Guardian of the Property

81.21

Property Management

- Bank Accounts
- Safe Deposit box
- Sources of Income
- Investments
- Insurance Policies
- Valuable Personal items
- Valuable documents
- Real Property
- Taxes

<u>ADVOCACY TIPS</u>
Actions in Debtor/Creditor Exempt Funds Cases

- Ask client/IP to notify you if ever in receipt of "legal letter" from a creditor
- Check origin of funds in client/debtor bank account
- If the account holds "reasonably traceable" exempt funds, even if they are commingled in the bank account with other funds, contact bank immediately

ADVOCACY TIPS
Actions in Debtor/Creditor Exempt Funds Cases

- Make a bank inquiry as to the status of client/debtor account and attempt to prevent the bank from freezing the account.

ADVOCACY TIPS
Actions in Debtor/Creditor Exempt Funds Cases

- If account is already frozen advocate for the release of funds up to the exempt amount
- Notify creditor of exempt status of funds
- If your attempts fail refer client (if you haven't already) to Legal Aid for assistance in filing an Exemption claim pursuant to CPLR Section 5239

MFY Legal Services
299 Broadway, New York, NY, 10007
212- 417- 3700

Consumer FACT Sheets
http://www.mfy.org/english.shtml

CONSUMER ISSUES:
DEALING WITH DEBT

Guardian of the Person

81.22

Guardian of the Person

- Personal care
- Social aspects
- Travel
- Driving
- Medical decisions
- Housing

Article 81
Protective Interventions

- Protective Arrangements and Single Transactions Section 81.16(b)
- Provisional Remedies Section 81.23

Article 81
Protective Interventions

- Demand for Fiduciary Accounting
  Section 81.29(d)
- Summary Discovery Turnover Proceedings Section 81.43

Art 81 Special Remedies

- Protective Arrangements and Single Transactions Section 81.16(b)

1. AIP is found to be incapacitated
2. The court, without appointing a guardian, can take actions that are necessary to provide for the personal needs and/or property management of the AIP

Art 81 Special Remedies

- Provisional Remedies Section 81.23(a)

1. Temporary Guardian
   - Appointed at the commencement of the proceeding or at any stage of the proceeding prior to appointment of a guardian

Art 81 Special Remedies

- Provisional Remedies Section 81.23(a)

1. Temporary Guardian
   - Legal standard – danger in the reasonably foreseeable future to the health and well being of the AIP, or danger of waste misappropriation, or loss of the property of the AIP
   - Powers and duties are specifically enumerated in the Order of Appointment

Art 81 Special Remedies

- Provisional Remedies Section 81.23(b)

2. Injunction and Temporary Restraining Order
   - May be issued while proceeding is pending or at any time after the appointment of the guardian
   - Issued to protect the AIP or property of the AIP

Art 81 Special Remedies

- Demand for Fiduciary Accounting 81.29(d)

1. Courts power to vacate POA and HCP extended to permit the exercise of that power for breach of fiduciary power in addition to invalid execution
2. The court has jurisdiction to demand an accounting for acts and omissions during the entire period of agency

Art 81 Special Remedies

- Demand for Fiduciary Accounting 81.29(d)

3. Thus within Article 81 there is created a cause of action and subject matter jurisdiction for an accounting of attorneys-in-fact found to have violated their fiduciary duty
4. **The court shall not invalidate or revoke a will or codicil of an IP during the IP's lifetime**

Art 81 Special Remedies

- Discovery and Turnover Proceedings Section 81.43

1. Discovery Proceeding
   - Commenced by the guardian to locate real and personal property of the IP
   - An investigation to inquire as to the whereabouts of the IP's property

Art 81 Special Remedies

- Discovery and Turnover Proceedings Section 81.43

1. Discovery Proceeding
   - An investigation to track income and assets of the IP to the Respondent's account/possession (conversion)

Art 81 Special Remedies

- Discovery and Turnover Proceedings Section 81.43

2. Turnover Proceeding
   - Commenced by the guardian to recover property of the IP
   - A hearing is held as to title of the property
   - The order requires the Respondent to turn over all property of the IP in his/her possession or control to the guardian

Medical Advocacy

- IP's medical condition and how IP deals with it
- Medical system (managed care)
- Payment for medical care
- Patient/staff issues

