.31](#) of this article provided, however, that if the incapacitated person has died the report need not include information otherwise required in paragraphs five and six of subdivision (b) of [section 81.31](#) of this article. The court may order the report to be filed with the clerk of the court on or before a fixed date.

(b) When a guardian dies or is removed, suspended, discharged pursuant to the provisions of this article, or allowed to resign, the court shall order a final report in a form prescribed by the court which shall include the same information as is required under [section 81.31](#) of this article provided, however, that if the incapacitated person has died the report need not include information otherwise required in paragraphs five and six of subdivision (b) of [section 81.31](#) of this article. When such a report has been made in the course of a proceeding to remove a guardian, the court may dispense with a further report.

(c) Notice of the filing of a report under this section shall be served upon the persons entitled to notice pursuant to paragraph three of subdivision (c) of [section 81.16](#) of this article. If the incapacitated person is deceased, notice shall also be served upon his or her executor or administrator, if any.

(d) The court may appoint counsel for the incapacitated person, if living, for the protection of such person's rights and interests with regard to such report. The court may appoint a referee to hear the matter and report to the court.

(e) Upon the motion for a confirmation of the report of the referee, or if the report is made before the court, upon the court's determination, the report shall be judicially approved and filed. The compensation of the referee and of counsel shall be fixed by the court and shall be payable out of the estate of the incapacitated person unless it is determined that the incapacitated person is indigent.

(f) If the incapacitated person resides in a facility, a copy of a report under this section shall be served upon the chief executive officer in charge of that facility and upon the mental hygiene legal service of the judicial department in which the residence is located.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993; amd, [L 2004, ch 438, § 24](#), eff Dec 13, 2004.

[NY CLS Men Hyg § 81.34](#)

****Current through 2024 released Chapters 1-545****

New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.34. Decree on filing instruments approving accounts

(a) The guardian or the personal representative of the guardian may present to the court a petition showing the names and addresses of all persons entitled to receive notice pursuant to paragraph three of subdivision (c) of [section 81.16](#) of this article and the personal representative of the estate showing that, to the extent the guardian is responsible for the property of the incapacitated person, all taxes have been paid or that no taxes are due and that the petitioner has fully reported and has made full disclosure in writing of all the guardian's actions affecting the property of the incapacitated person to all persons interested and seeking a decree releasing and discharging the petitioner. Upon the death of the incapacitated person, the guardian is authorized to pay the funeral expenses of the incapacitated person and, in the absence of a duly appointed personal representative of the estate, pay estimated estate and income tax charges, as well as other charges of emergent nature.

(b) The petitioner shall also show that the incapacitated person has died or that the guardian has died, or has been removed, suspended, or discharged pursuant to the provisions of this article, or allowed to resign.

(c) The petitioner shall also file with the petition acknowledged instruments executed by all persons interested or in the case of an infant, or incapacitated person whose claim has been paid, by the guardian, or guardian receiving payment, approving the report of the petitioner and releasing and discharging the petitioner.

(d) The court may thereupon make a decree releasing and discharging the petitioner and the sureties on his or her bond, if any, from any further liability to the persons interested.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993; amd, [L 2008, ch 175, § 1](#), eff Jan 3, 2009 (see 2008 note below).

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NY CLS Men Hyg § 81.35

****Current through 2024 released Chapters 1-545****

New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 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.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993.

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[NY CLS Men Hyg § 81.36](#)

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New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.36. Discharge or modification of powers of guardian.

(a) The court appointing the guardian shall discharge such guardian, or modify the powers of the guardian where appropriate, if it appears to the satisfaction of the court that:

1. the incapacitated person has become able to exercise some or all of the powers necessary to provide for personal needs or property management which the guardian is authorized to exercise;
2. the incapacitated person has become unable to exercise powers necessary to provide for personal needs or property management which the guardian is not authorized to exercise;
3. the incapacitated person has died; or
4. for some other reason, the appointment of the guardian is no longer necessary for the incapacitated person, or the powers of the guardian should be modified based upon changes in the circumstances of the incapacitated person.

(b) The application for relief under this section may be made by the guardian, the incapacitated person, or any person entitled to commence a proceeding under this article.

(c) There shall be a hearing on notice to the persons entitled to notice pursuant to paragraph three of subdivision (c) of [section 81.16](#) of this article. The court may for good cause shown dispense with the hearing provided that an order of modification increasing the powers of the guardian shall set forth the factual basis for dispensing with the hearing. If the incapacitated person or his or her counsel raises an issue of fact as to the ability of the incapacitated person to provide for his or her personal needs or property management and demands a jury trial of such issue, the court shall order a trial by jury thereof.

(d) To the extent that relief sought under this section would terminate the guardianship or restore certain powers to the incapacitated person, the burden of proof shall be on the person objecting to such relief. To the extent that relief sought under this section would further limit the powers of the incapacitated person, the burden shall be on the person seeking such relief.

(e) If the guardian is discharged because the incapacitated person becomes fully able to care for his or her property, the court shall order that there be restored to such person the property remaining in the hands of the guardian. If the incapacitated person dies, the guardian shall provide for such person's burial or other disposition the cost of which shall be borne by the estate of the incapacitated person.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993; amd, [L 2004, ch 438, §§ 25](#), 26, eff Dec 13, 2004.

§ 81.36. Discharge or modification of powers of guardian.

End of Document

NY CLS Men Hyg § 81.37

****Current through 2024 released Chapters 1-545****

New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.37. Resignation or suspension of powers of guardian

- (a) The court appointing a guardian may allow the guardian to resign or may suspend the powers of the guardian.
- (b) Where a guardian is engaged in war service as defined in [section seven hundred seventeen of the surrogate's court procedure act](#), the court, upon motion by the guardian or any other person and upon such notice as the court may direct, may suspend the powers of the guardian until further order of the court. If the suspension will leave no other person acting as guardian, the motion shall seek the appointment of a successor. When the suspended guardian becomes able to serve, he or she may be reinstated by the court upon motion and such notice as the court may direct. If the suspended guardian is reinstated, the court shall thereupon discharge his or her successor, who may be required to account, and make any other order as justice requires.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993.

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New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.38. Vacancy in office

(a) Interim guardian. A vacancy created by the death, removal, discharge, resignation, or suspension of a guardian shall be filled by the court. Upon the application of any person entitled to commence a proceeding under this article, the court shall appoint an interim guardian who shall serve for a period of ninety days or until a final accounting is filed and a successor guardian is appointed by the court. The powers and duties of the interim guardian shall be specifically enumerated in the order of appointment. The court may require service of the order to show cause seeking the appointment of an interim guardian on any persons it deems appropriate.

(b) Standby guardian. At the time of the appointment of the guardian, the court may in its discretion appoint a standby guardian to act in the event that the guardian shall resign, die, be removed, discharged, suspended, or become incapacitated. The court may also appoint an alternate and/or successive alternates to the standby guardian, to act if the standby guardian shall resign, die, be removed, discharged, suspended, or become incapacitated. Such standby guardian, or the alternate in the event of the standby guardian's resignation, death, removal, discharge, suspension or adjudication of incapacity, shall without further proceedings be empowered to immediately assume the duties of office immediately upon resignation, death, removal, discharge, suspension or adjudication of incapacity, of the guardian or the standby guardian as set forth in the order of appointment, subject only to the confirmation of appointment by the court sixty days following the assumption of the duties of the office. Before confirming the appointment of a standby guardian, the court may conduct a hearing in accordance with the provisions set forth in [section 81.11](#) of this article upon petition of any person entitled to commence a proceeding under this article.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993.

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New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.39. Guardian education requirements

- (a) Each incapacitated person is entitled to a guardian whom the court finds to be sufficiently capable of performing the duties and exercising the powers of a guardian necessary to protect the incapacitated person.
- (b) Each person appointed by the court to be a guardian must complete a training program approved by the chief administrator which covers:
1. the legal duties and responsibilities of the guardian;
 2. the rights of the incapacitated person;
 3. the available resources to aid the incapacitated person;
 4. an orientation to medical terminology, particularly that related to the diagnostic and assessment procedures used to characterize the extent and reversibility of any impairment;
 5. the preparation of annual reports, including financial accounting for the property and financial resources of the incapacitated person.
- (c) The court may, in its discretion, waive some or all of the requirements of this section or impose additional requirements. In doing so, the court shall consider the experience and education of the guardian with respect to the training requirements of this section, the duties and powers assigned to the guardian, and the needs of the incapacitated person.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993.

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****Current through 2024 released Chapters 1-545****

New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.40. Court evaluator education requirements

(a) Each incapacitated person is entitled to a court evaluator whom the court finds to be sufficiently capable of performing the duties of a court evaluator necessary to ensure that all the relevant information regarding a petition for the appointment of a guardian comes before the court and to assist the court in reaching a decision regarding the appointment of a guardian.

(b) Each person appointed by the court to be an evaluator must complete a training program approved by the chief administrator which covers:

1. the legal duties and responsibilities of the court evaluator;
2. the rights of the incapacitated person with emphasis on the due process rights to aid the court evaluator in determining his or her recommendation regarding the appointment of counsel and the conduct of the hearing;
3. the available resources to aid the incapacitated person;
4. an orientation to medical terminology, particularly that related to the diagnostic and assessment procedures used to characterize the extent and reversibility of any impairment;
5. entitlements;
6. psychological and social concerns relating to the disabled and frail older adults.

(c) The court may, in its discretion, waive some or all of the requirements of this section or impose additional requirements. In doing so, the court shall consider the experience and education of the court evaluator with respect to the training requirements of this section.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993.

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New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.41. Court examiner education requirements

- (a) Each incapacitated person is entitled to a thorough examination of all reports required to be filed by the guardian.
- (b) Each person appointed pursuant to [section 81.32](#) of this article must complete a training program approved by the chief administrator which covers the legal duties and responsibilities of the examiner and of guardians.
- (c) The court may, in its discretion, waive some or all of the requirements of this section or impose additional requirements. In so doing, the court shall consider the experience and education of the court examiner with respect to the training requirements of this section.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993.

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****Current through 2024 released Chapters 1-545****

New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.42. Compliance

(a) A motion to dismiss based on the alleged failure to comply with any of the provisions of this article, other than subparagraph (i) of paragraph one of subdivision (d) of [section 81.07](#) of this article, must be determined without regard to technical mistakes, deficiencies, and omissions that do not result in actual prejudice that affects the integrity of the proceeding.

(b) A judgment or order made pursuant to this article, unless reversed on appeal, releases the guardian and the sureties from all claims of the incapacitated person and/or any person affected thereby based on any act or omission directly authorized, approved or confirmed in the judgment or order. This section does not apply where the judgment or order is obtained by fraud or conspiracy or by misrepresentation contained in the notice, petition, account, or in the judgment or order as to any material fact. For purposes of this subdivision, misrepresentation of a material fact includes but is not limited to the omission of a material fact.

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993.

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New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.43. Proceedings to discover property withheld

(a) To the extent that it is consistent with the authority otherwise granted by the court a guardian may commence a proceeding in the court which appointed the guardian to discover property withheld. The petition shall contain knowledge, or information and belief of any facts tending to show that any interest in real property or money or other personal property, or the proceeds or value thereof, which should be delivered and paid to the guardian, is in the possession, under the control, or within the knowledge or information of respondent who withholds the same from the guardian, whether such possession or control was obtained before or after the appointment of the guardian, or that the respondent refuses to disclose knowledge or information which such person may have concerning the same or which will aid the guardian in making discovery of such property. The petition shall request that respondent be ordered to attend an inquiry and be examined accordingly and deliver property of the incapacitated person if it is within his or her control. The petition may be accompanied by an affidavit or other written evidence, tending to support the allegations thereof. If the court is satisfied on the papers so presented that there are reasonable grounds for the inquiry, it must make an order accordingly, which may be returnable forthwith, or at a future time fixed by the court, and may be served at any time before the hearing. If it shall appear from the petition or from the answer interposed thereto, or in the course of the inquiry made pursuant to the order that a person other than the respondent in the proceeding claims an interest in the property or the proceeds or the value thereof, the court may by the original order or by supplemental order, direct such additional party to attend and be examined in the proceeding in respect of his or her adverse claim, and deliver the property if in his or her control or the proceeds or value thereof. Service of such an order must be made by delivery of a certified copy thereof to the person or persons named therein and the payment or tender, to each of the sum required by law to be paid or tendered to a witness who is subpoenaed to attend a trial in such court.

(b) If the person directed to appear submits an answer denying any knowledge concerning or the possession of any property which belongs to the incapacitated person or should be delivered to the guardian, or shall make default in answer, he or she shall be sworn to answer truly all questions put to him or her regarding the inquiry requested in the petition. Any claim of title to or right to the possession of any property of the incapacitated person must be made by verified answer in writing. If such answer is interposed, the issues raised thereby shall be tried according to the usual practice of the court as a litigated issue but the interposition of such answer shall not limit the right of the guardian to proceed with the inquiry in respect of property not so claimed by the verified answer. If possession of the property is denied, proof on that issue may be presented to the court by either party. The court may in an appropriate case make interim decrees directing the delivery of property not claimed by verified answer and may continue the proceeding for determination of any litigated issue. If it appears that the guardian is entitled to the possession of the property, the decree shall direct delivery thereof to the guardian or if the property shall have been diverted or disposed of, the decree may direct payment of the proceeds or the value of such property or may impress a trust upon said proceeds or make any determination which a court of equity might decree in following trust property funds. In any case in which a verified answer is served and the court after a trial or hearing determines the issue, the court may in its discretion award costs not exceeding fifty dollars and disbursements to be paid by the unsuccessful party.

History

Formerly added as § 81.44, [L 1993, ch 32, § 16](#), eff April 1, 1993; renumbered § 81.43, [L 2004, ch 438, § 27](#), eff Dec 13, 2004.

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NY CLS Men Hyg § 81.44

****Current through 2024 released Chapters 1-545****

New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

§ 81.44. Proceedings upon the death of an incapacitated person

(a) When used in this section:

1. “Statement of death” means a statement, in writing and acknowledged, containing the caption and index number of the guardianship proceeding, and the name and address of the last residence of the deceased incapacitated person, the date and place of death, and the names and last known addresses of all persons entitled to notice of further guardianship proceedings pursuant to paragraph three of subdivision (c) of [section 81.16](#) of this article including the nominated and/or appointed personal representative, if any, of the deceased incapacitated person’s estate.
2. “Personal representative” means a fiduciary as defined by subdivision twenty-one of [section 103 of the surrogate’s court procedure act](#) to whom letters have been issued and who is authorized to marshal the assets of the decedent’s estate.
3. “Public administrator” means a public administrator within or without the city of New York, as established by articles eleven and twelve of the surrogate’s court procedure act, or the chief fiscal officer of a county eligible to be appointed an administrator, pursuant to [section twelve hundred nineteen of the surrogate’s court procedure act](#). The role of the public administrator under this section is that of a stake holder or escrowee only, and the public administrator shall not, by virtue of this section, have a substantive role in administering the estate.
4. “Statement of assets and notice of claim” means a written statement under oath containing the caption and index number of the guardianship proceeding, the name and address of the incapacitated person at the time of death, a description of the nature and approximate value of guardianship property at the time of the incapacitated person’s death; with the approximate amount of any claims, debts or liens against the guardianship property, including but not limited to medicaid liens, tax liens and administrative costs, with an itemization and approximate amount of such costs and claims or liens.

(b) Unless otherwise directed by the court, all papers required to be served by this section shall be served by regular mail and by certified mail return receipt requested.

(c) Within twenty days of the death of an incapacitated person, the guardian shall:

1. serve a copy of the statement of death upon the court examiner, the duly appointed personal representative of the decedent’s estate, or, if no personal representative has been appointed, then upon the personal representative named in the decedent’s will or any trust instrument, if known, upon the local department of social services and upon the public administrator or the chief fiscal officer of the county in which the guardian was appointed, and
2. file the original statement of death together with proof of service upon the personal representative and/or public administrator or chief fiscal officer, as the case may be, with the court which issued letters of guardianship.

(d) Within one hundred fifty days of the death of the incapacitated person, the guardian shall serve upon the personal representative of the decedent’s estate or where there is no personal representative, upon the public administrator or chief fiscal officer, a statement of assets and notice of claim, and, except for property

§ 81.44. Proceedings upon the death of an incapacitated person

retained to secure any known claim, lien or administrative costs of the guardianship pursuant to subdivision (e) of this section, shall deliver all guardianship property to:

1. the duly appointed personal representative of the deceased incapacitated person's estate, or
2. the public administrator or chief fiscal officer given notice of the filing of the statement of death, where there is no personal representative.
3. any dispute as to the size of the property retained shall be determined by the surrogate court having jurisdiction of the estate.

(e) Unless otherwise ordered by the court upon motion by the guardian on notice to the person or entity to whom guardianship property is deliverable, and the court examiner, the guardian may retain, pending the settlement of the guardian's final account, guardianship property equal in value to the claim for administrative costs, liens and debts.

(f) Within one hundred fifty days of the incapacitated person's death, the guardian shall file his or her final report with the clerk of the court of the county in which annual reports are filed, and thereupon proceed to judicially settle the final report upon such notice as required by subdivision (c) of [section 81.33](#) of this article, including notice to the person or entity to whom the guardianship property was delivered. There shall be no extension of the time to file a final report except by order of the court.

(g) Upon failure of the guardian to comply with subdivisions (d) or (f) of this section, any person entitled to notice of this proceeding may file a petition to compel the guardian to account, to suspend and/or remove the guardian, and to take and state the guardian's account.

History

Add, [L 2008, ch 175, § 2](#), eff Jan 3, 2009 (see 2008 note below); amd, [L 2011, ch 97, § 1](#) (Part C, Subpart G), eff Sept 22, 2011.

NY CLS Men Hyg, Title E, Art. 81

****Current through 2024 released Chapters 1-545****

New York Consolidated Laws Service > Mental Hygiene Law (Titles A — E) > Title E General Provisions (Arts. 29 — 91) > Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management (§§ 81.01 — 81.44)

Article 81 Proceedings for Appointment of a Guardian for Personal Needs or Property Management

History

Add, [L 1992, ch 698, § 3](#), eff April 1, 1993.

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Liman*

In re Crump

Supreme Court of New York, Appellate Division, Second Department

February 13, 1996, Argued ; August 19, 1996, Decided

95-09196

Reporter

230 A.D.2d 850 *; 646 N.Y.S.2d 825 **; 1996 N.Y. App. Div. LEXIS 8603 ***

In the Matter of Mary Crump, Respondent, Frances
Parthe, Appellant.

Subsequent History: [***1] This Opinion Substituted
for Recalled and Vacated Opinion of March 25, 1996.
Previously Reported at: 1996 N.Y. App. Div. LEXIS
3159.

Prior History: Motion by the appellant for reargument of
an appeal from an order and judgment (one paper) of
the Supreme Court, Suffolk County, dated August 23,
1995, which was determined by decision and order of
this Court dated March 25, 1996.

Upon the papers filed in support of the motion and the
papers filed in opposition thereto, it is

Core Terms

appoint, financial affairs, legal fees, incapacitated,
proceedings

Case Summary

Procedural Posture

Appellant filed a motion for reargument of an appeal

from an order and judgment of the Supreme Court,
Suffolk County (New York), which granted petitioner's
request for the appointment of a guardian of appellant's
personal needs and property, and which declared
appellant's power of attorney and healthcare proxy to be
void.

Overview

On reargument, the court held that the trial court
improvidently exercised its discretion in appointing a
guardian for appellant. The evidence showed that
appellant had effectuated a plan for the management of
her affairs which obviated the need for a guardian.
Moreover, appellant possessed sufficient resources to
protect her well being. Accordingly, the court found that
it was necessary for the guardian to restore appellant's
property to her and to file a final report and accounting
of her management of appellant's financial affairs. A
determination was also necessary as to the amount of
the guardian's compensation, which the court directed
was to be paid by petitioner.

Outcome

The court granted appellant's motion for reargument and

vacated its prior decision and order. The court then reversed the order and judgment of the trial court, dismissed the petition to appoint a guardian, and remitted the case to the trial court for further proceedings.

LexisNexis® Headnotes

Family Law > Guardians > General Overview

HN1 [2] Family Law, Guardians

In exercising its discretion to appoint a guardian for an individual's property, a court must make a two-pronged determination: first, that the appointment is necessary to manage the property or financial affairs of that person, and, second, that the individual either agrees to the appointment or that the individual is "incapacitated" as defined in *N.Y. Mental Hyg. Law § 81.02(b)*. *N.Y. Mental Hyg. Law § 81.02(a)*.

Counsel: Novak & Juhase, Woodmere, N.Y. (G. Alexander Novak and Rebecca A. Novak of counsel), for appellant.

Phillips, Weiner & Quinn, Lindenhurst, N.Y. (James F. Quinn of counsel), for respondent.

Judges: Bracken, J. P., O'Brien, Santucci and Goldstein, JJ., concur.

Opinion

[*850] [*826] Ordered that the motion is granted; and it is further,

Ordered that upon reargument the unpublished decision and order dated March 25, 1996, is recalled and vacated and the following decision and order is substituted therefor:

In a proceeding pursuant to Mental Hygiene Law article 81 to appoint a guardian for the person and property of Frances Parthe, an alleged incapacitated person, Frances Parthe appeals from an order and [***2] judgment (one paper) of the Supreme Court, Suffolk County (Luciano, J.), dated August 23, 1995, which, *inter alia*, after a hearing, granted the petition, appointed [*851] a guardian of her personal needs and property, and declared a power of attorney and health care proxy dated November 15, 1994, to be void.

Ordered that the order and judgment is reversed, on the law, with costs to the appellant payable by the petitioner, and the petition is dismissed; and it is further,

Ordered that the matter is remitted to the Supreme Court, Suffolk County, for further proceedings in accordance herewith.

As this Court recently held in *Matter of Maher* (207 AD2d 133, 139-140): HN1 [7] "In exercising its discretion to appoint a guardian for an individual's property ... a court must make a two-pronged determination: first, that the appointment is necessary to

manage the property or financial affairs of that person, and, second, that the individual either agrees to the appointment or that the individual is 'incapacitated' as defined in Mental Hygiene Law § 81.02 (b) (Mental Hygiene Law § 81.02 (a))".

In the present case the court improvidently exercised its discretion in appointing [***3] a guardian for Mrs. Parthe. The evidence adduced at the hearing shows that Mrs. Parthe had both effectuated a plan for the management of her affairs which obviated the need for a guardian and that she possessed sufficient resources to protect her well being (see, *Matter of O'Hear [Rodriguez]*, 219 AD2d 720).