HIPAA - Personal Representative 45 CFR 164.502(g)

Person with legal authority to make health care decisions under state law

- Health Care Proxy
- Guardian of the Person with medical decision making power

HIPAA and Guardianship

- Needed information must meet one of the disclosure exceptions
- Parties will need judicial subpoenas or orders
- Use of medical evidence at the hearing may be limited
- Guardians with medical decision making power should have express authorization to access PHI as the IP's "Personal Representative" in the Order

Medical Record

DISCHARGE SUMMARY

MEDICAL HISTORY

DOCTORS ORDERS

MD PROGRESS NOTES

COGNITIVE FUNCTION REPORTS

Medical Record

NURSING CARE PLAN

NURSING NOTES

THERAPY NOTES

MEDICATION RECORD

SOCIAL SERVICE NOTES

Assisted Outpatient Treatment Program
Kendra's Law
9.60 Mental Hygiene Law

To be eligible for Assisted Outpatient Treatment (AOT), an individual must:

1. Be 18 years of age or older; and
2. Be diagnosed as mentally ill; and
3. Be unlikely to survive safely in the community without supervision (clinically determined: and

Assisted Outpatient Treatment Program
Kendra's Law
9.60 Mental Hygiene Law

To be eligible for AOT, an individual must:

4. Have a history of lack of compliance with treatment that has resulted in:
   - Two episodes of treatment in a psychiatric inpatient unit or forensic or other mental health unit in a State or Local correctional facility within the last 36 months; or

Assisted Outpatient Treatment Program
Kendra's Law
9.60 Mental Hygiene Law

To be eligible for AOT, an individual must:

4. Have a history of lack of compliance with treatment that has resulted in:
   - One or more acts of series violent behavior toward self or other or threats of, or attempts at, serious physical harm to self or others within the past 48 months; and

Assisted Outpatient Treatment Program (Kendra's Law)

Eligibility Criteria (continued)

5. Be unlikely to voluntarily participate in the services identified in the treatment plan; and

Assisted Outpatient Treatment Program (Kendra's Law)

Eligibility Criteria (continued)

6. Based on history and current behavior, be in need of Assisted Outpatient Treatment in order to prevent relapse or deterioration that would likely result in serious harm to the individual or others; and

Assisted Outpatient Treatment Program (Kendra's Law)

Eligibility Criteria (continued)

7. Be likely to benefit from Assisted Outpatient Treatment.

AOT Program Goals

An assisted Outpatient Treatment Program is a system to:

- Arrange for and coordinate the provision of assisted outpatient treatment
- **Monitor treatment compliance**
- Evaluate the condition or needs of assisted outpatients

AOT Program Goals

An assisted Outpatient Treatment Program is a system to:

- Take appropriate steps to address the needs of assisted outpatients
- **Ensure compliance with Court Orders**

Art 17-A SCPA Vs. Art 81 MHL

17- A

- Easier process
- Less expensive
- Standardized forms
- Clear procedures for health care decision making
- Life sustaining decisions allowed by guardian

17-A Legal Standard

- Certification by two MDs or one MD and one psychologist
- Person is incapable of managing self and affairs due to MR, DD or cerebral palsy, epilepsy, neurological impairment, autism, TBI
- Condition is permanent
- Determination of ability to make health care decisions

In order for a decision to withhold or withdraw life-sustaining treatment the MR/DD person's incapacity to make such decisions must be re-certified. 1750(b)(4) The attending physician must also certify:

- **that the life-sustaining treatment would be an extraordinary burden, in light of the person's medical condition and the expected outcome, notwithstanding the person's MR/DD.**

In order for a decision to withhold or withdraw life-sustaining treatment the MR/DD person's incapacity to make such decisions must be re-certified. 1750(b)(4) The attending physician must also certify:

- **If the decision is to withdraw or withhold artificially provided nutrition or hydration, it must be proven that either there is no reasonable hope of maintaining life, or that it poses an extraordinary burden.**

In order for a decision to withhold or withdraw life-sustaining treatment the MR/DD person's incapacity to make such decisions must be re-certified. 1750(b)(4) The attending physician must also certify:

- **the person is terminal, is permanently unconscious, or has a condition requiring life-sustaining treatment which is irreversible and which will continue indefinitely, and**

Life Sustaining Decisions under Art 81

- Not specifically addressed in the statute
- Court hearing required
- Clear and convincing evidence standard

GUIDE TO ADULT GUARDIANSHIP

ARTICLE 81
OF THE NEW YORK STATE
MENTAL HYGIENE LAW

Appointment of a Guardian
for
Personal Needs and/or Property Management

Prepared for
The New York State Office of Children and Family Services
by
The Brookdale Center for Healthy Aging & Longevity of Hunter College
Sadin Institute on Law, Public Policy & Aging
and
The New York State Law Revision Commission

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INTRODUCTION

Article 81 of the Mental Hygiene Law, Appointment of a Guardian for Personal Needs and/or Property Management, became law in New York State in 1992 and went into effect April 1, 1993. The statute repealed Articles 77 and 78 of the Mental Hygiene Law and replaced them with one guardianship statute. Article 81 authorizes a proceeding based on the concept of the least restrictive alternative - one that authorizes the appointment of a guardian whose authority is appropriate to satisfy the needs of an incapacitated person, either personal or financial, while at the same time tailored and limited to only those activities for which a person needs assistance. The standard for appointment under this procedure focuses on the decisional capacity and functional limitations of the person for whom the appointment is sought rather than on some underlying mental or physical condition of the person. Article 81 also fills the gap in New York law for persons who require assistance but not the drastic remedy of a guardian. Article 81 requires the court to consider alternatives to the appointment of a guardian, such as visiting nurses, homemakers, home health aides, adult day care, trusts, and representative and protective payees and allows the court to fashion remedies which include protective arrangements and single transactions which would achieve security, service or care to meet the foreseeable needs of the incapacitated person without the appointment of a guardian. The law advocates the protection of the rights of the allegedly incapacitated person by striking a balance between the benign paternalistic approach traditional to guardianship proceedings and an adversarial one affording due process to the subject of the proceeding.

The law also established education requirements to increase the awareness of the Bar, the persons appointed as guardians, and other participants in guardianship proceedings of the complexity of guardianship issues.

Hopefully this manual will guide the reader through the process of guardianship appointment. While the examples are used to emphasize some of the major provisions, it should be noted that every situation is unique and may require very different solutions. The beauty of Article 81 is that it is flexible enough to address the needs of each individual.

This manual should not be read in a vacuum however. When legal intervention is being discussed, the reader should consider all legal options that are available such as power of attorney, trusts, joint bank accounts representative payee, civil commitment and orders of protection. Guardianship is to be used as a last resort. Remember, the appropriate intervention must be the least restrictive alternative yet adequate to meet your client's needs.

DEFINITIONS

The definitions highlight the underlying goals of the statute.

Section 81.03

(a) "guardian". The statute specifically names a person who is eighteen years or older, a corporation, or a public agency, including a local department of social services as a potential guardian. As was previously the practice, the commissioner of the Department of Social Services under its Adult Protective Services Program may be appointed as guardian in accord with Article 81 and the Social Services Law and Regulations. A community guardian program may be appointed as guardian when the proceeding was commenced by a Social Services Official with whom such program was contracted.

(b) "functional level". This definition is a neutral term which encourages those participating in the guardianship proceeding to consider the abilities of the person and not just to focus on the person's limitations.

(c) "functional limitations". This definition emphasizes the behavior of the allegedly incapacitated person which impairs the ability to provide for personal needs or financial or property management. The statute stresses functional level and limitations rather than disease or underlying medical condition.

(d) "least restrictive form of intervention". This definition emphasizes the goal of the statute which is that the guardian should have only those powers necessary to assist the incapacitated person to compensate for limitations and to allow the person the greatest amount of independence and self-determination in light of the person's ability to appreciate and understand his or her functional limitation. In appointing a guardian the court should be guided by the concept of least restrictive form of intervention. That goal is reflected particularly in the provisions governing the power of the court to appoint a guardian (Section 81. 02) and the provision governing dispositional alternatives (Section 81.16).