Having now reversed the order appointing a guardian, it is necessary that the property of Mrs. Parthe still in the possession of the guardian be restored to her (see, Mental Hygiene Law § 81.36 (e)), that the guardian file a final report and accounting of her management of Mrs. Parthe's financial affairs (see, Mental Hygiene Law § 81.33), and that the court fix the compensation, if any, of the guardian (see, Mental Hygiene Law § 81.28), which shall be paid by the petitioner. Upon the conclusion of these proceedings, the guardian may petition for her release and discharge (see, Mental Hygiene Law § 81.34).

We deem it appropriate that the petitioner pay her own legal fees as well as the fee of the court evaluator, and the fee of her expert, Dr. Frederick Sherman (see, Mental Hygiene Law § 81.09 (f); § 81.10 (f)). We further

find that Edward [***4] Parthe and Mrs. Parthe should pay their own legal fees.

Bracken, J. P., O'Brien, Santucci and Goldstein, JJ., concur.

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Matter of Ardelia R.

*Clear & Convincing
w/o medical proof*

Supreme Court of New York, Appellate Division, Second Department

April 4, 2006, Decided

2004-06657, (Index No. 7535/04)

Reporter

28 A.D.3d 485 *; 812 N.Y.S.2d 140 **; 2006 N.Y. App. Div. LEXIS 4077 ***; 2006 NY Slip Op 2549 ****

[****1] In the Matter of Ardelia R., Appellant. New York City Health and Hospital Corporation-Elmhurst Hospital Center, Respondent. Raymond M., Nonparty Appellant; Suanne Linder Chiacchiaro, Nonparty Respondent.

Core Terms

appointed, incapacitated, unsuitable, disbursements, costs, funds

Case Summary

Procedural Posture

Appellants, a woman and her brother, appealed a judgment by the Queens County Supreme Court (New York) that granted petitioner hospital's N.Y. Mental Hyg. Law art. 81 petition determining that the woman was an incapacitated person, and appointed a guardian.

Overview

The 82-year-old woman was found in her home without running water, food, electricity, or heat. When she presented to the hospital, she was malodorous and frail.

She was unable to cook, and was known to wander away from her home. She had forgotten where she banked and did not know her sources of income. Although she owned a home and possessed approximately \$ 115,000 in savings, she was delinquent on her utility bills. She was diagnosed with, inter alia, dementia. The appellate court found, pursuant to N.Y. Mental Hyg. Law § 81.02(b)(1), (2), that the woman lacked the understanding or appreciation of the nature and consequences of her functional limitations. Thus, the trial court properly found that she was an incapacitated person. As there was evidence of undue influence in the brother's actions to bring about the execution of a power of attorney and evidence of impropriety in his management of the woman's property, the brother was deemed unsuitable to act as guardian under N.Y. Mental Hyg. Law § 81.19(a)(1), (d). The woman's other two relatives were likewise unsuitable or unwilling to act as guardian. Consequently, the trial court properly appointed an independent guardian.

Outcome

The judgment was affirmed.

Headnotes/Summary

Headnotes

[***1] Incapacitated and Mentally Disabled Persons--Appointment of Guardian for Personal Needs or Property Management.--Since record established that 82-year-old appellant lacked understanding or appreciation of nature and consequences of her functional limitations, finding that she was incapacitated person requiring guardian was proper notwithstanding lack of medical testimony regarding her medical condition.

Incapacitated and Mentally Disabled Persons--Appointment of Guardian for Personal Needs or Property Management.--Independent guardian was properly appointed for appellant since appellant's family members were unsuitable--as there was evidence of undue influence in brother's actions to bring about execution of power of attorney and evidence of impropriety in brother's management of appellant's property, he was unsuitable to act as guardian; appellant's other two relatives were likewise unsuitable or unwilling to act as guardian.

Counsel: Reuben Blum, New York, N.Y., for appellant and nonparty-appellant.

Allen Federman, Forest Hills, N.Y. (Alan Marcus of counsel), for petitioner-respondent.

Bellin & Associates, LLC, New York, N.Y. (Aytan Y.

Bellin of counsel), for nonparty-respondent.

Judges: GABRIEL M. KRAUSMAN, J.P., ROBERT A. SPOLZINO, ROBERT A. LIFSON, MARK C. DILLON, JJ. Krausman, J.P., Spolzino, Lifson and Dillon, JJ., concur.

Opinion

[*486] [**141]

In a proceeding pursuant to Mental Hygiene Law article 81 to appoint a guardian for the person and property of Ardelia R., an alleged incapacitated person, Ardelia R. and nonparty Raymond M. appeal, as limited by their brief, from so much of an order and judgment (one paper) of the Supreme Court, Queens County (Thomas, J.), dated June 17, 2004, as, after a hearing, granted the petition, determined that Ardelia R. was an incapacitated person, and appointed Suanne Linder Chiacchiaro as guardian.

Ordered that the appeal by Raymond M. is dismissed, without [***2] costs or disbursements, as he is not aggrieved by the portion of the order and judgment appealed from (see CPLR 5511; *Hayden v Catholic Home Bur.*, 298 AD2d 557, 748 NYS2d 676 [2002]); and it is further,

Ordered that the order and judgment is affirmed insofar as appealed from by the appellant Ardelia R., without costs or disbursements.

[****2] The appellant Ardelia R. is an 82-year-old

28 A.D.3d 485, *486; 812 N.Y.S.2d 140, **141; 2006 N.Y. App. Div. LEXIS 4077, ***2; 2006 NY Slip Op 2549, ****2

woman who was found in her home by Protective Services for Adults without running water, food, electricity, or heat. When she presented to Elmhurst Hospital Center, she was malodorous and frail and, thereafter, she was diagnosed with dementia, hypertension, and coronary artery disease. She was unable to cook, and was known to wander away from her home. She had forgotten where she banked and did not know her sources of income. Although she owned a home and possessed approximately \$ 115,000 in savings, she was delinquent on her utility bills.

Based on these facts, the hearing record established by clear and convincing evidence that Ardelia R. lacked the understanding or appreciation of the nature and consequences of her functional limitations (see Mental Hygiene Law § 81.02 [b] [1],[2]). [***3] Thus, the Supreme Court's finding that she was an incapacitated person requiring a guardian was proper notwithstanding the lack of medical testimony regarding her medical condition (see Matter of Rosa B.-S., 1 AD3d 355, 356, 767 NYS2d 33 [2003]; Matter of Harriet R., 224 AD2d 625, 626, 639 NYS2d 390 [1996]; [**142] cf. Matter of Grinker [Rose], 77 NY2d 703, 711, 570 NYS2d 448 [1991]; Matter of Donald [F. L.], 210 AD2d 227, 228, 619 NYS2d 351 [1994]; Matter of Flowers [Dove], 197 AD2d 515, 602 NYS2d 194 [1993]).

Moreover, the Supreme Court providently exercised its discretion in appointing an independent guardian since the record established that Ardelia R.'s family members were unsuitable (see Mental Hygiene Law § 81.19 [a]

[1],[d]; Matter of Joseph V., 307 AD2d 469, 471, 762 NYS2d 669 [2003]). After admission to Elmhurst Hospital Center, Ardelia R. executed a power of attorney in favor of her brother, the appellant Raymond M. The record demonstrates that Raymond M. told Ardelia R. to sign the document without reading it and, thereafter, withdrew funds from her bank accounts and failed to account for a substantial portion of those funds. [***4] As there was evidence of undue influence in Raymond M.'s actions to bring about the execution of the power of attorney (see Matter of Maher, 207 AD2d 133, 143 n. 621 NYS2d 617 [1994]) and evidence of impropriety in Raymond M.'s management of Ardelia R.'s property (see Matter of Nora McL. C., 308 AD2d 445, 764 NYS2d 128 [2003]; Matter of Rochester Gen. Hosp. [Levin], 158 Misc 2d 522, 528, 601 NYS2d 375 [1993]; cf. Matter of Maher, supra at 142-143), he was providently deemed unsuitable to act as guardian. Ardelia R.'s other two relatives were likewise unsuitable or unwilling to act as guardian. Accordingly, the Supreme Court properly appointed an independent guardian. Krausman, J.P., Spolzino, Lifson and Dillon, JJ., concur.

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Matter of Carole L.

*Proof of
INCAPACITY*

Supreme Court of New York, Appellate Division, Second Department

February 17, 2016.

2014-11315

Reporter

136 A.D.3d 917 *; 26 N.Y.S.3d 133 **; 2016 N.Y. App. Div. LEXIS 1186 ***; 2016 NY Slip Op 01184 ****

[****1] In the Matter of Carole L., Appellant. Richmond University Medical Center, Respondent. (Index No. 80190/13).

Core Terms

appoint, personal needs, property management, incapacitated, manage, appreciate, appointment of a guardian, unable to provide, clear and convincing evidence, fail to demonstrate, financial affairs, nature and extent, likely to suffer, disability, incapacity, appeals

Case Summary

Overview

ISSUE: Whether a guardian was to be appointed for an alleged incapacitated person (AIP). HOLDINGS: [1]-The trial court erred in appointing a guardian for the AIP's personal needs and property management, pursuant to Mental Hygiene Law § 81.02(a), because the medical center failed to demonstrate, by clear and convincing evidence, that the AIP was incapacitated, pursuant to Mental Hygiene Law § 81.02(b). The testimony

presented by the medical center at the hearing failed to show that the AIP was unable to provide for her personal or financial needs and that she was unable to adequately understand and appreciate the nature and consequences of any such inability.

Outcome

Judgment reversed.

LexisNexis® Headnotes

Estate, Gift & Trust Law > ... > Conservators & Guardians > Conservators > Appointment

Family Law > Guardians > Appointment

HN1 [2] **Conservators, Appointment**

For a court to exercise its authority to appoint a personal needs guardian or a property management guardian, it must make a two-pronged determination. Mental Hygiene Law § 81.02(a). To appoint a personal needs guardian, a court must first determine that the

appointment is necessary to provide for the personal needs of that person, including food, clothing, shelter, health care, or safety. Mental Hygiene Law § 81.02(a)(1). Similarly, to appoint a property management guardian, a court must first determine that the appointment is necessary to manage the property and financial affairs of that person. Second, to appoint either a personal needs or a property management guardian, a court must determine that the person agrees to the appointment, or that the person is incapacitated. Mental Hygiene Law § 81.02(a)(2). With respect to the second prong regarding appointment of a guardian of the person, the determination of incapacity shall consist of a determination that a person is likely to suffer harm because (1) the person is unable to provide for his or her personal needs; and (2) the person cannot adequately understand and appreciate the nature and consequences of such inability. Mental Hygiene Law § 81.02(b).

Estate, Gift & Trust Law > ... > Conservators & Guardians > Conservators > Appointment

Family Law > Guardians > Appointment

HN2[2] Conservators, Appointment

Insofar as a person is alleged to need appointment of a guardian of the property, a determination of incapacity must be based upon evidence that the person is likely to suffer harm because: (1) he or she is unable to provide for property management; and (2) the person cannot

adequately understand and appreciate the nature and consequences of such inability. Mental Hygiene Law § 81.02(b).

Estate, Gift & Trust Law > ... > Conservators & Guardians > Conservators > Appointment

Family Law > Guardians > Appointment

HN3[2] Conservators, Appointment

In reaching its determination for the appointment of a guardian of the property, a court must give primary consideration to the person's functional level and functional limitations. Mental Hygiene Law § 81.02(c), including an assessment of the person's ability to manage the activities of daily living related to property management, such as money management and banking, his or her understanding and appreciation of the nature and consequences of any inability to manage these activities, his or her preferences, wishes, and values regarding management of these affairs, and the nature and extent of the person's property and finances, in the context of his or her ability to manage them. Mental Hygiene Law §§ 81.02(c) and 81.03(h). The court must also assess the extent of the demands placed on the person by the nature and extent of that person's property and financial affairs; any mental disability and the prognosis of the disability; any medications with which the person is being treated and their effect on the person's behavior, cognition and judgment; and other relevant facts and circumstances.

136 A.D.3d 917, *917; 26 N.Y.S.3d 133, **133; 2016 N.Y. App. Div. LEXIS 1186, ***1186; 2016 NY Slip Op 01184, ****1

Mental Hygiene Law § 81.02(c)(4)(d).

JJ., concur.

Opinion

Estate, Gift & Trust Law > ... > Conservators &

Guardians > Conservators > Appointment

Family Law > Guardians > Appointment

Evidence > Burdens of Proof > Allocation

Evidence > Burdens of Proof > Clear & Convincing
Proof

HN4[2] Conservators, Appointment

For both personal needs guardians and property management guardians, the determination that a person is incapacitated must be based on clear and convincing evidence. Mental Hygiene Law §§ 81.02(b) and 81.12(a). The burden of proof shall be on the petitioner. Mental Hygiene Law § 81.12(a).

Headnotes/Summary

Headnotes

Incapacitated and Mentally Disabled Persons—
Guardian for Personal Needs or Property Management

Counsel: [***1] Main Street Legal Services, Inc., Long Island City, NY (Kristin Booth Glen and Joseph A. Rosenberg of counsel), for appellant.

Judges: CHERYL E. CHAMBERS, J.P., LEONARD B. AUSTIN, ROBERT J. MILLER, HECTOR D. LASALLE, JJ. CHAMBERS, J.P., AUSTIN, MILLER and LASALLE,

[*918] [**134] In a proceeding pursuant to Mental Hygiene Law article 81 to appoint a guardian for the person of Carole L., an alleged incapacitated person, Carole L. appeals from a judgment of the Supreme Court, Richmond County (Aliotta, J.), dated September 12, 2014, which, after a hearing, granted the petition and appointed a guardian to manage her person and property.

Ordered that the judgment is reversed, on the law, without costs or disbursements, the petition is denied, and the proceeding is dismissed.

The petitioner commenced this proceeding pursuant to Mental Hygiene Law article 81 to appoint a guardian for the person of Carole L., an alleged incapacitated person (hereinafter the AIP). The petition alleged that the AIP was an incapacitated person and that a guardian was needed to provide for her personal needs. After a hearing, the Supreme Court granted the petition and appointed a guardian to manage the person and property of the AIP. The AIP appeals.

HN1[3] In order for a court [***2] to exercise its authority to appoint a personal needs guardian or a property management guardian, it must make a two-pronged determination (see Mental Hygiene Law § 81.02 [a]; see also Matter of Samuel S. [Helene S.], 96 AD3d 954, 957, 947 NYS2d 144 [2012]; Matter of Daniel

TT., 39 AD3d 94, 96-97, 830 NYS2d 827 [2007]; Matter of Maher, 207 AD2d 133, 139-140, 621 NYS2d 617 [1994]. To appoint a personal needs guardian, the court must first determine that "the appointment is necessary to provide for the personal needs of that person, including food, clothing, shelter, health care, or safety" (Mental Hygiene Law § 81.02 [a] [1]). Similarly, to appoint a property management guardian, the court must first determine that "the appointment is necessary . . . to manage the property and financial affairs of that person" (*id.*). Second, to appoint either a personal needs or a property management guardian, the court must determine "that the person agrees to the appointment, or that the person is incapacitated" (Mental Hygiene Law § 81.02 [a] [2]).

With respect to the second prong regarding appointment of a guardian of the person, "[t]he determination of incapacity . . . shall consist of a determination that a person is likely to suffer harm because" (1) "the person is unable to provide for [his or her] personal needs," and (2) "the person cannot adequately understand and appreciate the nature and consequences of such inability" (Mental Hygiene Law §§ 81.02 [b] [1], [2]).

HN2 Insofar as a person is alleged to need appointment of ***3 a guardian of the property, a ****2 determination of incapacity must be based upon evidence that the person is "likely to suffer harm" [*919] because: (1) he or she is "unable to provide for . . . property management," and (2) "the person cannot adequately understand and appreciate

the nature and consequences of such inability" (Mental Hygiene Law § 81.02 [b]). HN3 In reaching its determination, the court must give primary consideration to the person's "functional level and functional limitations" (Mental Hygiene Law § 81.02 [c]), including an assessment of the person's ability to manage the activities of daily living related to property management, such as money management and banking, his or her understanding and appreciation of the nature and consequences of any inability to manage these activities, his or her preferences, wishes, and values regarding management of these affairs, and the nature and extent of the person's property and finances, in the context of his or her ability to manage them (see Matter of Maher, 207 AD2d at 140; Mental Hygiene Law §§ 81.02 [c], 81.03 [h]). ***135 The court must also assess, in pertinent part, "the extent of the demands placed on the person . . . by the nature and extent of that person's property and financial affairs"; any mental disability and the prognosis of the disability; "any medications ***4 with which the person is being treated and their effect on the person's behavior, cognition and judgment"; and "other relevant facts and circumstances" (Mental Hygiene Law § 81.02 [c] [4], [d]).

HN4 For both personal needs guardians and property management guardians, the determination that a person is incapacitated must be based on clear and convincing evidence (see Mental Hygiene Law §§ 81.02 [b], 81.12 [a]). "The burden of proof shall be on the

petitioner" (Mental Hygiene Law § 81.12 [a]; see Matter of Samuel S. [Helene S.], 96 AD3d at 957; Matter of Maher, 207 AD2d at 140).

Here, the petitioner failed to demonstrate, by clear and convincing evidence, that the AIP is incapacitated (see Mental Hygiene Law § 81.02 [b]; see Matter of Edward G.N., 17 AD3d 600, 601, 795 NYS2d 244 [2005]; Matter of David C., 294 AD2d 433, 434, 742 NYS2d 336 [2002]). The testimony presented by the petitioner at the hearing failed to show that the AIP was unable to provide for her personal or financial needs and that she was unable to adequately understand and appreciate the nature and consequences of any such inability (see Matter of Ardelia R., 28 AD3d 485, 486, 812 NYS2d 140 [2006]; cf. Matter of Joseph S., 25 AD3d 804, 805-806, 808 NYS2d 426 [2006]; Matter of Joseph V., 307 AD2d 469, 470-471, 762 NYS2d 669 [2003]). Thus, the Supreme Court's conclusion that the AIP required a guardian was not supported by the record. Inasmuch as the petitioner failed to demonstrate that the AIP was incapacitated or [*920] consented to the appointment of a guardian for her personal or property needs, the court erred in granting the petition and appointing a guardian for the AIP's personal needs and property management (see Mental Hygiene Law § 81.02 [a]).

In light of our determination, [***5] we need not reach the petitioner's remaining contentions. Chambers, J.P., Austin, Miller and LaSalle, JJ., concur.



Neutral

As of: October 28, 2024 3:06 PM Z

Matter of Corinne S. (Steven S.)

Supreme Court of New York, Nassau County

December 31, 2023, Decided

Index No. 850081-I-2022

*Independent
Guardian
wanted*

Reporter

82 Misc. 3d 679 *; 207 N.Y.S.3d 353 **; 2023 N.Y. Misc. LEXIS 23409 ***; 2023 NY Slip Op 23416 ****

[****1] In the Matter of Corinne S., Petitioner, for the Appointment of a Guardian for Steven S., an Alleged Incapacitated Person, Respondent; Shelly F. et al., Cross-Petitioners.

Subsequent History: As corrected through Wednesday, April 24, 2024.

Prior History: Matter of Newman (Steven S.), 77 Misc. 3d 1229[A], 181 N.Y.S.3d 442, 2022 NY Slip Op 51330[U], 2022 N.Y. Misc. LEXIS 8913 [Dec. 23, 2022]

Core Terms

appointed, cross-petitioner, guardianship, temporary guardian, evaluator, best interest, family member, incapacitated, fiduciary, further order, reside, trusts, phase, property management, temporary receiver, conferences, settlement, relocate, millions of dollars, reasonable sum, disbursements, participated, appointees, co-chair, partner, awards, manage

Case Summary

Overview

HOLDINGS: [1]-In a Mental Hygiene § 81 proceeding, it was in the best interests of the incapacitated person for the court to appoint an independent guardian for his personal and property management needs because of the conflict within the family and the fact that the family members who wanted to be the guardian resided at least 2500 miles away from New York. Moreover, the independent guardian had extensive knowledge of the proceeding and was one of the elite elder and guardianship law practitioners in New York.

Outcome

Petition and cross-petitions granted in accordance with the findings.

LexisNexis® Headnotes

Civil Procedure > Judicial

Officers > Judges > Discretionary Powers

Family Law > Guardians > Appointment

HN1 [📄] Judges, Discretionary Powers

In selecting a guardian for an incapacitated person, the primary concern for the court is the best interests of the incapacitated person. This determination involves the judgement of the facts and discretion of the court. While appointment of a family member is preferable, it is well within the Supreme Court's discretion to appoint an outsider upon a determination that the available family member is, in some way, not suitable. Moreover, when there is dissension between family members, a court is justified in appointment of a neutral third-party guardian.

Family Law > Guardians > Appointment

HN2 [📄] Guardians, Appointment

A guardianship proceeding is unlike any other civil proceeding since the alleged incapacitated person is not accused of wrongdoing or fault, yet his or her civil liberties may be taken away in whole or in part. If a guardian needs to be appointed by the court, the paramount concern determining what is in the best interests of the most vulnerable person in society — the incapacitated person.

Family Law > Guardians > Appointment

HN3 [📄] Guardians, Appointment

The general public policy in preferring that a family member be appointed as the guardian for the

incapacitated person is based upon a presumption that the incapacitated person will be more comfortable with that person rather than a stranger, and that the family member will be more caring and be more involved in the day-to-day life of the incapacitated person. However, that is not necessarily so.

Civil Procedure > Judicial

Officers > Judges > Discretionary Powers

Civil Procedure > ... > Costs & Attorney

Fees > Attorney Fees & Expenses > Reasonable Fees

HN4 [📄] Judges, Discretionary Powers

Long tradition and just about a universal one in American practice is for the fixation of lawyers' fees to be determined on the following factors: time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved. The Supreme Court has broad discretion in determining, in a guardianship proceeding pursuant to Mental Hygiene Law § 81, the reasonable amount to award to court appointees; however, it must provide a clear and concise explanation for its award in a written decision, with reference to the above-listed

factors.

Headnotes/Summary

Headnotes

Incapacitated and Intellectually or Developmentally Disabled Persons — Guardian for Personal Needs or Property Management — Appointment of Neutral Third Party Instead of Family Members

At the conclusion of a four-phase trial in a Mental Hygiene Law article 81 proceeding concerning an incapacitated person (IP) who had been a successful real estate investor, in which a daughter of the IP and his estranged third wife cross-petitioned for guardianship and another daughter of the IP cross-petitioned for an independent guardian, the court appointed the neutral third party who had been serving as temporary guardian as the IP's personal needs guardian and property management guardian. In selecting a guardian, the primary concern for the court is the best interests of the incapacitated person. While appointment of a family member is preferable, it is well within the court's discretion to appoint an outsider upon a determination that the available family member is, in some way, not suitable. Petitioner daughter misconstrued the fiduciary obligations for which the guardian is responsible and admitted that she might have difficulty following orders from the court or advice of professionals appointed by the court. The antenuptial agreement entered into between the IP and his

estranged wife created a significant conflict of interest preventing her from serving as guardian. It strained credulity that the daughter or the estranged wife, both of whom resided at least 2,500 miles away, would actually relocate to New York if either one was appointed as guardian, and the bitter dissension and resentment between them was another reason why neither person would be an appropriate guardian. Although the IP never testified, the evidence proffered at trial, including his video will and his interviews with the court evaluator, revealed that he was adamant that he did not want his daughter or his estranged wife to be appointed as his guardian and would like the temporary guardian to continue in that capacity if he needed a guardian.

Counsel: [***1] For Corrine S., Petitioner: John G. Farinacci, Ruskin Moscou Faltischek, PC, Uniondale, NY.

Grace S., Cross Petitioner, Pro se.

For Shelly F., cross petitioner: Robert M. Harper, Farrell Fritz, P.C., Uniondale, NY.

For Shelly F., cross petitioner: Bret Cahn, Farrell Fritz, P.C., New York, NY.

For Steven S., Alleged Incapacitated Person: Sarah A. Chussler, Abrams Fensterman, LLP, Lake Success, NY.

For Evaluator: Ariella T. Gasner, Salem, Shor & Saperstein, Lake Success, NY.

For Temporary Guardian: John Newman, John Newman, Esq., Commack, NY.

For Grace S., Cross-Petitioner: Aytan Bellin, Katsky
Korins LLP, New York, NY.

Judges: Gary F. Knobel, J.

Opinion by: Gary F. Knobel

Opinion

[*680] [**357] OPINION OF THE COURT

Gary F. Knobel, J.

"Justice is the only meaningful goal in the resolution of any lawsuit. The law may not always be just, but it does provide a path to justice" (*Estate of Kainer v UBS AG*, 37 NY3d 460, 468, 160 N.Y.S.3d 182, 181 N.E.3d 537 [2021, Fahey, J., dissenting]).

The path to justice has been arduous in this highly contested and complicated proceeding pursuant to article 81 of the Mental Hygiene Law for the appointment of a guardian, or guardians, for the personal needs and property management of 79-year-old Steven S., an alleged incapacitated person. After 17 trial days spread out over several months, numerous conferences and seven controverted motions,¹ the last

contested [***2] issue is whether the best interests of Steven S. require that a family [*681] member—petitioner Corinne S., a daughter of Steven S. and a resident of California, or cross-petitioner² Grace S., the estranged third wife of Steven S., who resides in Seattle, Washington—or a neutral third party on the Part 36 guardian fiduciary list be appointed as a guardian for Steven S. Cross-petitioner Shelly F., a daughter of Steven S. who [****2] resides in Israel, advocated for an independent guardian to be appointed and did not want either Corinne or Grace to be appointed as the guardian for her father. Corinne traveled to New York for almost all of the trial and conference court appearances, while Grace and Shelly participated via Microsoft Teams.

The three petitioners symbolically represent three different periods in Steven S.'s life and reflect the difficulty in fulfilling Steven S.'s wish (expressed in his video will) that one day, after he was no longer alive, the discord and distrust between the petitioners and their three different families could be blended into one functional family that would unite at his home occasionally and be friendly with each other. Ironically, their individual, meritorious [***3] petitions at bar contributed to the intervention and prevention by this court of any further wasteful dissipation of Steven S.'s assets, and the purported elder abuse and financial exploitation by Steven S.'s former business partner and

¹ See *Matter of Newman (Steven S.)*, 77 Misc 3d 1229(A), 181 N.Y.S.3d 442, 2022 NY Slip Op 51330(U) (Sup Ct, Nassau County 2022); Feb. 2, 2023 order (Knobel, J.); Feb. 21, 2023 order (Knobel, J.); *Matter of Corinne S. (Steven S.)*, 79 Misc 3d 777, 188 N.Y.S.3d 905 (Sup Ct, Nassau County 2023); *Matter of Corinne S. (Steven S.)*, 78 Misc 3d 1236(A), 186 N.Y.S.3d 584, 2023 NY Slip Op 50427(U) (Sup Ct, Nassau County 2023).

² The court notes that there is no provision in *Mental Hygiene Law article 81* specifically permitting cross-petitions.

former cross-petitioner, Mark Wysocki.

In his heyday Steven was a savvy, successful real estate investor with his sister. Steven S. intentionally did not have the petitioner and cross-petitioners involved in his real estate businesses and holdings in any manner. Steven proverbially marched to the beat of his own drummer. Steven enjoyed being a global gallavanter, a promiscuous philanderer who had inter alia four children with three wives, and a 12-year affair in China with cross-petitioner wife Grace S.'s cousin. He was not your traditional father or husband.

The depth and quality of the petitioner's and cross-petitioners' individual relationships with Steven S. are difficult to assess since Steven, although he appeared at the beginning of the trial, never testified. However, the evidence proffered at trial **[**358]** revealed that he was adamant that he did not want his daughter Corinne, or his estranged wife Grace, to be appointed **[*682]** as his guardian. The petitioners **[***4]** would occasionally visit with Steven and they apparently care to some degree, but his relationships with them did not appear to be very close or warm and fuzzy. Interestingly, there were very few tears shed by the petitioners during their respective testimonies about Steven S.'s deteriorated physical and mental condition, nor did the petitioners specifically express any feelings of love for Steven. Perhaps this is what Bob Dylan meant when he wrote the lyric popularized in a song by Joan Baez, that "love is just a four-letter word."³

An abbreviated procedural history is set forth as follows:

At the inception of the proceeding at bar this court suspended the power of attorney and health care proxy allegedly executed by Steven S., and appointed a temporary guardian, a court evaluator, and an attorney to represent Steven S., because of the averred allegations that Steven S. was suffering from cognitive deficits as a result of a stroke and was the victim of financial improprieties, poor business judgment, financial exploitation and undue influence allegedly perpetrated by former cross-petitioner Wysocki, a business associate of Steven S. Shortly thereafter, this court appointed labor counsel **[***5]** to represent the temporary guardian in federal court in New Jersey to protect Steven S.'s ownership interest in Arbah Corp., a nonoperational and dilapidated hotel; Wysocki had been held in contempt for the nonpayment of wages to hotel employees. The temporary guardian subsequently made an application to this court for the appointment of a temporary receiver to manage and preserve Steven S.'s businesses in view of inter alia Wysocki's failure to turn over the proceeds and the documentation pertaining to the sale of one of the properties owned by Steven S./52 West Associates LLC for \$33 **[****3]** million, and the failure to sell that property in accordance with Internal Revenue Code (26 USC) § 1031 and save millions of dollars in taxes. That motion was granted. Two years prior to the sale of this valuable property, on May 20, 2022, Steven S. allegedly

³ Or, perhaps as Tina Turner would sing, "what's love got to do with it?"

transferred or gifted to Wysocki 15% of his 100% interest in Arbah Corp. and 52 West Associates LLC. However, both the court evaluator and the temporary guardian, based upon evidence reviewed in camera by the court, contended that Steven S. may not have had capacity when he executed the documents transferring his interests in those corporations. [***6]

[*683] Prior to the commencement of the trial, this court ordered that the trial would be conducted in four phases. At the conclusion of the first phase—whether a guardian should be appointed for Steven S.—this court orally found on the record that the petitioner and cross-petitioners Grace and Shelly established by clear and convincing evidence that (1) a guardian is necessary to provide for the personal needs, including food, clothing, shelter and health care, of Steven S., and manage his property and financial affairs; (2) Steven S. does not adequately understand and appreciate the nature and consequences of his limited abilities, and if a guardian is not appointed for him, he is likely to suffer harm because he is unable to provide for both his personal and property management needs; and (3) Steven S. is an incapacitated person as defined by Mental Hygiene Law § 81.02 (see Matter of Joan A.C. [Debra A.C.—Irene R.], 217 AD3d 941, 942, 192 N.Y.S.3d 217 [2d Dept 2023]; Matter of Carolyn S. [Gaylor], 192 AD3d 1114, 1115, 141 [*359] N.Y.S.3d 358 [2d Dept 2021]; Matter of Dorothy K.F. [Michael F.—Stephenie F.], 145 AD3d 887, 888, 44 N.Y.S.3d 98 [2d Dept 2016]; Matter of Loftman [Mae R.], 123 AD3d 1034, 1035-1036, 999

N.Y.S.2d 166 [2d Dept 2014]; Mental Hygiene Law §§ 81.02 [a] [1], [2]; [b] [1], [2]). Before the next phase of the trial, Wysocki filed in the United States Bankruptcy Court in Newark, New Jersey, as a purported 15% owner of Arbah Corp., a bankruptcy petition on behalf of Arbah Corp. The proceeding at bar was not stayed since Arbah Corp. was not a party in this case. This court was required to then [***7] appoint and approve separate bankruptcy counsel for the temporary guardian and the temporary receiver to properly protect Steven S.'s interest in Arbah Corp.

The second and third phases of the trial concerned whether cross-petitioner Wysocki breached his fiduciary duty on behalf of Steven S., and whether Steven S. had capacity (a) when he allegedly conferred upon Wysocki a power of attorney in May 2020, (b) when he allegedly transferred to Wysocki 15% of his businesses, (c) when he sold the Florida property in 2021, and (d) when 52 West Associates LLC sold the New York County property. However, before Wysocki was scheduled to cross the proverbial Rubicon and testify and answer questions on those issues, a comprehensive settlement agreement between Wysocki and the parties was reached, which this court approved (see order dated July 20, 2023, Knobel, J.). As a part of the settlement agreement, cross-petitioner Wysocki withdrew his petition seeking to be guardian, and any power of attorney [*684] and health care proxy were revoked. Thereafter, the final phase of the trial began on the issue of the most appropriate individual, or individuals,

to be appointed to serve as the [***8] guardian of Steven S. for his personal and property management needs.

HN1 [§] "In selecting a guardian for an incapacitated person, the primary concern [for the court] is the best interests of the incapacitated person" (Matter of Audrey D., 48 AD3d 806, 807, 853 NYS2d 143 [2d Dept 2008]; see Matter of Von Bulow, 63 NY2d 221, 224, 470 N.E.2d 866, 481 N.Y.S.2d 67 [1984]; Matter of Marilyn A.I. [Kevin D.], 106 AD3d 821, 822, 964 N.Y.S.2d 640 [2d Dept 2013]). This determination involves the judgment of the facts and discretion of the court (Matter of Von Bulow). "While appointment of a family member is preferable, it is well within the Supreme Court's discretion to appoint an outsider upon a determination that the [****4] available family member is, in some way, not suitable" (Matter of Audrey D. at 807). Moreover, when there is dissension between family members, a court is justified in appointment of a neutral third-party guardian (see Matter of Dorothy K.F. [Michael F.—Stephenie F.], 145 AD3d 887, 888, 44 N.Y.S.3d 98; Matter of Beatrice R.H. [Dean E.H.—Penny F.H.], 131 AD3d 1058, 1059, 16 N.Y.S.3d 474 [2d Dept 2015]; Matter of Joshua H., 62 AD3d 795, 796, 880 N.Y.S.2d 645 [2d Dept 2009]; Matter of Wynn, 11 AD3d 1014, 1015-1016, 783 N.Y.S.2d 179 [4th Dept 2004]).

In applying these principles to the evidence adduced at trial, this court finds, for the reasons explained below, that the most appropriate person to serve as the

guardian of the personal and property management needs of Steven S. is a neutral, independent person on the Part 36 fiduciary list, the current temporary guardian, John Newman, Esq. (see Matter of Joan A.C. [Debra A.C.—Irene R.], 217 AD3d 941, 943, 192 N.Y.S.3d 217; Matter of Dorothy K.F. [Michael F.—Stephenie F.], 145 AD3d 887, 888, 44 N.Y.S.3d 98; Matter of Beatrice R.H. [Dean E.H.—Penny F.H.], 131 AD3d 1058, 1059, 16 N.Y.S.3d [***360] 474; Matter of Ollie D., 30 AD3d 599, 600, 817 N.Y.S.2d 142 [2d Dept 2006]). This finding by the court should not be interpreted by petitioner daughter Corinne S. or cross-petitioner wife Grace S. that they "lost." HN2 [§] A guardianship proceeding is unlike [***9] any other civil proceeding since the alleged incapacitated person is not accused of wrongdoing or fault, yet his or her civil liberties may be taken away in whole or in part (see Matter of Caminite [Amelia G.], 57 Misc. 3d 720, 721-722, 62 N.Y.S.3d 724, 725-726 [Nassau County Ct 2017]). If a guardian needs to be appointed by the court, the paramount concern is determining what is in the best interests of the most vulnerable person in our society—the incapacitated person (Matter of Kristine F., 206 AD3d 729, 730, 167 NYS3d 810 [2d Dept 2022]).

[*685] Petitioner Corinne can take solace in the fact that if it were not for her petition, her father would probably have millions of dollars less in his possession, due to the purported misappropriation and mismanagement by former business associate Wysocki, than the millions of dollars more he now possesses

thanks to the efforts of the temporary receiver and temporary guardian appointed by this court. The court does not doubt that Corinne sincerely wants to do what she believes is in the best interest for her father, but unfortunately her beliefs and plans for him and his property assets do not coincide with what is in her 79-year-old father's best interests.

Corinne is a very confident 33-year-old mother, Los Angelino and custodian of two young children from different men, one of whom was responsible for her losing a residential [***10] property she owned in Florida which was worth over \$500,000.00⁴ (testimony of Corinne S., July 25, 2023 at 10, 18, 32, 44, 49, 65-93; exhibits 31, 32). She has never been married. Corinne was sent to boarding school in Europe for her high school years, and has not graduated from college. She has no plans to complete her bachelor's degree "because it is not going to help me get a job. I know exactly what I'm doing for the rest of my life. I'm killing it, I'm connected, I'm powerful, I'm beautiful" (testimony of Corinne S., July 26, 2023 at 34). Corinne views herself as "a professional" and as "a leader" who is "on [call] 24 hours a day" to manage her household and help her friends and children (testimony of Corinne S., July 26, 2023 at 64, 107). She is not formally employed, apparently living off of a trust fund established by her maternal grandfather in a \$30,000.00 per month home rental, but she claims that one day she would like to

[***5] be a licensed stockbroker (like her mother, Steven S.'s second wife, who now resides in Dubai) and manage the portfolios of "the biggest names out there" (testimony of Corinne S., July 26, 2023 at 84).

Corinne misconstrues [***11] the fiduciary obligations for which the guardian is responsible. Her vision as guardian appears to be that she would be the chief executive officer over her father and have teams carry out her directives. Corinne testified that if she was appointed as the guardian for Steven she would relocate to New York with her children and have them homeschooled. Her plan to take care of her father's personal needs includes having a house manager/caretaker who would reside [**686] in New Jersey while overseeing the care of Steven S. with an entirely new staff. Corinne also testified that she would have her father undergo an unproven noninvasive procedure she identified as "red light therapy" to improve his cognitive function. Corinne further testified that she [**361] knows better than the current doctors and professionals treating her father if they do not come from the same circles that she engages in (testimony of Corinne S., July 26, 2023 at 66-69). Corinne honestly admitted that she may have difficulty following orders from the court or advice of professionals appointed by the court if the orders or recommendations are not what she believes is in her father's best interest (*id.* at 54-70). Perhaps the most [***12] fantastical idea she has pertains to her potential role as property guardian, where she would be a venture capitalist with her father's

⁴When questioned about this loss she laughed and stated, "I wasn't affected by this, sir" (testimony of Corinne S., July 26, 2023 at 81-82).

assets, such as renovating the New Jersey hotel he owned at a cost of over \$17,000,000.00 (testimony of Corrine S., July 26, 2023 at 66-67; see order dated Sept. 8, 2023, Knobel, J.).

Cross-petitioner Grace S. testified that she is also willing to relocate back to New York if she is appointed to be Steven S.'s guardian. Grace is Steven S.'s third wife. They were married in 2001 and have been separated since 2008, when Grace and Stevie, Grace and Steven S.'s son, moved to Washington state. Grace was employed as a tutor and then subsequently opened her own private tutoring school. During their marriage Steven S. has purchased multiple real estate investments for Grace, four of which included apartments in Shanghai, China. Grace has, on occasion, sold some of the apartments to support her and her son's lifestyle, using the funds to purchase a home in Washington.

Grace and Steven S. entered into an antenuptial agreement in 2001. This agreement creates a significant conflict of interest preventing Grace from serving as guardian. Article II subsection "h" [***13] states "[i]n the event the 'Prospective Husband' and the 'Prospective Wife' shall be *separated*, then in such event, 'Prospective Wife' and the 'Prospective Husband' shall sell the said apartment and split the net proceeds on a fifty-fifty basis" (see exhibit 38; testimony of Grace S., Sept. 19, 2023 at 131-138 [emphasis added]). Separated is not defined in the agreement, creating an issue that the guardian would need to investigate.

Furthermore, Grace S. and Steven S. have had numerous marital disputes ranging from divorce filings to threats of divorce (see exhibits 10, 39-40). Grace has also stated she would only relocate to New York if she was appointed as [*687] guardian, reasoning that "if I'm not the guardian he doesn't need my support. He needs my love. I can go visit him. . . . If I'm not appointed to be the guardian I will be here [in Washington state] for my students more" (testimony of Grace S., Sept. 18, 2023 at 36-37, 55-56; testimony of Grace S., Sept. 19, 2023 at 124-129). The conflict of interest between Grace and Steven S. as well as the marital issues between them and Grace's non-commitment to relocation to New York prevent the court from appointing [***14] Grace S. as guardian for Steven S.

HN3 [T] The general public policy in preferring that a family member be appointed as the [****6] guardian for the incapacitated person is based upon a *presumption* that the incapacitated person will be more comfortable with that person rather than a stranger, and that the family member will be more caring and be more involved in the day-to-day life of the incapacitated person. However, that is not necessarily so. Here neither Corinne nor Grace made any attempt to relocate to New York after Steven S.'s stroke in 2020, or even in 2023 during the pendency of this proceeding. That is perfectly understandable since they have followed their own separate paths and created lives for themselves in Los Angeles and Washington state, having very little to do with Steven S. It strains credulity that they would

actually relocate to New York if either one was appointed as guardian; it [**362] is also not realistic. A more likely scenario which would occur if either one was appointed guardian would be to request that Steven S. be permitted to move out west and reside with them in their respective residences.

The bitter dissension and resentment between Corinne and Grace is another reason [***15] why neither person would be an appropriate guardian for Steven S. Corinne has accused Grace of knowing about the financial fraud and abuse which allegedly took place by Wysocki and consequently, according to Corinne, Grace "loses the right to be involved in this," Grace doesn't "deserve[] any involvement in [Steven S.'s] personal care and his business," and "she [Grace] hit the jackpot" with Steven S. (testimony of Corinne S., July 26, 2023 at 61-62, 97-100, 124-127, 137-139; see also testimony of Corinne S., July 25, 2023 at 21).

In addition to this court's assessment and analysis, it is important to note that counsel for cross-petitioner Shelly F., counsel to Steven S., and the court evaluator, Ariella Gasner, have all advocated for the appointment of an independent, neutral guardian, and have acknowledged it is Steven S.'s [*688] desire, through his assigned counsel and the court evaluator, not to have a guardian, but if he was required to have one he did not want any family member to be his guardian. The court evaluator's testimony, and extremely thorough investigation and comprehensive interviews she conducted, completely support her recommendations. Furthermore, the

evidence contained [***16] within the addendum to the court evaluator's report clearly demonstrates why Steven S. has consistently expressed his preference that no family member be in control over his life. In Steven S.'s video will, recorded on May 12, 2013, well before he suffered any strokes or known mental deficiencies, Steven S. clearly outlined the familial conflicts and his desires. He never wanted any of his immediate family members to have control over any of his financial or personal interests. Steven would like his fragmented family to get along and be happy but, as he stated, this is "something that I did not experience in my life" and there was always some sort of "conflict, jealousy or complaints" (addendum to ct evaluator's rep, dated Sept. 20, 2023). Steven S.'s objection to having the petitioners involved in his personal and business matters has consistently been displayed through his actions, including: (1) his 2013 video will; (2) the 2014 power of attorney he executed; (3) his interviews with the court evaluator; (4) the testimony of witnesses throughout the trial; and (5) the actions he took with his company and with those whom he employed.

This court further notes that the court [***17] evaluator testified that Steven S. likes John Newman, the temporary guardian of Steven S. since August 4, 2022, and would like Mr. Newman to continue in that capacity if he needed a guardian (testimony of Ariella Gasner, Sept. 20, 2023 at 200-204). Corinne testified that she is satisfied with Mr. Newman's performance as guardian (testimony of Corinne S., July 25, 2023 at 29-30).

Given the conflict that has riddled the family dynamic, and the fact that the family members who wish to be the guardian for Steven S. reside at least 2,500 miles from New York, [***7] and in view of the recommendation of the court evaluator and the complexity of Steven S.'s businesses, this court finds that it is in Steven S.'s best interests to appoint, for an indefinite period of time, John Newman, Esq. as the independent guardian for the personal and property management needs of Steven S. Mr. Newman has extensive knowledge of this proceeding and Steven S.'s personal [**363] and business needs, and is one of the elite elder and guardianship law practitioners in New York State. [*689] This court is confident that Mr. Newman will continue to execute his fiduciary obligations in a professional and compassionate manner and follow [***18] the advice of medical, legal, or financial experts.

Turning now to the issue of reasonable compensation for the court appointees and the attorneys who represented the petitioners, this court has reviewed and scrutinized all the fee requests by the court appointees and respective counsel for the petitioners in this proceeding for the services they provided in 2022 and 2023. The following awards shall be paid from the guardianship account for the reasons stated below:

HN4 [¶] The Court of Appeals in Matter of Freeman (34 NY2d 1, 311 N.E.2d 480, 355 N.Y.S.2d 336 [1974]) reiterated the factors the trial court must apply before it awards reasonable counsel fees:

"Long tradition and just about a universal one in American practice is for the fixation of lawyers' fees to be determined on the following factors: time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved" (Matter of Freeman, 34 NY2d 1, 9, 311 N.E.2d 480, 355 N.Y.S.2d 336 [1974]).

The Supreme Court has broad discretion in determining, [***19] in a guardianship proceeding pursuant to article 81 of the Mental Hygiene Law, the reasonable amount to award to court appointees; however, it must provide a clear and concise explanation for its award in a written decision, with reference to the above-listed factors (see Matter of Zofia L. [Jolanta S.—Bogdan L.], 136 AD3d 818, 821, 26 N.Y.S3d 95 [2d Dept 2016]; Matter of Alice D. [Lupoli], 113 AD3d 609, 979 N.Y.S.2d 77 [2d Dept 2014]; Matter of Marion C.W. [Lisa K.—Maquire], 83 AD3d 1089, 1090, 923 N.Y.S.2d 558 [2d Dept 2011]; Matter of Theodore T. [Charles T.], 78 AD3d 955, 957, 912 N.Y.S.2d 72 [2d Dept 2010]; Matter of Catherine K., 22 AD3d 850, 803 N.Y.S.2d 193 [2d Dept 2005]).

With respect to the fee applications at bar, the highest

average hourly rate this court will award is \$600.00 per hour as a fair and reasonable hourly rate based upon the high quality of their work and the rate charged by the top tier practitioners in the guardianship field with extensive years of experience. Other court appointees in this matter previously received similar [*690] compensation, including Thomas McNamara, Esq., counsel to the temporary receiver, who has been engaged in complex bankruptcy issues (see NY St Cts Elec Filing [NYSCEF] Doc No. 350 [awarding Mr. McNamara \$585.00 per hour]; NYSCEF Doc Nos. 301, 320 [awarding Mr. Newman, the temporary guardian, \$500.00 per hour]).

The temporary receiver, the temporary guardian, the court evaluator, court appointed counsel for Steven S., and the attorneys for the petitioner and cross-petitioners were individually and collectively instrumental in preventing the further siphoning of millions of dollars from Steven S.'s assets, [***20] as well as any further financial abuse and undue influence over Steven S. Through all of their diligent efforts they were able to reach a resolution which ensured that [****8] Steven S. technically retained full control over all his businesses (instead of 85%), and the alleged financial abuser waived all claims to any present or future [**364] interests in Steven S.'s affairs, including any testamentary gifts. This settlement by itself preserved millions of dollars and years of litigation. To achieve this remarkable accomplishment, extensive negotiations, legal research, motion practice, and aggressive pretrial and trial advocacy were required to be performed since the petition at bar was filed in June 2022. This was not an ordinary article 81 guardianship proceeding. Nearly every week there was a surprising turn of events which impacted Steven S.'s businesses and properties, such as the bankruptcy filing of the Arbah Corp. in New Jersey, the labor dispute it was involved in, the complications and delays created by the repetitive substitution of counsel by former cross-petitioner Wysocki, and the presentation to this court of multiple legal issues of apparent first impression.

Ariella Gasner, [***21] Esq., the court evaluator, is awarded the reasonable sum of \$222,780.00 for 371.3 hours of professional services and \$593.70 for disbursements (see NYSCEF Doc No. 357). Ms. Gasner has practiced law since 2010, and is a partner at Salem, Shor & Saperstein, focusing on trusts and estates and elder law and guardianship litigation. She is a member of the New York State Bar Association and the Nassau County Bar Association, and served as co-chair from 2021-2022, and chair from 2022-2023, of the Nassau County Bar Association Elder Law, Social Services & Health Advocacy Committee. Ms. Gasner has appeared before this court on several occasions and is a very experienced guardianship attorney. Ms. Gasner compiled the most thorough and in-depth court evaluator's [*691] report this court has received and admitted into evidence. It consisted of over 50 pages and 30 exhibits in addition to two addendums which contained vital information for the court's decision. Ms.

Gasner interviewed at least 14 individuals over the course of her investigation in addition to participating in the bankruptcy proceeding.

Sarah Chussler, Esq., court-appointed counsel to Steven S., is awarded the reasonable sum of [***22] \$134,325.00 for 298.5 hours of professional services and \$951.19 for disbursements (see NYSCEF Doc No. 356). Ms. Chussler has been practicing law since 2013, and is a partner at Abrams Fensterman LLP in the Mental Health and Elder Law Department. She is a member of the New York State Bar Association, Elder Law and Special Needs Section and currently serves as the vice co-chair of the Elder Abuse Committee. She is also a member of the New York State Bar Association Health Law Section, Nassau County Bar Association Elder Law Social Services & Health Advocacy Committee, and the Brooklyn Bar Association Elder Law Committee. She was selected as a New York Metro "Rising Star" in New York Elder Law by Super Lawyers in 2019, 2020, and 2021, and was selected to the Best Lawyers "Ones to Watch" list for Elder Law from 2021 through 2024 and for Health Care Law from 2012 through 2024. Ms. Chussler has vigorously advocated for Steven S.'s interests throughout the pendency of this case, including 13 status conferences, settlement conferences, and oral arguments, and the entirety of the trial, engaging in direct examination and cross-examination of multiple witnesses.

Aytan Bellin, Esq., counsel [****23] to cross-petitioner Grace S., is awarded the reasonable sum of

\$175,200.00 for 298.5 hours of professional services and \$46.09 for disbursements (see NYSCEF Doc No. 358). Mr. Bellin has been practicing for over 32 years and is counsel to Katsky Korins LLP. He graduated magna cum laude from Yale College and received his Juris Doctor from Columbia Law School [**365] where he served as editor for the Columbia Law Review. Mr. Bellin was a law clerk in the United States District Court for the Southern District of New York, and [****9] has vast experience in both New York State and federal courts, litigating Medicaid benefits in both individual and class action lawsuits. Additionally, Mr. Bellin has extensive commercial litigation experience. He has received the New York State Bar Association Elder Law and Special Needs Section Award and has lectured for the continuing legal education [*692] programs for the New York State Bar Association's Elder Law and Special Needs Section as well as for the National Academy of Elder Law Attorneys. Although Mr. Bellin was not retained for the entirety of the trial, he participated in the pretrial conferences and applications and the early stage of the trial, and returned to engage [***24] in the settlement conferences and phase four of the trial where he conducted extensive direct and cross-examination of the witnesses.

Robert Harper, Esq., counsel for cross-petitioner Shelly F., is awarded the reasonable sum of \$247,592.52 for 464.08 hours of professional services rendered, of which \$150,359.35 shall be reimbursed to Shelly F., and \$5,760.07 in disbursements (see NYSCEF Doc No.

352). Mr. Harper has been practicing since 2008 and is currently a partner with Farrell Fritz, P.C., primarily specializing in trusts and estates and contested guardianship proceedings. He serves as a special professor of law at Hofstra University's Maurice A. Deane School of Law, has chaired the New York State Bar Association's Trusts and Estate Law Section, was director of the Suffolk County Bar Association, co-chaired the Suffolk County Bar Association's Surrogate's Court Committee, was an officer of the Suffolk Academy of Law and co-chair of the Legislation and Governmental Relations Committee of the New York State Bar Association's Trust and Estates Law Section, and is chair-elect, secretary, and treasurer of the New York State Bar Association's Trust and Estates Law Section. In 2023, Mr. Harper was elected a director of the Nassau County Bar Association. [***25] Mr. Harper has served as counsel of record and co-authored an amicus curiae brief for a case that appeared before the United States Supreme Court, has had multiple articles published in various law publications and was recognized as a Super Lawyers New York Metro "Rising Star" in the field of Estate and Trust Litigation between 2013-2022. Mr. Harper, and his co-counsel Mr. Cahn, have participated in every stage of this proceeding that was highly contested and were instrumental in the settlement of phases two and three of this proceeding. Both engaged in vigorous direct and cross-examination which aided the court in determining Steven S.'s best interests.

John Farinacci, Esq., counsel to petitioner Corinne S., is awarded the reasonable sum of \$292,380.00 for 487.3 hours of professional services, of which \$40,000.00 shall be reimbursed to Corinne S., and \$3,923.48 in disbursements (see NYSCEF Doc No. 361). Mr. Farinacci has been practicing for 25 years, [*693] concentrating in trusts, estates, Surrogate's Court and guardianship. He has been a partner at Ruskin Moscou Faltischek P.C. for 10 years and is head of the Estate, Trust and Fiduciary Litigation practice group. He has extensive trial experience [***26] in New York State Supreme Court, successfully argued an appeal before the New York State Court of Appeals and practiced in the Eastern District of New York. Mr. Farinacci is a past co-chair of the Surrogate's Court Estates and Trusts Committee of the Nassau County Bar Association, a member of the Executive Committee of the New York State Bar Association [**366] Trusts and Estates Law Section, past vice-chair of the Section's Surrogate's Court Committee, past vice-chair of its Committee on Continuing Legal Education and a past chair of the Surrogate's Court Committee and Estate Litigation Committee. Mr. Farinacci lectures on areas of trusts and estates and fiduciary law, has served as a speaker for the New York State Bar Association's continuing legal education programs and Nassau Academy of Law, and frequently writes on trust and estate topics. Mr. Farinacci has been a necessary and vital party to this matter and has [****10] participated in every stage of this proceeding from the initial filing of the petition through the present. He conducted impressive direct

and cross-examination of the witnesses when advocating for his client and Steven S.

Accordingly, it is:

Ordered that John Newman, Esq. (Fiduciary [***27] No. 112251) of 6268 Jericho Turnpike, Commack, NY 11725, (631) 486-7802, jnewesq@gmail.com, is appointed personal needs guardian and property management guardian of Steven S. for an indefinite period of time and is directed to visit with Steven S. at least 24 times per year; and it is further

Ordered that the guardian, John Newman, Esq., is authorized to have all of the powers set forth in the proposed judgment pursuant to Mental Hygiene Law §§ 81.21 and 81.22, and to exercise those powers in the best interests of Steven S., with due consideration given to Steven S.'s mental and physical impairments; and it is further

Ordered that the monetary awards granted to the court appointees and to the privately retained attorneys shall be paid by the guardian, John Newman, Esq., from the guardianship account (see Matter of John T., 42 AD3d 459, 462, 839 N.Y.S.2d 783 [2d Dept 2007]) within 10 days after this order has been uploaded into the New York State Courts Electronic Filing System (NYSCEF); and it is further

[*694] Ordered that the temporary guardian file a final account within 60 days of the uploading of this order on NYSCEF; and it is further

Ordered that the temporary receiver, Hon. Anthony F. Marano (retired), turn over the monies in possession to the guardian, John Newman, Esq., [***28] who shall in turn

1. obtain a bond as soon as possible in the sum of \$2 million; and

2. invest the sum of \$6 million in guardianship assets with each of the following principals and entities on the condition that these assets be *placed in restrictive accounts and prudently and conservatively managed by*

a. *Bernstein Private Wealth Management by Jeffrey Weisenfeld and Casey Sullivan* as fiduciaries, 1345 Avenue of the Americas, New York, N.Y. 10105, 212-407-5878, 212-407-5850 (fax) wiesenfeldjs@bernstein.com;

b. *Stifel, by Alan H. Cohn, CFP*, First Vice-President Investments, 1393 Veterans Memorial Highway, Hauppauge, New York 11788, 631-360-5719, 631-070-2930 (fax), cohna@stifel.com, contact registered assistant Donna Russo at 631-360-5737;

c. *Madison Advisors Services by Gary Schwartz*, President and CEO, 4 New King Street, Suite 120, White Plains, NY 10604, 800-222-2091, 800-249-9403 (fax), cell: 914-837-8330, email: gschwartz@madisonplanning.com, and it is further

Ordered that the guardian must seek pre-approval from this court to retain any attorneys or professionals on behalf of the guardian and Steven S., and it is further

Ordered that the guardian, [***29] John Newman, Esq.,
is directed to schedule an [**367] appointment, within
90 days of the date of this order,

1. to have Steven S. evaluated and assessed by the
chair of the Department of Cardiology at St. Francis
Hospital and Heart Center, 100 Port Washington Blvd.,
Roslyn, N.Y., and

2. to have Steven S. evaluated and assessed by the
Northwell Health Institute for Neurology and
Neurosurgery, Memory Disorders Center, Manhasset,
N.Y., and it is further

Ordered that the petition and cross-petitions are granted
in accordance with the findings as indicated above.

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*Two prong Test
to Appoint Guardian*

Matter of Laurent G. (Alexander G.)

Supreme Court of New York, Appellate Division, Second Department

June 29, 2022, Decided

2020-03031, (Index No. 2268/18)

Reporter

206 A.D.3d 996 *; 168 N.Y.S.3d 847 **; 2022 N.Y. App. Div. LEXIS 4083 ***; 2022 NY Slip Op 04168 ****; 2022 WL 2335728

incapacity, manage

[***1] In the Matter of Laurent G. (Anonymous),
appellant, and Alexander G. (Anonymous), et al.,
respondents.

Counsel: John C. Wirth, Jr., Poughkeepsie, NY, for
appellant.

Cori A. Robinson PLLC, New York, NY, for respondents.

Notice: THE PAGINATION OF THIS DOCUMENT IS
SUBJECT TO CHANGE PENDING RELEASE OF THE
FINAL PUBLISHED VERSION.

THIS OPINION IS UNCORRECTED AND SUBJECT
TO REVISION BEFORE PUBLICATION IN THE
OFFICIAL REPORTS.

Judges: VALERIE BRATHWAITE NELSON, J.P.,
REINALDO E. RIVERA, CHERYL E. CHAMBERS,
DEBORAH A. DOWLING, JJ. BRATHWAITE NELSON,
J.P., RIVERA, CHAMBERS and DOWLING, JJ., concur.

Opinion

Prior History: In a proceeding pursuant to Mental
Hygiene Law article 81 [***1] to appoint a guardian of
the property of Laurent G., an alleged incapacitated
person, Laurent G. appeals from an order and judgment
(one paper) of the Supreme Court, Dutchess County
(Michael G. Hayes, J.), dated February 4, 2020. The
order and judgment, after a hearing, granted the
petition.

Core Terms

incapacitated, appointment, clear and convincing
evidence, property management, financial affairs,

[*997] [**847] DECISION & ORDER

ORDERED that the order and judgment is affirmed,
without costs or disbursements.

The petitioners commenced this proceeding pursuant to
Mental Hygiene Law article 81 to appoint a guardian for
the property of Laurent G., their father, an alleged
incapacitated person. After a hearing, in an order and
judgment dated February 4, 2020, the Supreme Court
granted the petition. Laurent G. appeals.

206 A.D.3d 996, *997; 168 N.Y.S.3d 847, **847; 2022 N.Y. App. Div. LEXIS 4083, ***1; 2022 NY Slip Op 04168, ****1

In order for a court to exercise its authority to appoint a [Gaylor], 192 AD3d at 1116).

property management guardian for an alleged incapacitated person, it must make a two-pronged determination (see Mental Hygiene Law § 81.02[a]; Matter of Carolyn S. [Gaylor], 192 AD3d 1114, 1115, 141 N.Y.S.3d 358). First, the court must determine that "the appointment is [***2] necessary to . . . manage the property and financial affairs of that person" (Mental Hygiene Law § 81.02[a][1]). Second, the court must determine either "that the person agrees to the appointment, or that the person is incapacitated" (*id.* § 81.02[a][2]).

A determination of incapacity must be based upon evidence that the person is [**848] "likely to suffer harm" because (1) he or she is "unable to provide for . . . property management," and (2) "the person cannot adequately understand and appreciate the nature and consequences of such inability" (*id.* § 81.02[b][1], [2]). "The petitioner has the burden of establishing the alleged incapacitated person's incapacity and need for a guardian by clear and convincing evidence" (Matter of Maria Z. [Bonifacio Z.], 204 AD3d 930, 931, 164 N.Y.S.3d 881; see Mental Hygiene Law § 81.12[a]).

Here, the petitioners established by clear and convincing evidence that Laurent G. is an incapacitated person as defined in Mental Hygiene Law article 81. Further, the evidence supported a finding that the appointment of a guardian was the least restrictive form of intervention necessary to manage Laurent G.'s property and financial affairs (see Matter of Carolyn S.

BRATHWAITE NELSON, J.P., RIVERA, CHAMBERS
and DOWLING, JJ., concur.

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§ 81.06. Who may commence a proceeding

(a) A proceeding under this article shall be commenced by the filing of the petition with the court by:

1. the person alleged to be incapacitated;
2. a presumptive distributee of the person alleged to be incapacitated, as that term is defined in subdivision forty-two of section one hundred three of the surrogate's court procedure act;
3. an executor or administrator of an estate when the alleged incapacitated person is or may be the beneficiary of that estate;
4. a trustee of a trust when the alleged incapacitated person is or may be the grantor or a beneficiary of that trust;
5. the person with whom the person alleged to be incapacitated resides;
6. a person otherwise concerned with the welfare of the person alleged to be incapacitated. For purposes of this section a person otherwise concerned with the welfare of the person alleged to be incapacitated may include a corporation, or a public agency, including the department of social services in the county where the person alleged to be incapacitated resides regardless of whether the person alleged to be incapacitated is a recipient of public assistance;
7. the chief executive officer, or the designee of the chief executive officer, of a facility in which the person alleged to be incapacitated is a patient or resident.

§ 81.12. Burden and quantum of proof

(a) A determination that a person is incapacitated under the provisions of this article must be based on clear and convincing evidence. The burden of proof shall be on the petitioner.

(b) The court may, for good cause shown, waive the rules of evidence. The report of the court evaluator may be admitted in evidence if the court evaluator testifies and is subject to cross examination; provided, however, that if the court determines that information contained in the report is, in the particular circumstance of the case, not sufficiently reliable, the court shall require that the person who provided the information testify and be subject to cross examination.

§ 81.15. Findings

(a) Where the court determines that the person agrees to the appointment and that the appointment is necessary, the court shall make the following findings on the record:

1. the person's agreement to the appointment;
2. the person's functional limitations which impair the person's ability to provide for personal needs or property management;
3. the necessity of the appointment of a guardian as a means of providing for personal needs and/or property management for the person;
4. the specific powers of the guardian which constitute the least restrictive form of intervention consistent with the person's functional limitations; and
5. the duration of the appointment.

(b) Where the petition requests the appointment of a guardian to provide for the personal needs for a person alleged to be incapacitated and the court determines that such person is incapacitated and that the appointment is necessary, the court shall make the following findings on the record:

1. the person's functional limitations which impair the person's ability to provide for personal needs;
2. the person's lack of understanding and appreciation of the nature and consequences of his or her functional limitations;
3. the likelihood that the person will suffer harm because of the person's functional limitations and inability to adequately understand and appreciate the nature and consequences of such functional limitations;
4. the necessity of the appointment of a guardian to prevent such harm;
5. the specific powers of the guardian which constitute the least restrictive form of intervention

consistent with the findings of this subdivision;

6. the duration of the appointment; and

7. whether the incapacitated person should receive copies of the initial and annual report.

(c) Where the petition requests the appointment of a guardian for property management for the person alleged to be incapacitated, and the court determines that the person is incapacitated and that the appointment of a guardian is necessary, the court shall make the following findings on the record:

1. the type and amount of the property and financial resources of the person alleged to be incapacitated;

2. the person's functional limitations which impair the person's ability with respect to property management; 3. the person's lack of understanding and appreciation of the nature and consequences of his or her functional limitations;

4. the likelihood that the person will suffer harm because of the person's functional limitations and inability to adequately understand and appreciate the nature and consequences of such functional limitations;

5. any additional findings that are required under section 81.21 of this article;

6. the necessity of the appointment of a guardian to prevent such harm;

7. if so, the specific powers of the guardian which constitute the least restrictive form of intervention consistent with the person's functional limitations and the likelihood of harm because of the person's inability to adequately understand and appreciate the nature and consequences of such functional limitations; 8. the duration of the appointment; and

9. whether the incapacitated person should receive copies of the initial and annual report.

NY CLS Men Hyg § 81.15

§ 81.16. Dispositional alternatives.

(a) Dismissal of the petition.

If the person alleged to be incapacitated under this article is found not to be incapacitated, the court shall dismiss the petition.

(b) Protective arrangements and single transactions. If the person alleged to be incapacitated is found to be incapacitated, the court without appointing a guardian, may authorize, direct, or ratify any transaction or series of transactions necessary to achieve any security, service, or care arrangement meeting the foreseeable needs of the incapacitated person, or may authorize, direct, or ratify any contract, trust, or other transaction relating to the incapacitated person's property and financial affairs if the court determines that the transaction is necessary as a means of providing for personal needs and/or property management for the alleged incapacitated person. Before approving a protective arrangement or other transaction under this subdivision, the court shall consider the interests of dependents and creditors of the incapacitated person, and in view of the person's functional level, whether the person needs the continuing protection of a guardian. The court may appoint a special guardian to assist in the accomplishment of any protective arrangement or other transaction authorized under this subdivision. The special guardian shall have the authority conferred by the order of appointment, shall report to the court on all matters done pursuant to the order of appointment and shall serve until discharged by order of the court. The court may approve a reasonable compensation for the special guardian; however, if the court finds that the special guardian has failed to discharge his or her duties satisfactorily in any respect, the court may deny or reduce the amount of compensation or remove the special guardian.

(c) Appointing a guardian.

1. If the person alleged to be incapacitated is found to have agreed to the appointment of a guardian and the court determines that the appointment of a guardian is necessary, the order of the court shall be designed to accomplish the least restrictive form of intervention by appointing a guardian with powers limited to those which the court has found necessary to assist the person in providing for personal needs and/or property management.
 2. If the person alleged to be incapacitated is found to be incapacitated and the court determines that the appointment of a guardian is necessary, the order of the court shall be designed to accomplish the least restrictive form of intervention by appointing a guardian with powers limited to those which the court has found necessary to assist the incapacitated person in providing for personal needs and/or property management.
 3. The order of appointment shall identify all persons entitled to notice of all further proceedings.
 4. The order of appointment shall identify the persons entitled to receive notice of the incapacitated person's death, the intended disposition of the remains of the decedent, funeral arrangements and final resting place when that information is known or can be reasonably ascertained by the guardian.
 5. The order of appointment may identify the person or persons entitled to notice of the incapacitated person's transfer to a medical facility.
 6. The order of appointment may identify the persons entitled to visit the incapacitated person, if they so choose. However, the identification of such persons in the order shall in no way limit the persons entitled to visit the incapacitated person.
- (d) The court shall direct that a judgment be entered determining the rights of the parties.
- (e) The order and judgment must be entered and served within ten days of the signing of the order. A copy of the order and judgment shall be personally served upon and explained to the

person who is the subject of the proceedings in a manner which the person can reasonably be expected to understand by the court evaluator, or by counsel for the person, or by the guardian.

(f) When a petition is granted, or where the court otherwise deems it appropriate, the court may award reasonable compensation for the attorney for the petitioner, including the attorney general and the attorney for a local department of social services.

NY CLS Men Hyg § 81.16

24 Misc.3d 567

Supreme Court, Nassau County, New York.

S.I. and F.H., as Proposed Special Needs Guardians
and Guardians ad Litem for their Disabled Brother,

S.S., an incapacitated person, Petitioner(s),

v.

R.S., as S.S.'s **health care** agent and South
Nassau Communities Hospital, Defendant(s).

April 7, 2009.

Synopsis

Background: Sister moved, by order to show cause, for order appointing her as **health care** special needs guardian and guardian ad litem for her brother, empowering her to direct immediate continuation of connection and/or re-connection of mechanical ventilator and to direct that ventilator not be disconnected and any other life-sustaining treatment or procedures be implemented, and also sought order voiding appointment of **health care** agent pursuant to **health care proxy** executed by brother, and other related relief.

[Holding:] The Supreme Court, Nassau County, Karen V. Murphy, J., held that no basis existed for appointment of guardian of brother's person or property.

Petition dismissed.

West Headnotes (3)

- [1] **Evidence** ⇌ Acts and Statements of Sick or Injured Persons

Evidence ⇌ Particular statements or assertions

Patient's request that community ambulance service that strictly adhered to Orthodox Jewish law be called was neither dying declaration nor excited utterance indicative of patient's desire to be saved, for purposes of petition by patient's siblings seeking, inter alia, to void patient's appointment of **health care** agent pursuant to **health care proxy**; request did not establish

anything other than patient's acknowledgement that he was in need of immediate medical care.

McKinney's Public Health Law § 2992(1, 3).

- [2] **Health** ⇌ Incompetent persons in general
Mental Health ⇌ Mental incompetency or incapacity in general

Health care proxy executed by patient was valid and satisfied statutory requirements, and no grounds existed to remove appointed **health care** agent or determine that she was acting in bad faith in making **health care** decisions for patient, and therefore no basis existed for appointment of guardian of patient's person or property pursuant to petition of patient's siblings, notwithstanding their contentions that appointed agent was acting contrary to patient's religious beliefs, was not acting in his best interests in not agreeing to certain medical care, including continued use of ventilation equipment and implementation of other life-sustaining procedures, and was acting in bad faith as a result of being motivated by fear of financial ramifications of patient's **health care**. McKinney's Public Health Law §§ 2981, 2992; McKinney's Mental Hygiene Law § 81.02.

- [3] **Health** ⇌ Substituted judgment; role of guardian or others in general

Mere speculation or hope, regardless of how heartfelt, cannot override decisions of **health care** agent appointed pursuant to **health care proxy**, which have priority over other surrogates.

McKinney's Public Health Law § 2982(4).

Attorneys and Law Firms

****861** Mark J. Kurzmann, Esq., Pearl River, for Petitioner.

Garfunkel, Wild & Travis, Eve Green Koopersmith, Esq., Great Neck, for Respondent (Hospital).


Emily Franchina, Garden City, for Respondent (R.S.)

Sidney Hirschfeld by Catherine Anagnosopoulos, Esq.,
Mineola, NY, for S.S.

Opinion

KAREN V. MURPHY, J.


***568** Petitioner moved by Order to Show Cause for an order pursuant to Mental Hygiene Law § 81.02(a) appointing the Petitioner F.H. the **health care** special needs guardian and guardian *ad litem* for her brother S.S.; empowering F.H. to direct the immediate continuation of the connection and/or re-connection of the mechanical ventilator; and to further direct that the ventilator not be disconnected and that any other life sustaining treatment or procedures be implemented.

Petitioner further sought an order pursuant to  Public Health Law § 2992(1) and (3) voiding the appointment of R.S. under the January, 2009 **health care proxy** executed by S.S. and other related relief.

Pending the hearing of the proceeding Respondents were "temporarily enjoined from interfering with or instructing any **health care** provider to withhold mechanical or other ventilation or breathing assistance, artificial nutrition and hydration from S.S." and it was further ordered that ****862** pending the hearing, South Nassau Communities Hospital was not to remove the ventilator attached to S.S.

Mental Hygiene Legal Services was appointed counsel for S.S. A hearing was held at the hospital on Monday March 23, 2009 and was continued there on Wednesday March 25, 2009. At the start of the hearing, Petitioner sought to amend the Petition to name S.I. as an additional Petitioner and that application was granted and the caption amended accordingly. At the conclusion of the hearing the Court visited the patient, S.S. at his bedside.

In 1990, Public Health Law was amended to add Article 29-C-**Health Care Agents and Proxies**. The legislative intent was to establish a decision making process to allow competent adults to appoint an agent to decide about **health care** treatment in the event they lose decision making capacity. The legislation conferred no new rights regarding the provision or rejection of any specific **health care** treatment and affirmed existing laws and policies, which limit individual conduct, including those laws and policies against homicide, suicide, assisted suicide and mercy killing (1990 Regular Session

Chapter 752, Message of Necessity). Senator Michael J. Tully, Jr. stated in his memorandum in support of this bill that the ***569** bill was based upon the consensus of the diverse Task Force on Life and the Law convened by Governor Mario Cuomo in March 1985. It was recognized that based upon the  Court of Appeals decision in *In Re O'Connor*, 72 N.Y.2d 517, 531 N.E.2d 607, 534 N.Y.S.2d 886 (1988) the decision to decline the provision of life sustaining treatment could be made only upon clear and convincing evidence that the patient, given the particular circumstances the patient was facing, would decline the particular treatment proposed. Recognizing that to be a "very stringent standard" that "may be difficult to meet in most cases" this law was enacted to fill what was believed to be a "critical gap" in the statutory framework governing **health care** decisions in New York.

Senator Tully explained that the *O'Connor* Court, despite stating a stringent standard (clear and convincing evidence) suggested that through the creation of a springing power of attorney, a principal could invest another person with authority to express the principal's wishes with respect to medical treatment. Public Health Law Article 29-C was enacted to "eliminate the ambiguities in the law and obviate the need for a **health care** provider or family member to seek court approval of proposed treatment for an adult unable to make **health care** decisions." (*Tully memorandum at page 363 of Chapter Law Memorandum, L. 1990 ch. 752*).

Governor Cuomo in his approval Memorandum cited the bill as "an effective means to ensure that [adult patients'] treatment wishes and interests will be protected if they lose the capacity to speak for themselves. The **health care** agent must make decisions based upon the patient's wishes, including consideration of the patient's religious and moral beliefs." The Governor discussed the standard of reasonableness adopted by the Legislature. "If the patient's wishes *are not reasonably known*, the agent must decide based on a judgment about the patient's best interests." Highlighting another safeguard, the Governor noted that a **health care** agent can decide against the provision of artificial nutrition and/or hydration only when the decision reflects the *patient's reasonably* ***570 known wishes**. The Governor further recognized "The choices posed by medical advances will still be difficult. We will continue to confront them as patients, family members, or **health care** professionals. But the added anguish of legal uncertainty ****863** and confusion will be removed for patients who have created a **health care proxy**." (*Governor's Mem. Approving L. 1990, ch. 752*).

The stated intent to remove the legal uncertainty and confusion when a patient has created a **health care proxy** has apparently been met successfully in practice. In the nearly two decades since the **Health Care Proxy Law** was enacted there have been few reported decisions interpreting and applying Public Health Law Article 29-C. While it appears to this Court, based upon the memoranda supporting the bill's passage, which contrasted the *O'Connor* decision and the reasonableness standard set forth in the statute, that the legislature rejected the clear and convincing standard when a **health care proxy** has been created, some courts are still applying the more stringent standard, thereby continuing the legacy of confusion and legal uncertainty. (see *Matter of University Hospital of the State University of New York Upstate Medical University*, 194 Misc.2d 372, 754 N.Y.S.2d 153 (Sup. Ct. Onondaga Co., 11/12/2002); *Matter of Balich*, 2003 N.Y. Slip Op. 51080(U), 2003 WL 21649907 [Sup. Ct. Suffolk Co., 7/10/2003]; *Borenstein v. Simonson*, 8 Misc.3d 481, 797 N.Y.S.2d 818 [Sup. Ct. Queens Co., 3/30/2005].)

Regardless of our *joie de vie*, death is still an inescapable certainty. Defining death, however, is becoming much more difficult and less certain. Historically, we had little to no control over how and when death would occur, but modern medicine has upset the laws of nature and created significant controversy regarding when life begins and ends. While recognizing the miracle of life saving measures, the legislature and courts have been forced to consider the meaning of life and equally important, death, at times referencing a *living corpse*, to reflect the condition of a person incapable of living without the aid of machines and tubes. The statutory creation of a **health care proxy** assures that even those unable to speak may still exercise their right to refuse treatment that would sustain their existence, even after life as they knew it was forever over, or to exercise their right to have such treatment regardless of quality of life issues or futility of such treatment, because every life is precious and unique.

The matter *sub judice* pits a patient's siblings against his wife. Not only are their differing positions based upon their relationship *571 with the patient, religion and other beliefs, the very intent of the principal is at issue. Herein the principal, while verbally expressing a wish to live his way and on his terms without being dependent upon machines, in response to being advised by his doctor that his future may well be dependent upon the use of a respirator, created a **health care proxy** stating "I wish to live." This Court is charged

with trying to reconcile those seemingly incongruent and impossible desires to determine the principal's wishes and whether the agent is acting in accordance with those wishes.

The principal and patient S.S. was described by witnesses as a magnetic, loud, colorful, outspoken, "in your face kind of guy" who loved to work, loved the Yankees and loved life. He suffered from obesity, which impacted on his ability to breathe. Despite having his stomach banded several years ago, S.S. still loved to eat and continued to battle his weight and the adverse effects it had on his health. Approximately two and one half years ago in November 2006, S.S. was rushed to the emergency room and during that hospitalization, due to elevated carbon dioxide (CO2) levels, had to have a tracheotomy.

Dr. A., S.S.'s treating Pulmonologist, who has treated S.S. since that hospitalization. **864 testified. Dr. A. is both a friend and doctor to S.S. and he began treating S.S. for abdominal distress and breathing difficulties after seeing him in the emergency room in November 2006. S.S. had an extended stay in ICU at that time. S.S. was able to be weaned off the respirator and was sent for rehabilitation upon his release from the hospital. After a brief re-hospitalization, S.S. returned home and while frustrated by limitations pertaining to the trache, for example his inability to swim, he resumed working and went about his activities of daily living.

After S.S. fell ill on January 5, 2009 R.S. took him to see Dr. A. Petitioner F.H. followed them to the doctor's office in her own car and waited in the waiting room while R.S. and S.S. met with Dr. A. At that visit, Dr. A. discussed S.S.'s condition and treatment alternatives going forward, including antibiotics, a stomach scope and a respirator. S.S. said he did not want a mechanical ventilator or artificial nutrition. According to Dr. A. and R.S., S.S. often complained about the trache and repeatedly tried to have it removed because "This is no way to live."

S.S. spoke about the people he saw while he was in ICU and "rehab", dependent on tubes to live and was very animated and *572 emphatic that he was willing to die rather than live like that. This was so, despite having already benefitted from the type of devices he was now rejecting, i.e., the NG (nasogastric feeding) tube and respirator during the November 2006 hospitalization.

In light of that, Dr. A. brought up the subject of a **Health Care Proxy** and provided the form, which meets the statutory

criteria, to S.S. and encouraged him to fill it out. R.S. actually completed the form for S.S.'s signature. At S.S.'s direction, R.S., in paragraph "2. Optional Instructions" wrote: "I wish to live." Dr. A. acknowledged never having seen anyone write such a statement on a **health care proxy**, but explained that S.S. did not want the doctor to give up on him, he wanted the trache out "in the worst way," so that he could go to the beach club, and wanted to live on his terms, not in a nursing home. The doctor said that S.S. spoke to him on a number of occasions about the value S.S. placed on the quality of life. S.S. was very emphatic, very clear about how he wanted to live, and spoke often on the subject, including his desire to go to Yankee games and the beach club.

Although Dr. A. did not recall F.H. being in the waiting room on that visit, he acknowledged speaking to her about S.S. on other occasions. S.S. did not list an alternate **health care agent**. S.S.'s siblings, the Petitioners herein, while interested in S.S.'s care, were not chosen by S.S. to be his **health care agents**, nor did he advise Dr. A. that he would like to discuss his care and treatment or the **health care proxy** with them prior to signing it.

Petitioners are Orthodox Jews and while S.S. was brought up in an Orthodox household, he has not been observant for decades. S.S. clearly respected his family's observances but he did not belong to a temple, he worked on the Sabbath, including during the year of mourning following his father's death, and did not keep a Kosher home or attend religious services on a regular basis. The strongly held views of Petitioners were not S.S.'s. It was important to S.S. however, that when his time came, he wished to be buried with his mother, and wanted his brother, Petitioner S.I. to officiate, and further that his funeral arrangements would be made by S.I. S.S., while freely discussing his funeral arrangements with his brother reportedly did not speak to him about artificial nutrition, hydration, the ventilator or other treatment or end of life decisions.

***865** F.H., upon learning at Dr. A.'s office that the doctor told S.S. that he must lose weight or he would be on a respirator and ***573** that S.S. had signed a **health care proxy** stating that he "wished to live" never discussed with S.S. what he meant by that, or what S.S.'s wishes were, nor did she inquire as to why she was not an alternate agent. Indeed, she acknowledged that S.S. was not an Orthodox Jew, and while her position, based upon her religious beliefs, is to prolong life no matter what the circumstance, the evidence did not establish that S.S. shared her religious views. F.H. also denied


ever having a specific conversation with S.S. regarding the use of a ventilator or artificial nutrition and hydration, but stated that they talked about his funeral arrangements.




Petitioners allege that Respondent R.S. is acting contrary to S.S.'s religious beliefs; not in his best interests in that she has not agreed to the insertion of a PEG tube, for optimum care to replace the NG tube; and further that she is acting in bad faith in that she is motivated by fear of the financial ramifications of S.S.'s **health care**. No evidence was presented to establish that S.S.'s insurance would not be continued or that financial circumstances were dire or that R.S.'s decisions are being made for financial reasons. While the Petitioners testified that S.S. honored his father's wishes and joined in his siblings' decision not to withhold life sustaining treatment from his dying father four years ago, there was no evidence that S.S. sought the same treatment for himself. Whether S.S. may have chosen to speak only of an Orthodox funeral but not end of life decisions because he knew his wishes were contrary to his siblings' religious beliefs is a matter of speculation and can not be determined by this Court. The evidence established that while S.S. chose not to live as an Orthodox Jew, it was his desire to be buried in accordance with Orthodox tradition.



[I] Petitioners argue that S.S.'s request that Hatzalah be called was either a dying declaration or an excited utterance indicative of his desire to be saved and consistent with his instructions in the **proxy**, "I wish to live!!!" Hatzalah is a community ambulance service that strictly adheres to Orthodox Jewish law and one that S.S. had used previously. The Court notes that had 911 been called instead of Hatzalah, the Emergency Medical Technicians would have also worked to save S.S., as saving lives is a shared mission and responsibility of all first responders. The Court does not find the choice of ambulance service to be either a dying declaration or excited utterance nor does "Call Hatzalah" establish anything other than S.S.'s acknowledgment that ***574** he was in need of immediate medical care. The agent's unfortunate use of punctuation (!!!) after writing S.S.'s "I wish to live!!!" statement was not at S.S.'s direction and the Court credits R.S.'s explanation of her "habit" of adding exclamation points and does not share Petitioners' contention that the punctuation was significant or meaningful to S.S. The Court notes that at the time R.S. unilaterally added the exclamation points, S.S. was walking, talking and while not in robust health, was on his way home from an office visit and not *in extremis*.

The Petitioners did not produce any witnesses who claimed to have discussed S.S.'s wishes regarding **health care**. The only evidence presented at the hearing regarding S.S.'s expressed wishes with respect to his **health care** and treatment was adduced through the testimony of Dr. A. and R.S. Both individuals had numerous conversations with S.S., wherein he indicated his desire to live life to the fullest, but that he did not want to be on a respirator. Indeed, he did not even want the trache, a less burdensome form of treatment. **866 R.S. testified that she and S.S. discussed the Terri Schiavo case when it was being reported in the news and how he did not want to live like that. She also recalled that while S.S. was in rehab, each day she wheeled him by the room next to his, he would look at the young girl, laying all but lifeless in her bed, hooked up to machines and tubes and would say that he would not want to live like that.

The testimony supports a finding that S.S. wanted to live life to the fullest, not to merely exist, unable to communicate and interact with his family and friends. The evidence established S.S. expressly entrusted his wife to be his **health care** agent and to carry out his wishes, as expressed again to R.S. and to Dr. A., just days before suffering a heart attack and severe neurological damage to his brain.

[2] [3] I find that the **Health Care Proxy** executed by S.S. on January 5, 2009 is valid and meets the statutory criteria set forth in  Public Health Law § 2981. While this proceeding

was properly commenced by the principal's siblings pursuant to PHL  § 2992, the Petitioners have failed to establish any ground upon which the agent should be removed, they have not established that the agent is acting in bad faith; nor have they proffered any proof that would warrant overriding the agent's decision on the grounds that the decision was made in bad faith or that it was not in accordance with PHL  § 2982(1) or (2). Mere speculation or hope, regardless of how heartfelt, can not override the agent's decisions, which have priority over other surrogates (PHL  § 2982[4]).

*575 Having determined that the **Health Care Proxy** is valid, there is no need for a guardian of the person or property of S.S. pursuant to Mental Hygiene Law § 81.02. Petitioners failed to establish grounds for such an appointment. (See  *Matter of Isadora R.*, 5 A.D.3d 494, 773 N.Y.S.2d 96 (2d Dept., 2004);  *Matter of Albert S.*, 286 A.D.2d 684, 730 N.Y.S.2d 128 [2d Dept., 2001]).

Accordingly, the Petition is dismissed.

The foregoing constitutes the Order of this Court.

All Citations

24 Misc.3d 567, 877 N.Y.S.2d 860, 2009 N.Y. Slip Op. 29154

**SUPREME COURT OF THE
STATE OF NEW YORK**

**APPELLATE DIVISION:
SECOND JUDICIAL DEPARTMENT**

**Hon. Hector D. LaSalle,
Presiding Justice**



BEST PRACTICES

GUARDIANSHIP PROCEEDINGS

SECOND JUDICIAL DEPARTMENT

GUARDIANSHIP TASK FORCE REPORT

May 2022

TABLE OF CONTENTS

Table of Contents	I
Introduction.....	ii, iii
Task Force Committee Membership.....	iv, v
Task Force Sub-Committees - Membership	v-vii
I. Guardianship Compliance - Personnel and Recommended Procedures	1-8
II. Continuing Legal Education (CLE)	9
III. Compensation of Court Examiners.....	10-13
IV. Compensation of Guardians	14
V. Duties of Guardianship Referee	15-16
VI. Uniform Practices and Procedures	17-20
VII. Court Evaluators	21-22
VIII. <i>Pro Bono</i> Guardians	23
IX. <i>Pro Se</i> Applicants - Assistance	24
X. Legislative Action	25
XI. Model Guardianship Part	26-28

Appendix

- A. Court Examiner and Accounting Fee Schedule
- B. Model Guardianship Forms
 - (1) Order to Show Cause to Appoint Guardian
 - (2) Petition for Appointment of a Guardian of the Person and Property
 - (3) Designation
 - (4) Commission for Guardian
 - (5) Statement Identifying Real Property
 - (6) Initial Report
 - (7) Application for Approval of Expenditures / Order
 - (8) Annual Report of Personal Needs Guardian
 - (9) Annual Report of Guardian
 - (10) Order and Judgment for Appointment of Successor Guardian

Introduction

This Task Force was constituted by then Presiding Justice of the Appellate Division, Second Department, Alan D. Scheinkman, and concluded under Presiding Justice Hector D. LaSalle.

We heartily thank them - both for their commitment to those with incapacities and their assistance with the creation of this Report.

This Task Force was comprised of members of the Court - from judges to clerks who are assigned to Guardianship matters primarily under Mental Hygiene Law Article 81 ("Article 81"). Additionally, members of the Elder Law / Guardianship bar, various bar associations, and the Article 81 Guardianship Roundtable were consulted and provided their views and recommendations.

Before we begin this Report, we wish to note that the success of our Court in Guardianship matters lies in the dedication of the attorneys, judges and clerks that practice in this area. The bar - both individually and through its associations - continually give of their time to assist the Court and those that we serve. The commitment of the judges and Court staff is, indeed, remarkable.

Initially, when we began this Report, our purpose was to re-examine how Guardianship Parts are functioning within the Second Department since the Report of the first Task Force was issued in 2005, and to make recommendations for changes that we felt might be appropriate. However, in March 2020, when the global health pandemic struck, both our focus and insight broadened considerably. As with the rest of our Courts in the Unified Court System, we faced unprecedented challenges and adapted through both conventional and unconventional means.

Unfortunately, the pandemic affected those that we serve the hardest. Most of these people are either elderly or are afflicted with pre-existing medical conditions, and a majority - who either reside in a residential health care or are isolated at home - were considered "high risk" members of society for this pandemic. Our Court staff and judges rose to the occasion. There were always individuals available in the courthouses to provide assistance. Judges and lawyers found ways to be available, whether in-person (behind masks and plexiglass) or *via* telephone or video technology. Countless hours were spent trying to ensure that our wards were safe, as well as making certain that those who did not survive were treated with the utmost dignity. Many emergency hearings were held for those who never expected to find themselves in such dire circumstances. With the assistance of our bar, Court staff and our judges, we proudly remained vigilant in serving our wards.

This Report provides a great deal of comments and recommendations regarding the various aspects of our Guardianship system. However, there are certain areas we would like to highlight.

First, we believe that it is crucial to expand services to accommodate those that seek to bring these cases *pro se*. The need to seek the appointment of a Guardian is not based on the financial means of an individual, and the process can be overwhelming and costly. An individual that commences a Guardianship proceeding *pro se* not only must navigate the preparation of the petition, but also must determine who must receive notice of the hearing and how these interested parties must be served. If the petition is granted, then comes the complexities of drafting a judgment, as well as obtaining a bond and the commission. Although our *pro se* offices do offer some assistance, the extent of assistance required exceeds that which these offices can or should provide.

We strongly recommend the creation of a system where *pro se* petitioners in Guardianship matters can be referred directly to practicing attorneys for *pro bono* legal assistance.

Second, we believe that there is a dire need for a system that can provide the appointment of Guardians to individuals who are residing in long term residential health care facilities and do not have an appropriate family member who can qualify and serve as a Guardian. To date, service to these individuals has been limited to a small number of not-for-profit organizations, which are all overwhelmed with cases and significantly understaffed and underfunded. All too often, we have come close to some of these organizations not being able to remain viable service providers to our wards. Since the Court has the obligation to appoint appropriate individuals to serve as Guardians, we believe that we should strive to establish a system that assists in meeting this task.

Third, the diversity of prospective appointees on the approved fiduciary list must be expanded. Specifically, we should strive to increase the diversity of cultures, languages and professions of the fiduciaries on the Part 36 fiduciary list. Individuals that speak languages in addition to English and that are aware of the nuances of other cultures would greatly assist the Court and, therefore, those that we serve. An expansion to recruitment of nurses, social workers and students would also enhance the expertise of Court Evaluators. At a minimum, we must seek to provide more information to Court users as to how to navigate the Guardianship process in languages other than in English - particularly for those who are acting *pro se*.

Fourth, as a consequence of the pandemic, Guardianship proceedings are now "e-filed". While this administrative modification has certainly resulted in greater efficiency and ease of handling a Guardianship case, it also raises concerns as to maintaining the privacy of an individual's medical and financial information. We believe that appropriate security measures must be developed and implemented in this respect.

Finally, we recommend a change in the manner in which Guardianship case inventories are recorded statistically. Currently, once a hearing is held and a decision rendered, the case is considered disposed and is no longer carried on a Guardianship Judge's open inventory. Yet, if someone is found to be incapacitated and a Guardian is appointed, in essence, the case has just begun. The Court has exclusive and continuing jurisdiction over every aspect of a guardianship matter. (MHL 83.21) The Court will have many motions and conferences pertaining to this file for years to come. For example, the Court will deal with Medicaid planning, selling/purchasing real property, managing real property, care management and residential placement issues, approving settlements, resolving family disputes, and a host of other issues. This is in addition to reviewing and approving annual accountings, initial reports, expense requests and applications for professional fees. Accordingly, it is recommended that if a petition to appoint a Guardian is granted, the case remain on a Guardianship Judge's case inventory until a final accounting is approved and the Guardian is discharged.

We encourage all to review our assessments, recommendations and ideas. The Task Force has put a great deal of thought and effort into this Report, with the goal of improving the way the Court can best serve our constituents - attorneys, Court users, and incapacitated persons alike.

The Guardianship Task Force

SECOND DEPARTMENT
GUARDIANSHIP TASK FORCE

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Hon. Robert A. Onofry (Co-Chair)
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- A. **Compliance with Court Orders**
 - B. **Termination of Inactive and/or Abandoned Cases**
 - C. **Court Examiners**
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Model Guardianship Part Committee

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I

GUARDIANSHIP COMPLIANCE: **Personnel and Recommended Procedures**

Active case management is essential to effectively monitor the status of Guardianship proceedings, to assure *compliance* with all court directives, laws and rules and, most importantly, to protect a Person In Need of a Guardian ("PING") or an Incapacitated Person ("IP"). Since 2005, each Judicial District has developed systems and a structure to track the proliferation and ever-increasing complexity of Guardianship matters. While ensuring compliance ultimately resides with the Guardianship Judge, the process to ensure compliance falls primarily upon Part 36 Court appointees (i.e. the *Guardian* and the *Court Examiner*) and Court personnel (i.e., the *Guardianship Referee* or a *Court Attorney/Referee* and clerical staff specifically appointed to monitor and review Guardianship matters). Accordingly, it is essential that the structure ultimately adopted ensures the accountability of Guardians respecting financial transactions and personal decisions.

This section will attempt to set forth uniform roles for the two most significant Court-appointees (the *Guardian* and the *Court Examiner*), the most significant Court personnel (*Guardianship Referee or Court Attorney/Referee, and Court Analyst*) - whom, where resources permit, should comprise the minimum staff members assigned in each Judicial District's Guardianship Part - and ideal procedures to be developed and implemented by the Administrative Judge in each Judicial District based on the resources available in each Court and, in some instances, on a District-wide basis to achieve judicial *compliance* during the course of Article 81 Guardianships. *Compliance* is best defined as ensuring reporting accountability by Guardians to Court Examiners, at statutorily-defined periodic intervals, or as directed by the Court, as to the personal decisions and/or financial transactions made by the Guardian on behalf of a PING and/or IP, all ultimately approved by the Court.

Appointees and Court Personnel

Guardian:

On occasion, upon the initial filing of the Guardianship petition and before the Guardianship hearing is completed, exigent circumstances may exist which must be addressed immediately. In those cases, the Court may appoint a Temporary Guardian of the Person and/or Property for the Alleged Incapacitated Person ("AIP") / PING (Mental Hygiene Law ["MHL"] § 81.23). A Court Certified Copy of the Order Appointing Temporary Guardian shall act as the Commission. In most instances, following a hearing (MHL §§ 81.11 - 81.15), and, in the case of a PING, upon the PING's consent, the Guardianship Judge will determine whether the AIP requires the appointment of a Guardian, upon review and assessment of the criteria set forth in MHL § 81.02. In the event the appointment of a Guardian is warranted and the Guardianship Judge is satisfied as to the eligibility of the proposed Guardian to serve (MHL § 81.19), the Court will render its decision - most often, on the record immediately following the hearing - appointing the Guardian and providing the Guardian with the powers defining the Guardian's authority attendant to the PING/IP's personal needs (MHL § 81.22) and/or property management (MHL § 81.21). These powers will ultimately be set forth in the Findings of Fact, Conclusions of Law and Judgment ("Judgment") or Order & Judgment, which is typically noticed for settlement upon the parties / counsel / Court-appointees (i.e., Court Evaluator [MHL § 81.09] and/or Counsel for the AIP [MHL § 81.10]) no later than 30 days from the date the Guardianship Judge renders a decision.

Court Examiner:

In most Judicial Districts, once there has been an appointment of a *permanent* Guardian for the IP's personal needs and/or property management, the Court will appoint a Court Examiner, who is a Part 36 appointee duly-qualified under the training requirements established and promulgated by the Appellate Division governing the Judicial District where the Guardianship has been established. In essence, the Court Examiner assists the Court by monitoring the administration of the Guardian's duties and obligations to the PING/IP (MHL § 81.20). Among the critical responsibilities innate to the Court Examiner's oversight of the Guardianship is the protection and preservation of the PING/IP's personal needs and finances by ensuring the Guardian's completion of all statutory requirements imposed by the Court in the Judgment, with the guidance of the Court whenever necessary.

Guardianship Referee / Court Attorney Referee and Court Analyst:

As set forth, *supra*, when the Court Examiner ultimately requires Court intervention to attain compliance from a delinquent Guardian, there should be a structure in place in each Guardianship Court / Judicial District by which the Court Examiner is able to bring the Guardian before the Court. The primary Court personnel who are typically assigned to undertake and assist with these "quasi-judicial" responsibilities are: (i) the *Guardianship Referee*, or, in Judicial Districts where none has been designated, a *Court Attorney/Referee*, who will be authorized to supervise and, if necessary, conduct *Compliance Conferences*, at which the Court Examiner and the Guardian appear and discuss the measures required to rectify any delinquencies noted by the Court Examiner; and (ii) a *Court Analyst* (or other qualified clerical staff member), whose primary responsibilities are to: (i) interface with the Court Examiners regularly to ensure that Court support is available, when necessary; (ii) compile case rosters and pertinent information related to the Court Examiners appointed in each Court / Judicial District; and (iii) establish and schedule individual *Compliance Calendars* and conferences for each Court Examiner, which are required until each Court Examiner has gained full compliance from the Guardian in each assigned file. These calendars and conferences will also serve as the active "tracking system" for the Court's periodic review of the Court Examiner's diligence in filing Court Examiner Reports (i.e., review of Court's correspondence and other communications with the Court Examiner for updates in advance of the Court Examiner's annual Inventory Reports), which is a crucial component in the annual performance evaluation performed by the Court / Judicial District for the Court Examiner's prospective re-appointment by the appropriate Appellate Division the following year.

The role of each of these Court appointees/Court personnel and the procedures recommended to ensure compliance may vary at different phases of each Guardianship, as set forth, *infra*.

Phase I - Important Early Requirements For Guardians

The Court Examiner's oversight of the Guardianship typically commences immediately upon the Court's issuance of the Judgment (where the Court Examiner's appointment is typically set forth), as there are certain documents the Guardian must file and certain obligations the Guardian must fulfill shortly thereafter.

Commission / Designation of the Clerk to Receive Process :

Notwithstanding the Court's execution of the Judgment, the Guardian is not authorized to act on behalf of the PING/IP until the Guardian has timely filed a Designation of Clerk to Receive Process, which ensures that the County Clerk can be served with process in the event a Guardian cannot, upon diligent search, be found in New York (MHL § 81.26), and the County Clerk issues

the Guardian a Commission, which serves as documentary evidence of the Guardian's authority to act (MHL § 81.27). Court Examiners should closely monitor these filings and immediately report any delinquencies to the Court, which will then determine what, if any, additional action is necessary at that time.

Bonds:

When imposed by the Court in the Judgment, a surety bond ensures that the PING/IP's assets are protected from a Guardian's misfeasance/malfeasance (MHL § 81.25). The bond is typically set at or around the value of the PING/IP's known assets, and the County Clerk will not issue a Commission to a property management Guardian until the Guardian procures the bond.

Education Requirement:

Unless the Court waives the education requirement, all non-institutional Guardians must complete an approved Guardianship training course (MHL § 81.39) and file a certificate of proof of attendance with the County Clerk, providing a copy to the Court Examiner. Guardianship training is typically provided through virtual/on-line programs administered by bar associations and other Guardianship assistance resources and organizations.

Initial Reports:

➤ The Guardian's Initial Report is due no later than 90 days after the issuance of the Guardian's Commission (MHL § 81.30). The Initial Report should not be marked off the Court's calendar until it has been appropriately filed, reviewed and approved. It serves as the "preview" for the Guardian's first Annual Report, and should provide an overview of the PING/IP's current physical/mental condition and assets marshaled to date. Depending on when a Guardian's Commission is issued, an Initial Report serves as the Court Examiner's sole review of the Guardianship until the first Annual Report is filed, which, in some cases, could amount to over a year's time. As such, the Court Examiner must carefully review the Initial Report to ensure not only that any and all assets marshaled by the Guardian are consistent with assets previously reported in the Judgment, but also that there is full compliance with any specific directives of the Court, as set forth in the Judgment.

Phase I - Recommended Compliance Procedures:

It is the Guardian's failure to timely meet any of the foregoing requirements which will likely trigger the Court Examiner's first foray into the Compliance procedures established by the Guardianship Court and/or Judicial District.

To avoid these issues in the early stages of each Guardianship, it is crucial that the Court Examiner immediately implement a personal "tracking" system to: (i) identify the statutory deadlines attendant to each of the aforementioned filings/events; (ii) maintain current contact information for each Guardian - *especially home address of record, viable telephone number(s), and a viable e-mail address*; and (iii) regularly engage in written communications with the Guardian (perhaps on a monthly or quarterly basis) to inquire if any problems are arising in the Guardianship and, more crucially, to offer assistance to Guardians who are delinquent in these preliminary responsibilities.

Once the Court Examiner has identified a situation where there is a delinquency and has engaged in several written communications with the Guardian, to no avail, the Court Examiner should notify the Court Analyst of the delinquency and request the Court to schedule an "*ad hoc*" compliance conference for this matter.

In this respect, the virtual technology that has emerged during the Court's implementation of COVID-19/pandemic procedures are valuable means of communication in scheduling compliance conferences and holding regular compliance "calendars" (as described, *infra*) for a Court Examiner in lieu of requiring physical appearances at the Court, provided that the Court Examiner has been diligent in maintaining viable contact information of the Guardian. More specifically, the Court Analyst is able to schedule a compliance conference via teleconference or Microsoft TEAMS video conference at the mutual convenience of the Guardian and Court Examiner, sending a teleconference number or video link with instructions, while setting forth the reason for the necessity of the conference and suggestions for appropriate preparation therefor. Notably, once the conference is scheduled, a delinquent Guardian will often rectify all outstanding preliminary issues prior to the scheduled conference date, as a means of avoiding a "Court appearance".

In the event that the conference must occur, the TEAMS platform, when used, provides a virtual, non-confrontational forum for the Court Examiner to identify the delinquencies and prospective solutions, provide follow-up deadlines, and schedule subsequent telephone/video conferences before the Guardianship Referee/Court Attorney/Referee. At that juncture, if non-compliance remains, the Court Examiner has the authority to commence a proceeding for appropriate relief, including removal of the Guardian (MHL § 81.35) - a proceeding which will be heard by the Guardianship Judge and may result in monetary consequences for the Guardian.

Phase II - Annual Reports / Accountings

Assuming the Guardian meets all of the aforementioned early requirements, the Court Examiner's oversight of the Guardianship continues with the monitoring of the Guardian's next set of reporting requirements.

Annual Accountings:

Following the Court's approval of the Initial Report, the Guardian must file an Annual Report for the preceding year with the County Clerk, no later than May 31st of each calendar year (MHL § 81.31). The Guardian must provide the Court Examiner with a copy of the Annual Report and all supporting documentation (i.e., receipts, invoices, bank statements, etc.) necessary for the Court Examiner to complete an examination of the Annual Report and assess the sufficiency of its content. The Court Examiner is required to examine and confirm an Annual Report within 30 days from the date the Guardian files it.

However, if the Guardian has not filed an Annual Report by May 31st, the Court Examiner must send the Guardian a written demand and file a copy of that demand with the Court (MHL §§ 81.31, 81.32). If the Guardian does not file the outstanding Annual Report within 15 days from the date of service of the demand (see MHL §81.32), compliance proceedings should ensue.

It should be noted that, during COVID-19/pandemic protocols, while many Judicial Districts adopted the use of e-filing for the submission of Guardian's reports/accountings, uniformity in this practice has not yet been achieved, due, in part, to logistical issues of sharing e-filed documents between/among counties located in the Judicial Districts which administer compliance procedures in multiple counties. Until uniformity is ultimately achieved in this procedure, Court Examiners should continue to be aware of and monitor the filing process being administered in the counties where they have received assignments.

Annual Visitation Requirements:

The Guardian is required to visit with the PING/IP no less than four (4) times per calendar year, or more frequently as may be specified by the Court (MHL § 81.20). Since it is preferred that visits should occur periodically during the calendar year and not over one brief period, the Court Examiner should require the Guardian to include any actual dates of visitation in the Guardian's Report, unless the PING/IP resides with the Guardian, in which case compliance with visitation is assumed. In this respect, visitation which has occurred virtually/electronically during the COVID-19 pandemic has served as a viable means of meeting these visitation requirements, and the Court Examiner will be required to report whether, in the Court Examiner's discretion, the Guardian met the statutory visitation requirements.

Phase II - Recommended Compliance Procedures:

In the event of the Guardian's non-compliance with the Annual Reporting process, the Court Examiner must be prepared to move forward with the compliance procedures established by the Court/Judicial District.

To effectively undertake the compliance procedures for delinquent Annual Reports, it is suggested that, no later than a deadline established by the Court/Judicial District (typically no later than June 30), the Court Examiner communicate with the Court Analyst to: (i) identify all cases (*by PING/IP Name / County-Index #*) for which the Annual Report has not yet been filed, with specific reference to the reason(s) for non-compliance (i.e., no report filed; improper format; lack of adequate documentation, etc.); (ii) provide the Court Analyst with the Court Examiner's unsuccessful documentary requests for compliance; (iii) request a monthly date/time for the Court Analyst to set an individual compliance calendar for each Court Examiner to appear before the Guardianship Referee or Court Attorney/Referee with any delinquent Guardian (and/or, if applicable, counsel for the Guardian); and (iv) cooperate with the Court Analyst by providing the Court Analyst with pertinent information for each Guardian (*i.e., name, viable telephone numbers and e-mail addresses*) to schedule the compliance calendars, which should be held via teleconferences/TEAMS video conferences on the designated dates/times.

In advance of a scheduled compliance calendar, it is incumbent upon the Court Examiner to communicate with each delinquent Guardian (and, if applicable, the Guardian's counsel), to attempt to achieve compliance prior to the calendar date. Again, with diligence (and a looming Court appearance), the Court Examiner will often achieve success in advance of the calendar. Regardless of pre-calendar success or failure, in advance of the compliance conference, the Court Examiner should apprise the Court Analyst (or the Guardianship Referee/Court Attorney) of any updated information regarding the status of any matters that have been scheduled, so as to maximize the efficiency of the Court's resources in assisting the Court Examiner in conducting these conferences. The Court should not relieve the Court Examiner of any obligation to conduct and appear at a monthly compliance conference until all matters are brought into full compliance, or are otherwise before the Guardianship Judge, for good cause.

Often, requests are made by the Guardian for an adjournment of a scheduled compliance calendar. These requests for an adjournment - which should be in writing (including fax, e-mail requests) - should be presented to the Court solely through the Court Examiner, and the Guardianship Referee and/or Court Attorney/Referee should evaluate these requests based on all circumstances presented, with the length and history of non-compliance typically remaining the crucial factor in determining whether to grant the requested adjournment.

In the event that the Guardian (with or without counsel) must appear at a scheduled compliance conference, the Court Examiner will identify and discuss the deficiencies in the method/format of reporting and/or documentation furnished with an incomplete Guardian's report or other pertinent reasons for non-compliance, and reset an appropriate deadline for filing an Annual Report. It is suggested that if the Guardian is required to appear for three successive monthly compliance calendars without achieving compliance, absent extraordinary circumstances, the Court Examiner will need to commence a proceeding for appropriate relief, including removal of the Guardian (MHL § 81.35), which will be heard by the Guardianship Judge and may result in monetary consequences for the Guardian.

Phase III - Intermediate and Final Reports

Assuming the Guardian meets all of the aforementioned requirements, the Court Examiner's oversight of the Guardianship concludes with the monitoring of the Guardian's filing of an Intermediate / Final Report (MHL § 81.33), which occurs upon: (i) the resignation, removal or death of a Guardian; (ii) the termination of a Guardianship due to changed circumstances by which the PING/IP no longer requires a Guardian (MHL § 81.36); or (iii) most commonly, upon the death of the PING/IP (MHL § 81.44).

In the event of the resignation, removal or death of the Guardian, the Court Examiner must ensure that a Final Report has been filed by or on behalf of the former/deceased Guardian, and the Guardianship assets on hand are properly transferred to and secured by the Successor Guardian appointed by the Court. In the case of the termination of the Guardianship due to changed circumstances by which the PING/IP no longer requires a Guardian (MHL § 81.36), the Court Examiner must ensure that a Final Report has been filed by the Guardian, and that the Guardianship assets on hand are properly transferred to the PING/IP. In some jurisdictions, a referee is appointed to hear and report on final accounts for matters where the guardianship is terminated for reasons other than the death of the PING/IP.

In the event of non-compliance in either of these two situations, the scope of the Court Examiner's duties and available Compliance procedures are handled as described, *supra*, in Phase I of the Guardianship, as the Court Examiner first actively pursues compliance from the former Guardian (or a designee reporting on behalf of a deceased Guardian) and, having failed to gain compliance, then invokes the "*ad hoc*" Compliance procedures with the Court, through the Court Analyst, Guardianship Referee or Court Attorney / Referee.

Upon the death of a PING/IP, the Court Examiner must ensure that the Guardian has fulfilled several specific obligations: (i) within 20 days of the date of the PING/IP's death, the filing of a Statement of Death; (ii) within 150 days of the PING/IP's death, the filing of a Statement of Assets and Notice of Claim and delivery of all Guardianship property not retained to secure satisfaction of the administrative costs of the Guardianship to a duly-appointed representative for the PING/IP's estate or, if none has been appointed, the Public Administrator or Chief Fiscal Officer of the County of the deceased PING/IP's domicile; and (iii) within 150 days of the PING/IP's death, the filing of a Final Report, on notice to those entitled thereto (MHL § 81.44).

In some Counties/Judicial Districts, upon receiving the Guardian's notification of the PING/IP's death, the Court Examiner will make an *ex parte* request for the Guardianship Judge to sign an Order by which the Court confirms its receipt of documentary evidence of the PING/IP's death (i.e., a Death Certificate or the Statement of Death ultimately required to be filed under MHL § 81.44[c]), and sets forth the Guardian's responsibilities as to the "150-day" requirements under

MHL §§ 81.44 (d), (e) and (f) to, *inter alia*, (i) file a Statement of Assets and Notice of Claim and delivery of all Guardianship property not retained to secure satisfaction of the administrative costs of the Guardianship to duly-appointed estate representative for the PING/IP's estate or, if none has been appointed, the Public Administrator or Chief Fiscal Officer of the County of deceased PING/IP's domicile; and (ii) file the Final Report, on notice to those entitled to receive notice thereof. This Order is extremely useful, inasmuch as it provides an explicit notice to the Guardian of the responsibilities entailed in finalizing the Guardianship, and also serves as an initial component of the active role the Court Examiner must assume to ultimately ensure the Guardian's compliance with those responsibilities. It is recommended that the Guardianship Courts adopt, as a uniform procedure, the implementation of an Order of this nature, along with a compliance calendar for Final Orders in conjunction with each Court Examiner receiving appointments, to gain the most stringent oversight and the highest likelihood of compliance at this stage of the Guardianship.

As a practical matter, in many cases, the statutory period of 150 days is not a sufficient period of time for a Guardian to complete all of the statutory requirements. Accordingly, the Court Examiner must assume the responsibility of monitoring this post-mortem period, and be prepared to immediately report any delinquencies to the Court. The scope of the Court Examiner's duties and available compliance procedures will be handled as described in Phase I of the Guardianship. The Court Examiner will first actively pursue compliance from the Guardian and, if unable to gain compliance, will then invoke the "*ad hoc*" compliance procedures with the Court, through the Court Analyst, Guardianship Referee or Court Attorney/Referee. The Court Examiner should continue to undertake the applicable compliance procedure until all of the statutory requirements are met, so that the Court Examiner is able to complete and file a Final Examiner's Report, and have the Court render its Final Order.

Phase IV - Ex Parte Orders and Inactive/Abandoned Cases

Subsequent to the Court's issuance of its Final Order, the final step leading to the Court's ultimate discharge of the Guardian (and any surety for a bond imposed) is the Guardian's submission of an Ex Parte Order, which the Guardian files for the Court's review, along with documentary evidence of the Guardian's disposition of Guardianship assets remaining on hand, as set forth in the Final Order.

Notably, once the Court signs the Final Order, the Court Examiner is not required to be involved in this final stage of compliance. While certain Guardianship Courts and Judicial Districts have requested Court Examiners to track their files through the Guardian's submission of the *Ex Parte* Order and attendant documents, there is no statutory mandate to require the Court Examiners to do so. It is suggested that the Legislature consider an amendment to the applicable statutes governing the Court Examiner's duties to mandate this oversight, to alleviate the burden on the Guardianship Court's staff to do so.

In any event, until the Guardian complies with these outstanding matters, it is suggested that, within the Final Order, the Court set forth an "ORDERED" paragraph, requiring the Guardian to provide documentary proof that the requirements of disposition/turnover of assets have been fulfilled by the filing of an Ex Parte Order by the stated deadline (typically 60 days following the entry of the Final Order), or else the Guardian will be subject to appear at a designated Ex Parte Compliance Calendar that the Court should establish once per month. These monthly calendars should require virtual appearances before the Guardianship Referee or Court Attorney/Referee, at which time the Guardian will be provided with guidance, if necessary, and a deadline by which to fulfill these *Ex*

Parte obligations.

Finally, it is strongly suggested that, in the event a Guardian has failed to appear at/achieve compliance with these *Ex Parte* obligations after three successive *Ex Parte* compliance calendars, the Court enter an ***Order of Abatement***, with service being effectuated upon all necessary parties, pursuant to which the Guardianship is deemed terminated and/or abandoned, and the Guardian is explicitly not discharged from any liability as to the Guardian's stewardship of the now-deceased PING/IP's assets. The implementation of this procedure would prevent many cases from remaining on the Court's docket indefinitely, and allow any parties aggrieved by the Guardian's failure to fulfill these *Ex Parte* obligations to explore an appropriate remedy against the Guardian (and, where applicable, the surety) in an appropriate forum.

Periodic reviews of Guardianship inventories should be conducted by the Court Examiner and the Court's staff to identify cases which may be abandoned. In this respect, some simple but effective measures can be adopted by Court Examiners and the Court to ensure that cases do not become abandoned/inactive at critical junctures.

For instance, the Court Examiner and the Court can develop a tracking system to follow cases after the filing of a Final Accounting has been directed to ensure that Final Accountings are filed timely. A tracking calendar approximately 60 - 90 days after direction to file the Final Accounting is suggested.

⑧ Additionally, the Court Examiner and the Court can track cases after approval of a Final Accounting to ensure that a discharge order has been filed. A tracking calendar of approximately 60 - 90 days after the Court's approval of the Final Accounting is suggested.

In sum, tracking cases for compliance at these two important junctures is critical in reducing the number of potentially abandoned/inactive cases on the Guardianship docket.


II

CONTINUING LEGAL EDUCATION (CLE)

A. Training for Part 36 Appointees:

1. The cost of mandatory training serves as a barrier to recruiting and retaining Part 36 appointees. By reimbursing appointees for the cost of mandatory training (as New York State already does for criminal defense attorneys who participate in the 18-b program), the State can remove this barrier in a manner that would be far more cost-effective than hiring additional institutional providers to fill the gap caused by a lack of qualified Part 36 appointees;
2. The quality of the representation, independent evaluation, and Guardianship services that the vulnerable MHL article 81 population receives will be vastly improved if additional, practical training opportunities are provided, such as a State-funded "mentoring" program, pairing experienced Part 36 appointees with novice appointees or appointees who need extra support or remediation (similar to the "mentoring" program that the State already provides for criminal defense attorneys who participate in the 18-b program);
3. Each Judicial District should sponsor informal programs, held in individual courthouses or virtually *via* TEAMS, including "meet and greet" functions hosted by the Guardianship Judges and Court staff; and
4. Add post-judgment compliance education to the Part 36 training curriculum, consistent with the practices and requirements of each jurisdiction.

B. Training for Court Personnel:

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1. MHL article 81 programs should be provided more frequently by / through the New York State Judicial Institute (either in-person or virtually); and
 2. There should be an additional MHL article 81 curriculum established and presented during educational seminars for new judges and at summer judicial conferences, and these separate conferences should then be made available for "on-line" training purposes.

C. Guardianship Roundtables / Database for Unpublished Decisions:

There should be reinforcement of the recommendations of the 2005 Task Force for Guardianship Judges to:

1. Maintain a regular schedule of roundtable discussions on at least a quarterly basis; and
2. Forward noteworthy decisions which they consider instructional to Mental Hygiene Legal Service ("MHLS") for posting on the Guardian and Fiduciary Services website (<http://www.nycourts.gov/ip/gfs/LandingCollected.shtml>).

III

COURT EXAMINER COMPENSATION

Overview/Introduction

By Order dated May 29, 2019 [effective June 3, 2019], Presiding Justice Alan Scheinkman implemented a schedule of increases for Court Examiner and Accounting fees in the Second Judicial Department - increases that were generally recognized as long overdue. The previous schedule of Court Examiner and Accounting fees had remained fixed since 2005.

In furtherance of those compensation adjustments, the Task Force Sub-Committee on Compensation for Court Examiners was charged with formulating a series of recommendations with the intent of improving and expanding the changes implemented by Presiding Justice Scheinkman in 2019.

In this respect, input was solicited from various Article 81 Guardianship professionals engaged as Court Examiners, Court Evaluators, Guardians and Attorneys who regularly serve as Attorneys for AIPs - input that was subsequently formalized in roundtable discussions, and further supplemented by post-roundtable submissions and commentary.

While the central focus of the discussions related to issues of Court Examiner compensation, there was universal recognition that issues of adequate Court Examiner compensation are closely intertwined with, and dependent upon, others areas being addressed by the Task Force - i.e., Uniform Practices and Procedures, Compliance issues, CLE considerations, and the ability of Lay Guardians to discharge their duties in a timely and competent matter, particularly where property Guardianships involve complex financial issues.

In formulating its 2005 Report, the Second Department's Guardianship Task Force recognized and concluded that while the Article 81 structure must be sensitive to practices and procedures that unnecessarily deplete an IP's assets, increases in compensation are, nevertheless, necessary in order to ensure not only that quality Court Examiners are retained, but also that newly-qualified Court Examiners are attracted to this area of practice. Those considerations and objectives remain just as compelling today.

Compensation

Building upon the 2005 recommendations, and the 2019 amendment to the Court Examiner and Accounting Fee Schedules, it is recommended that the issue of ensuring adequate compensation for Court Examiners be addressed through a pragmatic, two-pronged approach:

1. By the systematic implementation of a schedule of periodic increases to the Court Examiner and Accounting Fee Schedules - increases which provide for, and implement, automatic adjustments that take into account inflationary factors; and
2. By ensuring that Court Examiners are awarded additional compensation for additional services rendered [separate and distinct from the accounting function] - services necessitated by a variety of issues they are forced to confront, including, but not limited to: enforcement, compliance, and/or the removal of a Guardian for malfeasance or misfeasance.

Court Examiner and Accounting Fee Schedules

As previously noted, the schedule of increases implemented by Presiding Justice Scheinkman in the May 29, 2019 Order constituted the first such adjustment in 14 years and amounted to a compounded inflationary adjustment of approximately 1.8% per year.

Accordingly, the Task Force recommends the following:

1. That future increases/adjustments to the Court Examiner and Accounting Fee Schedules be implemented automatically at defined intervals (3 to 5 years), at least for a defined period of time, pending further re-assessment and review regarding the adequacy of the compensation levels;
2. The scheduled increases/adjustments mirror the model implemented by Presiding Justice Scheinkman in the 2019 adjustment;
3. The designated benchmark adjustments/increases, when implemented, computationally equate to either a 1.8% annual increase or a cost of living increase derived from an analysis of the consumer price index (CPI) for the preceding defined adjustment period, whichever is greater; and
4. The provisions for automatic periodic increases not remain open-ended. Such increases should be subject to further re-assessment and re-evaluation concerning the adequacy of the compensation and fee schedules, with such reassessment being undertaken at no less than 10-year intervals.

Utilization of the 2019 Schedule, coupled with the prospective periodic adjustments for inflation, should provide an adequate framework within which Court Examiners can perform their core duties (i.e., the review, analysis and approval of Guardianship reports and annual accountings) and be adequately compensated for the discharge of these essential duties.

Compensation for Additional Services

The issue of awarding Court Examiners additional compensation for services rendered above and beyond their core duties is, and remains, an area of concern. This issue becomes considerably more acute when dealing with lay Guardians, particularly in situations where a property Guardian is entrusted with the management of assets of significant value and where the composition of those assets may be considerably more complex.

This concern touches upon three core considerations:

1. The applicable standard to be applied in awarding such additional compensation;
2. The procedural posture for the application - i.e. should it be routinely presented to the Court that conducted the hearing, considered the Court Evaluator's Report, and issued the original Judgment, or at the District level as a compliance matter; and
3. The level of scrutiny that should be employed at the hearing/trial level - even if a hearing must be delayed - to ensure that the capability and qualifications of the Guardian are commensurate with the level of complexity of the Guardianship.

Ensuring that the Guardian's Reports are timely filed and are complete remains a paramount and time-consuming issue for Court Examiners. In fact, the prevailing view is that, in many instances, the services rendered and the time expended by the Court Examiner in ensuring the Guardian's compliance is not only separate and distinct from the time actually expended in conducting the core duties of review, analysis, and approval of the accountings themselves, but also that such services invariably become more time consuming and, in most instances, are uncompensated. Yet, there is also a commonly held, contrary belief that such additional services should not be labeled as "extraordinary" in nature, since these services are typically undertaken by the Court Examiner to either compel or ensure the Guardian's compliance with applicable reporting requirements and the proper discharge of fiduciary duties.

As a practical matter, while uniformity of Guardianship practice and procedure is sought and encouraged throughout the Second Judicial Department, the reality is that Guardianship administrative structures differ widely among the Judicial Districts and, in some instances, among the counties within those Districts - a divergence that is particularly acute when comparing urban and rural Counties. Thus, the establishment and/or implementation of uniform practices and procedures for the filing of such applications may be more appropriately reserved for each respective Judicial District.

To that end, the Task Force recommends the following:

1. Requests by the Court Examiner for additional compensation, which emanate from additional services that are rendered and necessarily incurred to ensure or to compel compliance by the Guardian should be routinely permitted and considered;
2. Applications for additional compensation should be evaluated by utilizing generally recognized standards - the time and labor expended, the complexity of the issues presented, the fees customarily charged, the nature of the services rendered (i.e., whether the services rendered were legal or ministerial in nature, which in turn drives the appropriate compensation rate) and whether the services rendered were "necessarily incurred";
3. The Court Examiner should be granted, to the extent possible, the option of filing such fee applications, on notice to the Guardian, with either the Court that conducted the initial hearing (the "Trial Court") and issued the original appointment order/judgment, or at the District level - as a matter of compliance - consistent with the administrative structure, practices and procedures established by each particular Judicial District; and
4. To the extent that the Court Examiner must commence an enforcement and/or removal proceeding necessitated by the Guardian's non-compliance, adjudication of both the enforcement/removal proceeding and the Court Examiner's companion application for additional compensation should, in the interest of judicial economy, be tried before the Trial Court, and District-wide practices and procedures should be developed and implemented consistent with that consideration.

Further Observations:

Implicit in the development and issuance of these recommendations is the Task Force's view that the Trial Court is the preferred venue for the adjudication of these issues and for the consideration and approval of the Court Examiner's application for additional compensation.

The Trial Court, which conducted the initial hearing and made the initial appointment, is typically in a better position to determine, within the context of such a proceeding, whether further guidance - including a more detailed mechanism for compliance - should be provided for the Guardian or whether surcharge and/or removal constitutes the more appropriate remedy. Such scrutiny and curative action by the Trial Court should serve the added benefit, in most instances, of ameliorating the necessity for (and the number of) prospective applications of this nature by the Court Examiner.

Furthermore, while possibly viewed as a self-evident dynamic, the Trial Court's role in determining the level and sophistication of the Guardianship and whether the proposed guardian is capable of assuming the task is an important one. Indeed, a common and recurring theme of the Court Examiners surveyed by the Task Force revealed that non-compliance and enforcement issues (and, thus, the necessity of rendering additional services and fee applications) are typically driven not by the Guardian's unwillingness or refusal to comply, but by the Guardian's inability or lack of expertise - a recurring and glaring dynamic particularly with lay Guardians.

IV

GUARDIAN COMPENSATION

A plan of compensation should be set at the time of the appointment of a Guardian. The compensation plan may be modified by further Court order, due to a change in circumstances, which might include a depletion/increase of the IP's assets.

A plan of compensation may be set in one of the following ways:

1. Annual Commissions, based upon a formula derived from the Surrogate's Court Procedure Act Section 2307 or 2309;
2. *Quantum meruit* for specific hours worked, which must be supported by an Affirmation of Services; (Note that the hourly rate of pay should be set by the Court and should be less than the rate set for attorney's fees. The last published rate of \$90/hour was contained in the 2005 Guardianship Task Force's Report. A current recommended rate would be in the range of \$130-150/hour.); or
3. A monthly stipend, based upon the IP's needs and financial means.

In all cases, the Guardian may apply for additional compensation based upon "extraordinary circumstances." This should be done on a case-by-case basis, and awarded only upon prior Court approval.

There are some distinct advantages for using stipends when setting fees for Part 36 Guardians, Community Guardians and Not-for-Profits Guardians. If the IP has monthly income or significant assets, not including Social Security, some of those funds can be earmarked for the Guardian at the inception of the Guardianship. Stipends provide a consistent stream of income for professional Guardians and avoid the delay of waiting for commissions to be paid out on an annual basis. Payment by stipend, as opposed to commission, also ensures a professional Guardian's compensation will not be depleted as Guardianship assets are spent down. Stipends can be set to reflect the actual work being done, which avoids a potential windfall for the Guardian in Guardianships where there are significant assets and helps to preserve the IP's assets. Also, stipends may sometimes not be considered an "available asset" when a local Medicaid coordinator (i.e., New York City HRA, a county DSS, etc.) is calculating Net Available Monthly Income ("NAMI"). Municipalities which fund Community Guardians and Not-for-Profits will be better able to budget their costs going forward when predictable stipends are used. Stipends can also be adjusted throughout the Guardianship process. For example, a stipend can be set at a higher rate for the first six months when the bulk of the transitional work is undertaken. It can then be reduced to a "maintenance" rate thereafter (e.g. \$750/ month for the first 6 months and \$450/month thereafter). Finally, the use of stipends avoids the time-consuming procedures involved in assessing appropriate *quantum meruit* payments and ensuring the accurate calculation of commissions by the Court Examiner and verification by the Court's staff.

Each case is unique, and the available assets of the IP must be considered in conjunction with the tasks that must be undertaken by the Guardian to ensure that the IP is safe and secure.

V

DUTIES OF THE GUARDIANSHIP REFEREE

In 2005, the Guardianship Task Force of the Second Judicial Department acknowledged the need for active Guardianship case management - particularly the need for additional oversight in monitoring compliance with post-judgment Guardianship orders and statutory requirements. In order to address these needs, the Task Force recommended the creation of the position of Court Examiner Specialist. As a Court Attorney-Referee, the Court Examiner Specialist would have the requisite authority to conduct post-judgment compliance conferences. Additionally, the Court Examiner Specialist would serve as a direct link between the individual Court Examiners, Guardians, and the appointing Court. Through its District Administrative Judge, each Judicial District would choose whether to utilize the Court Examiner Specialist or other member of the Court's staff to actively monitor compliance. At that time, most, if not all, of the Judicial Districts within the Second Judicial Department retained a Court Examiner Specialist - now referred to as the Guardianship Referee.

Over 15 years after the initial Guardianship Task Force's recommendations, the need for continued oversight of post-Judgment Guardianship orders and monitoring compliance remains strong. Currently, while several Judicial Districts have an assigned Guardianship Referee or Judicial Hearing Officer ("JHO") to monitor compliance with post-judgment Guardianship orders and statutory requirements, some of the Judicial Districts no longer have a individual or JHO fulfilling the oversight functions typically assigned to a Guardianship Referee/JHO, causing, in some instances, oversight inconsistencies and backlogs. As our predecessor did, this Guardianship Task Force recommends that all Districts in the Second Judicial Department designate a Guardianship Referee or JHO to monitor the timely filing and review of accountings and reports, along with other post-judgment statutory requirements for Guardians and Court Examiners.

As previously indicated in the Compliance section of this Report, the Guardianship Judge's signing of the final Order and Judgment appointing the Guardian marks the beginning of years and, in some instances, decades of Court oversight and monitoring of many Guardianships. The initial step in such monitoring occurs by the Court Examiner - the "eyes and ears of the Court" for compliance issues - to ensure that the personal needs and finances of PINGs/IPs are being adequately protected. Indeed, the primary responsibility of the Guardianship Referee/JHO is to ensure that the Court Examiners are monitoring the filing of the Guardian's accountings and reports, and that these accountings and reports are timely reviewed and evaluated by Court Examiners.

In this respect, as recommended in the Compliance section of this Report, the Guardianship Referee/JHO should be empowered to conduct compliance conferences. Moreover, since the issues that arise during these conferences may be complex, it is imperative that any person designated as Guardianship Referee/JHO must have a background in Article 81 Guardianship practice and procedures. Indeed, as the volume of Guardianship cases continue to grow, and the myriad issues that develop post-Guardianship hearing continue to do so as well, a majority of these issues can be and, in fact, are often resolved by the Guardianship Referee / JHO at these conferences, thereby avoiding further congestion of the Guardianship Judge's calendars. More importantly, the earlier any irregularities are detected and addressed by the Guardianship Referee/JHO, the more likely it is that harm to the PING/IP can be prevented.

It is also crucial that the Guardianship Referee/JHO remain readily available to assist the Court Examiner in obtaining compliance from the Guardian when compliance conferences prove to be ineffective. In this respect, since the Court Examiner is vested with the authority to serve demands/requests on the Guardian for any failure to comply with statutory and/or Court-mandated requirements, the Court Examiner should immediately report to the Guardianship Referee/JHO any failure by the Guardian to comply with any prospective demands/requests.

Finally, each County should establish procedures by which the Guardianship Referee/JHO reports to the Guardianship Judge any continued failures by Guardians and, when applicable, by Court Examiners, to comply with the Guardianship Referee/JHO's post-judgment compliance conference directives, so that the Guardianship Judge can determine if the parties should be required to appear. While the Guardianship Referee/JHO may conference this matter with the Guardian and the Court Examiner prior to seeking judicial relief, the Guardianship Referee/JHO should ultimately apprise the Guardianship Judge assigned to the matter of any non-compliance by either the Guardian or the Court Examiner, as the ultimate responsibility of ensuring compliance lies with the Guardianship Judge - not the Guardianship Referee/JHO. In this process, the Guardianship Referee/JHO must remain mindful that, in accordance with the Rules of the Chief Administrative Judge with respect to Referees, orders directing compliance must be signed by a Guardianship Judge, and at no time should an order be issued by anyone other than the Guardianship Judge presiding over the case in question.

VI

GUARDIANSHIP UNIFORM PRACTICES AND PROCEDURES

In order to insure uniformity, consistency and judicial economy, it is recommended that a set of uniform Article 81 forms and orders be established, expanded and maintained in an online database. This will result in increased efficiency for both the Court and the practicing bar, as well as potentially decreased costs to be borne by an IP's estate. Uniform forms would also serve as a starting point for legal practitioners, ensuring that both novice and seasoned Guardianship practitioners present proper applications and orders for the Court's consideration.

Recognizing that the different counties and Judicial Districts within the Second Judicial Department vary with respect to caseload, resources, staffing, and numerous other factors, it is recommended that each Judicial District within the Second Department develop a set of uniform forms and orders. More specifically, each Judicial District should form its own Committee to expand the uniform form applications and orders currently available on their respective websites. It is recommended that these Committees should complete the expansion of their respective online forms within 90-120 days from their formation.

Additionally, it is recommended that Judicial Districts which share geographical proximity and Guardianship practitioners (i.e., Kings [Brooklyn], Queens and Richmond [Staten Island] Counties in New York City, and within the Ninth Judicial District [Westchester, Putnam, Rockland, Orange and Dutchess Counties]) designate a liaison from their Committees to compare and contrast their respective sets of uniform forms with those being promulgated in other Judicial Districts and Counties, with the ultimate goal of promoting as much similarity and uniformity as possible between and among those particular Judicial Districts.

While individual Guardianship Judges would retain the discretion to make changes to a form order, as warranted by the facts and circumstances of a particular case, the submission of these uniform applications and orders should be accepted, as long as they are properly completed and filed by the Court user.

Below is a list of websites and/or sample applications and forms currently available to the general public in the First and Second Judicial Departments:

FIRST JUDICIAL DEPARTMENT (included for reference only)

New York County [Manhattan]:

General:

- Order and Judgment;
- Initial Report (with instructions);
- Annual Report;
- Simplified Annual Report for Guardianships of \$100K or less;
- Short Form Application to Authorize Expenditures (with Court Examiner Approval line);

Release/Discharge Guardian:

Petition;
Order Waiving Filing of Formal Account;
Order Discharging Guardian and Surety;
Consent to Informal Account.

Final Report:

Order To Show Cause - Settle Final Report;
Verified Petition to Settle Final Accounting;
Final Account Verification;
Statement of Death;
Statement of Assets - Notice of Claim;
Final Report (Sample);
Order Settling and Approving Final Report;
Affidavit in Support of Discharge of Guardian and Cancellation of Bond;
Order Discharging Guardian and Surety;
Instructions for Submission of a Proposed Order Discharging Guardian and Surety.

Bronx County:

General:

Initial Report;
Annual Accounting / Report;
Final Accounting / Report;
Ex Parte Application for Approval of Secondary Fiduciary Appointment;
Article 81 Judgment.

SECOND JUDICIAL DEPARTMENT

2nd Judicial District - Kings County [Brooklyn]:

Website: <http://ww2.nycourts.gov/courts/2jd/kings/civil/guardianship.shtml#sampleform>

General:

Instruction Sheet for Petition for Appointment of Guardian;
Sample Notice of Guardianship Proceeding for Appointment of Guardian;
Order to Show Cause for Appointment of Guardian;
Order and Judgment (with instructions and separate checklist);
Commission to Guardian;
Oath and Designation;
Initial Report - Sample;
Annual Report - Sample;
Annual Report - Sample for Guardian of the Person only .

9th Judicial District (Westchester, Rockland, Putnam, Orange, Dutchess Counties):

Website: <http://ww2.nycourts.gov/courts/9jd/guardianship.shtml>

General:

Application to Activate Standby Guardian;
Application to Retain Professionals - Part 36;
Application to Retain Professionals - Part 36 - Order
Ex Parte Order;
Guardian's Annual Accounting;
Guardian's Final Accounting;
Guardian's Initial Report;
Notice of Article 81 Proceeding with Order To Show Cause and Petition;
Notice on Final Accounting;
Order Activating Standby Guardian;
Judgment;
Simplified Accounting Questionnaire;
Statement of Death;
Statement of Real Property;

10th Judicial District



Nassau County:

Website: <http://ww2.nycourts.gov/COURTS/10JD/nassau/guardianship.shtml>

General:

Initial Report;
Annual Report of Guardian for Personal Needs Only;
Annual Report for Guardian of Property Management & Personal Needs;
Designation;
Statement Identifying Real Property.

Suffolk County:

Website: <http://ww2.nycourts.gov/COURTS/10jd/suffolk/supreme.shtml>

General:

Commission to Guardian Form .

Other sample forms not posted on the website, but available from the Court:

Order to Confirm Sale;
Order Discontinuing Guardianship;
Order Settling Final Account;
Order to Show Cause;

Poor Person Application;
Order and Judgment;
Short Form Application;
Temporary Guardian Template;
Affirmation in Opposition with Cross Motion;
Affirmation in Opposition;
Annual Account;
Bond Sample;
Commission;
Designation and Consent;
Final Account by Decree;
Final Account by Motion;
Fee Application;
Initial Report;
Order Approving Sale of Real Property.

11th Judicial District - Queens County :

Website: ww2.nycourts.gov/courts/11jd/supreme/civilterm/guardianship.shtml

General:

Guardian's Initial Report;
Guardian's Annual Accounting;
Short Form Application/Order .

13th Judicial District - Richmond County [Staten Island]:

Website: <http://ww2.nycourts.gov/courts/13jd/Gaurdianship.shtml>

General:

Annual Accounting;
Initial Report .

VII

COURT EVALUATORS

As explained in the prior Guardianship Task Force's Report, the Court Evaluator plays an integral role in an Article 81 proceeding. It is the Court Evaluator who conducts the initial investigation of the AIP's circumstances in advance of the proceeding. The Court Evaluator is able to meet with the AIP in the AIP's own surroundings, and also meets with the parties and the AIP's family members. The testimony and report of the Court Evaluator not only provide the Court with an unbiased view of the AIP's capacity and the propriety of the appointment of a Guardian, but also assists the Court in defining the issues that must be addressed at the hearing and the proper assessment of the AIP's resources and finances, thus ensuring the proper marshaling of the AIP's assets. In the past few years, administrative and logistical issues have arisen that require some changes to be promulgated by the Office of Court Administration (OCA) attendant to the Court Evaluator's appointment.

Accordingly, the following are recommendations of this current Guardianship Task Force.

Sealing and Distribution of the Reports of the Court Evaluator:

As a result of the health pandemic, e-filing was extended to documents filed in Article 81 proceedings. The implementation of e-filing has simplified access to all documents filed in a Guardianship proceeding - including the Court Evaluator's Report. However, since the Court Evaluator's Report always contains confidential and personal medical and financial information pertaining to the AIP, it is recommended that any Court Evaluator's Report filed via e-filing be deemed automatically sealed, requiring permission of the Guardianship Judge for the parties/counsel to view. It should be noted that Article 81 vests the Guardianship Court with the discretion to determine if any portion of the Court Evaluator's Report should even be disclosed to any parties / counsel in the proceeding. Accordingly, until such time as the Court Evaluator's Report is required to be automatically sealed upon filing, each Court should review the information contained within a Report, then assess whether the Report should be sealed *ab initio*.

As to which parties the Guardianship Judge may ultimately distribute the Court Evaluator's Report, it is clear that this decision is currently left to the discretion of the Guardianship Judge. While the Guardianship bar has expressed its understanding that each Guardianship Court may have its own policies regarding the exchange of the report, it has asked - and the Task Force recommends - that each individual Guardianship Court set forth and publish a policy as to its distribution of Court Evaluator Reports, so that counsel may better prepare for the Guardianship hearing in any given matter.

Alternate Dispute Resolution ("ADR"):

A large number of Guardianship proceedings involve disputes among family members. These disputes, which are readily identified by the Court Evaluator, generally have a negative impact on an AIP. Since OCA has greatly expanded its use of ADR in civil proceedings, ADR should be implemented in Article 81 proceedings, where appropriate, to address these common disputes. Accordingly, it is recommended that the Court Evaluator be required to identify what disputes might

appropriately be resolved by ADR, as the early identification and resolution of these disputes would be beneficial to both the AIP and the Guardianship Court in making its ultimate determination.

Recruitment of Court Evaluators with Diverse Backgrounds:

The Second Judicial Department has jurisdiction over some of the most ethnically-diverse communities in our country. Accordingly, Guardianship Judges should strive to recruit Court Evaluators from a wider array of cultural and ethnic backgrounds - particularly prospective Court Evaluators who are fluent in languages other than English. Unquestionably, a Court Evaluator with personal knowledge and understanding of an AIP's cultural beliefs and customs will render a more complete and accurate evaluation of an AIP, by affording the Court Evaluator a better opportunity to cultivate the trust of the AIP, as well as to understand any unique family dynamics present in the AIP's life. Moreover, the AIP would benefit if a Court Evaluator spoke the same language as the AIP, as Court Evaluators rarely have access to an Interpreter outside of the actual Guardianship hearing. Indeed, the inability of the Court Evaluator to communicate with the AIP in the AIP's native language can unduly impede the Court Evaluator's investigation in many respects, including the accuracy of the information the AIP ultimately discloses to the Court Evaluator.

Provide Access to Language Interpreting Services:

Since the Court Evaluator's investigation occurs outside of the courtroom, communicating with an AIP, the AIP's family members, or other necessary parties that do not speak English can impede the Court Evaluator from obtaining information that could prove to be vital to the Guardianship Judge's determination. Since it is unduly burdensome on the Court Evaluator to retain an Interpreter while conducting an investigation, it is recommended that OCA arrange for any Court Evaluator appointed to be provided immediate access to interpreting services - telephonically or via TEAMS video technology - for the duration of the Court Evaluator's investigation.

Recruitment of Court Evaluators with Diverse Work Experience:

Although the majority of Court Evaluators traditionally have been attorneys, Guardianship Courts are increasingly looking to individuals in other professions to assist in cases where a specific expertise is warranted. It is not unusual to see the Guardianship Judge look to nurses, social workers, mental healthcare professionals, teachers and numerous other professionals to assist in properly evaluating a case. Guardianship Judges are encouraged to adopt the practice of appointing a Court Evaluator who is not an attorney more frequently, where appropriate.

VIII

PRO BONO GUARDIANS

All jurisdictions are facing increasing difficulties in finding attorneys who are willing to serve as Guardians in Article 81 cases, especially where the AIP has little or no funds available to pay a Guardian for long-term appointment. Accordingly, this Task Force encourages Guardianship Judges to consider more appointments of professional non-attorneys to serve as Guardians of both the Person and Property of an AIP.

The experience of the 10th Judicial District (Nassau and Suffolk Counties) may be illustrative. Upon receiving a grant from the New York State Department of Health (through the office of then-State Senator Kemp Hannon), each county received \$250,000.00, to create a pilot program to address the shortage of attorney/Guardians in their communities. The programs are distinct in their approach: Nassau County appoints geriatric care managers ("GCMs") through a non-profit organization and pays them a set hourly fee, while Suffolk County utilizes a network of retired volunteers. Both programs have been successful, ultimately serving a significant number of wards who would otherwise have been assigned to the "public" or "not-for-profit" Guardians in each county. Currently, each county is pursuing more funding for these programs, so that the programs may ultimately become permanent.

Jurisdictions facing an attorney/Guardian shortage are encouraged to approach their local Departments of Social Services or Office for the Aging to investigate partnering with these agencies to create similar programs. It has been the experience of Nassau and Suffolk Counties that New York State does not staff independent local offices addressing the needs of the aging population in each county. Accordingly, it has become incumbent on local jurisdictions to address these needs with programs promulgated by the Courts, as occurred in Nassau and Suffolk Counties.

In counties where bar associations have active Elder Law committees, this Task Force recommends partnering with those bar associations and committees to recruit attorneys who will be willing to serve as Guardians *pro bono*. In this respect, new lawyers entering the practice of Elder Law and Guardianship should provide a pool of candidates for these prospective appointments, as novice attorneys may be willing to take an appointment and gain valuable experience from their Court appearances and performance of their duties, while earning "good will" credit with the Guardianship Judges. In counties located in New York City, large law firms which participate in *pro bono* commitments may also provide a pool of candidates willing to accept these appointments.

Accordingly it is recommended that Guardianship Courts in other Judicial Districts explore the implementation of similar alternative programs for appointments of Guardians as a means of alleviating a glaring need for qualified Guardians.

IX

PRO SE APPLICANTS - ASSISTANCE

Currently, many Guardianship Courts provide information to individuals who appear at the Court inquiring about how to commence an Article 81 Guardianship proceeding without an attorney (i.e., *pro se*). Most Guardianship Courts, at a minimum, provide sample forms of the Petition and Order and Judgment. This Task Force recommends that Guardianship Courts adopt a "three-prong" approach to assist individuals who inquire about commencing a Guardianship proceeding without counsel:

1. Enlist the assistance of Elder Law attorneys and *pro bono*/*"low"* *bono* committees at local bar associations, and require these attorneys to donate *one hour a month* to be available to speak with *pro se* applicants;
2. Encourage the use of the Unified Court System's website - www.inside-ucs.org/ - as an excellent starting point for *pro se* applicants to begin to familiarize themselves with the Guardianship process.

The steps to follow from there are:

Go to ***Help for Unrepresented Litigants***; then

Courthelp; then to

Guardianship; then to

More—Guardianship Basics and Guardian Case.

Under the tab of '***Guardianship of an Incapacitated Adult***,' there is a link to Article 81 of the Mental Hygiene Law. This link will bring you into the actual statute; and

3. Obtain the instructional manual produced by CUNY Law School's Main Street Legal Services, Inc., entitled, ***Guide to Becoming a Guardian Without a Lawyer***. This 37-page manual provides step-by-step instructions, explanations and forms for the *pro se* applicant to review and duplicate, as appropriate. In fact, this Task Force recommends that Guardianship Courts consider reproducing and providing copies of this manual at the front counters, or as a PDF document accessible on-line on the Courts' or Judicial Districts' respective websites.

X

LEGISLATIVE ACTION

Since the initial Guardianship Task Force Report was issued in 2005, there have been sporadic, inconsistent efforts undertaken by the Legislature to promote and effectuate legislation on behalf of IPs and the elderly in general. Sadly, the insidious nature of elder abuse, which encompasses physical, emotional, and financial abuse, most often remains undetected and results in devastating consequences to the lives of this segment of our population. Guardianship Judges and members of the Elder Law bar can all attest to the sometimes horrifying impact of this abuse. Unfortunately, in many cases, the Guardianship Courts in Article 81 proceedings are left to attempt to restore a modicum of stability to the lives of these people, many of whom have limited resources and are living with the trauma of elder abuse already having been inflicted upon them - with damage often beyond that which the Guardianship Court can repair.

These countless narratives of misfortune and abuse place Guardianship Judges and members of the Elder Law bar in a unique position to identify the pitfalls and flaws inherent in our institutions which furnish the opportunity for elder abuse to occur. The "deep dive" into the complexities of these cases has provided a wealth of insight and knowledge regarding not only the problems but also, to some degree, the solutions.

A concerted effort must be made to identify and promote legislation for the benefit of IPs. To this end, this Task Force recommends the following:

1. Establishment of a standing committee - to be comprised of Guardianship Judges, other Court personnel and members of the Elder Law bar - tasked with creating a comprehensive package of legislative proposals to aid in the prevention of physical, emotional, and financial abuse of AIPs and IPs;
2. Identification of particular legislators in this State who will commit themselves to drafting and promoting the proposals of the aforementioned committee;
3. Designation of a representative from the OCA to act as a liaison to and with State legislators and the Governor regarding these proposals; and
4. Research and study other jurisdictions that have developed effective legislation in this regard (e.g., protective banking laws, effective legislation and policies to prevent elder abuse, laws to facilitate investigation of financial abuse, and specialized prosecutorial investigatory units within law enforcement agencies).

MODEL GUARDIANSHIP PART

The Model Guardianship Part ("MGP") in Suffolk County commenced with Chief Judge Judith Kaye's 2005 judiciary address acknowledging the importance of prioritizing and protecting the rights, needs and interests of IPs. Thereupon, the initial Guardianship Task Force outlined recommendations toward the establishment of MGP, with the ultimate goal of determining whether the program was feasible and should be expanded throughout the Second Judicial Department. Accordingly, since 2006, the Model Guardianship Part in Suffolk County has been a functioning and evolving Part, with the Honorable H. Patrick Leis, III presiding over its jurisdiction. Along with his staff comprised of a Guardianship Referee and a Guardianship Analyst, MGP has expanded upon those original concise goals and grown into a working, problem-solving Court, tailored to uniquely address the best interests of AIPs and IPs. Amongst the most successful facets of MGP is the integration of litigation affecting AIPs, the effective and efficient monitoring of Guardians once appointed, the individualized care and attention to each case, and the proactive innovations aimed at enhancing ways in which best to serve AIPs and IPs.

At center-stage in MGP is the Court's ability to accept other pending actions and proceedings affecting the AIP or IP by way of integration. Akin to the successes of the Integrated Domestic Violence Courts, integration has proven to be a most effective facet of MGP, allowing one judge to gain familiarity with a vulnerable individual's needs and determine the core issues driving the litigation. Additionally, integration serves to reduce superfluous court appearances and costs to AIPs and IPs, and prevents the potential for contradictory determinations of factual issues. Although all types of cases have been integrated over the years, the MGP has primarily heard matrimonial actions, Family Court orders of protection, and landlord/tenant actions in conjunction with Guardianship matters. Due to the multitude of cases that may arise for integration, it is recommended that the Guardianship Judge assigned to a MGP possess experience in areas of matrimonial, landlord/tenant, family law and civil litigation in addition to Article 81 Guardianship matters.

Innovative monitoring practices are another cornerstone of MGP. Unlike other types of legal matters, in the area of Guardianship, the outcome of a hearing often marks the beginning of the Court's oversight of a Guardian's duties in caring for a PING or an IP. In fact, it is often remarked that the end is truly the beginning in Guardianship matters. Indeed, once a Guardian is appointed and the subject of the proceeding is found to be either PING or an IP, then that individual must be protected from loss or harm. While a Guardian is granted the least restrictive authority necessary to ensure the PING/IP's health, safety and welfare, the Court Examiner simultaneously appointed therein, must ensure that the Guardian is accountable for the actions taken on behalf of the PING / IP. In this respect, MGP has initiated many measures to ensure each Guardian's accountability. Specifically, the use of effective and efficient compliance calendars overseeing the Court Examiner's responsibilities to ensure the acquisition of appropriate commissions and bonds, as well as the filing of timely and accurate reports and accountings. The staff assigned to MGP work closely with Court Examiners through weekly compliance calendars to ensure that an organized and efficient review of requirements are completed, as well as to address the queries and needs of Court Examiners managing complex cases or difficult Guardians. Weekly calendars often address both professional and lay Guardians in-person (or, during the pandemic, via TEAMS video conferences), who may have pressing issues or questions regarding their duties or obligations. The Guardianship Referee presides each Wednesday morning to address all those cases on the calendar, and may settle Post-

Judgment matters in compliance, grant adjournments for those working toward compliance, or trouble-shoot with Court Examiners and Guardians.

The MGP has been dedicated to prioritizing the unique individual needs of each case and to best serving all AIPs and IPs coming before the Court. Toward this end, Judge Leis and his staff have implemented numerous programs and courtroom adaptations aimed at ensuring a non-threatening courtroom experience for vulnerable individuals. While access to funding for special programing has been tenuous and has resulted in adaptation by all participants, a valued program to Guardianship has been the Volunteer Case Monitor ("VCM") program - a partnership with the Education and Assistance Corporation ("EAC, Inc."). The VCM program may be utilized post-hearing once a Guardian is appointed. Case monitors have proven most valuable in cases where family members are serving as Guardian in matters that have demonstrated frustrated family dynamics. The case monitors then serve as the "eyes and ears" of the court through unscheduled periodic visits with the PING/ IPs at their place of residence, and make written reports to the Court as to the PING/IP's health, safety and welfare. While the effectiveness of this VCM program is unquestioned, the need for willing and available Guardians - especially in cases where there are little or no assets to pay a Part 36 Guardian - has led to changes that shifted EAC, Inc. into filling a gap where the agency may now serve as Guardians for IPs. With a limited funding source and their staff now reallocated to serving as Guardians, the VCM program has been suspended at this time. However, it would be beneficial to MGP if the VCM program were resurrected.

Another program available to AIPs is the use of therapy dogs through a partnership with Partners in Restorative Animal Assisted Therapy, Inc. ("PRAAT"). A therapy dog and its handler may be assigned on a case-by-case basis to emotionally and/or physically frail individuals with the impending stressors of a possibly contentious Court proceeding. Court Evaluators can request a therapy dog for upcoming proceedings, and if approved, a dog and its handler will first meet with the AIP in their place of residence before seeing them again in Court at a later date. There has been a notable positive difference in the affect of AIPs utilizing this service, leading to a less intimidating and overall, more comfortable courtroom environment.

MGP has implemented a number of additional proactive adaptations and innovations to advance the goal of creating a more comfortable courtroom experience for vulnerable persons. Frequently, a Guardianship proceeding is the first time an AIP has appeared in court, often resulting in fear and uncertainty. To alleviate undue stressors on AIPs who enter the courthouse, MGP has adapted the courtroom by setting up a non-adversarial table arrangement which places the AIP front and center before the Guardianship Judge hearing their case. The AIP may sit there with Court-appointed counsel and a caregiver, therefore putting the distractions of the other parties involved (petitioners, possible cross-petitioners, and potential contentious family members) behind them. Assisted Hearing Devices are always available and often used in MGP as well. Ensuring that the AIP has access to hearing what is going on in their case serves best to respect each individual's rights and minimizes risk for confusion in what may already be an overwhelming situation for a frail individual. Additionally, the courtroom is equipped with access to therapeutic music for the AIP who wishes to listen to music during any court "down time". However, the MGP ensures that court delays are negligible by accurately scheduling each case for a specified calendar time. Best practices indicate no more than one case shall be scheduled per morning or afternoon, affording more attention to each matter and simultaneously less waiting for individuals that may be physically or emotionally frail. The Guardianship Analyst is also available to provide resources which may include information and telephone numbers or websites to IPs/PINGs, their Guardians, and their family members, should queries be made. Whether it is simple assistance through enlisting the services of an interpreter or

teletype machine, an off-site hearing - thereby bringing the court to the individual or working with Adult Protective Service agencies, GCMs or staff in Guardianship Courts in other states, the MGP is prepared to handle each case's unique needs.

The MGP also effectuates the continued education of its core stakeholders, including Court staff, Guardianship attorneys, Part 36 Guardians, Court Examiners, and Guardianship volunteers by hosting annual educational Guardianship Programs or workshops. Often, free CLE accreditation is available through these programs as a manner of giving back to those dedicated individuals who make serving vulnerable persons a priority in their work in Suffolk County.

Locating appropriately qualified and willing Guardians is a persistent issue facing the area of Guardianship. Many Guardianship proceedings offer little in the way of assets to adequately compensate quality Part 36 Guardians, or present a multitude of complex issues and strained family dynamics. Either situation may cause few willing or qualified Guardians to accept an appointment. In response, MGP has been appointing non-lawyer Guardians with backgrounds in social work or elder care since its inception back in 2006. Outreach outside of the local bar associations has been extensive over the years. While funding has continued to pose a problem, in recent years, two not for profit 501(c)(3) agencies - EAC, Inc. and Guardianship Corp. - have begun to work toward filling the need for affordable Guardians. These agencies are currently available to serve as Guardians in non-monied and low-asset cases, or in cases where the Department of Social Services serves as Petitioner. Because of their social work and elder care backgrounds, they may also be appropriate for cases with complex non-legal issues. However, there is a need for continued efforts on this front, as steady and reliable funding is a pervasive issue.

Lastly, it should be noted that MGP has been an evolving problem-solving court since 2006. Therefore, its dedicated and devoted staff have employed numerous types of programs geared toward serving AIPs and IPs over the years that are not detailed in this document. The evolving nature of MGP also means that some trial programs have come and gone. Programs like our *pro bono* Guardianship mentorship program and volunteer case monitors have sadly been lost due to lack of steady funding, while other facets, such as Mediation, have not yet been fully realized.

In conclusion, over the course of its first 15 years, MGP has implemented an enlightened and respectful approach to Article 81 Guardianships in Suffolk County. By placing the unique needs of AIPs and IPs at the forefront, MGP has implemented innovative mechanisms to protect, respect and best serve those individuals coming before the Court. With an ever-burgeoning growth of the elder population in the United States, the impending need to protect the vulnerable adult population is more important than ever, necessitating the need for innovative and adaptive approaches to Guardianship. In more recent years, the successes of MGP, with the exception of integration, have been incorporated into all existing Guardianship Parts and practices in Suffolk County to extend its benefits to every Guardianship case heard within the county - exemplifying that the working model of this Court is not only beneficial, but also transferable to other jurisdictions.