(e) "available alternative resources". This definition promotes the goal of the statute of requiring a disposition which represents the least restrictive form of intervention. It is incumbent upon the petitioner, the court evaluator, and the court to consider voluntary alternatives to judicial intervention under this article. The definition sets out the types of services that might operate as voluntary alternatives such as, visiting nurses, homemakers, home health aides, adult day care and multipurpose senior centers, powers of attorney, health care proxies, trusts, representative and protective payees. The list is not meant to be restrictive but rather set the wheels of investigation in motion for considering what possibly could be done to assist this person without appointing a guardian.

(f) "personal needs". This definition describes the type of needs that are characterized as personal, such as food, clothing, shelter, health care, and safety.

(g) "property management". This definition describes the type of needs that relate to property and financial affairs such as 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". This definition describes the type of activities that the court should look at to determine the person's functional level, 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". This definition describes the categories of health care treatment which the court and the guardian should regard as having a significant effect on the person. The language of this section is similar to that contained in section 80.03 of the Mental Hygiene Law regarding non-judicial surrogate decision making.

(j) “life sustaining treatment”. This definition 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. Including life sustaining treatment in the definitions section distinguishes such treatment from other major medical treatment and emphasizes that major medical treatment does not include withholding or withdrawing life sustaining treatment. Thus the guardian’s power to consent to major medical treatment is subject to, and limited by, the law and precedents of the Common Law governing third-party consent to withholding or withdrawing life sustaining treatment.

LEGAL STANDARD

When May A Court Appoint A Guardian?

Section 81.02

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 or to manage the property and financial affairs of the person, or both, and (2) that the person agrees to the appointment or that the person is incapacitated. A determination of incapacity requires clear and convincing evidence that a person is likely to suffer harm because:

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

The law requires the court to give primary consideration to the functional level and functional limitations of the person. This consideration includes an assessment of the person's:

1. management of the activities of daily living, as defined in Section 81.03(h) 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;
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 property and financial affairs; (ii) any physical illness, mental disability, alcoholism or substance dependence and the prognosis of such illness, disability or dependence; and (iii) any medications with which the person is being treated and their effect on the person's behavior, cognition and judgment.

Comments:

The cornerstone of Article 81 is the concept of appointing a guardian whose powers are tailored specifically to the particular needs of a person with respect to personal care, property management, or both. This section of the statute sets forth the concept of a specifically tailored appointment based on a functional assessment of the person and sets the tone for the remaining provisions.

The appointment of a guardian must be found to be necessary because the person is unable to meet the needs for personal care, property management, or both. In deciding whether the appointment of a guardian is necessary, the court must consider all the evidence including the information and independent observations provided by the court evaluator's report as to the person's condition, affairs and situation, and the sufficiency and reliability of available resources such as visiting nurses, homemakers, home health aides, adult day care, powers of attorney, health care proxies, trusts and representative and protective payees.

The court should regard guardianship as a last resort and should assess the advantages and disadvantages of alternatives to guardianship, deciding on guardianship only when it clearly benefits the person who is the subject of the proceeding and when the alternatives are not sufficient and reliable to meet the needs of the person.

The person must either agree to the appointment or be found by the court to be incapacitated. There are two components to a determination of incapacity: 1) the person cannot adequately understand and appreciate the nature and consequences of the person's particular inabilities; and 2) the person is likely to suffer harm because of these limitations and the inability to appreciate the consequences of the limitations. The court is required to give primary consideration to the functional level and functional limitations of the person. The words "primary consideration" are used to reinforce the underlying intent of the statute that the court is not to assign undue weight to any medical diagnosis but rather should consider such diagnosis in light of information about the behavior and functional limitation of the person. To the extent a physical or mental condition is present, information regarding medication and prognosis regarding the condition should be closely scrutinized. The prognosis of any medical condition is especially useful to the court in tailoring the powers of the guardian and the duration of the guardianship.

The court should also consider what harm, if any, will befall the person alleged to be incapacitated because of any functional limitations. The focus should be on what will happen to the person rather than on what third parties may believe is an appropriate outcome.

Finally, this section emphasizes that even if all the elements of incapacity are present, a guardian should be appointed only as a last resort and should not be imposed if available resources or other alternatives will adequately protect the person (see also section 81.16 - Dispositional alternatives). If the court determines that the appointment of a guardian is necessary, the guardian should be granted only those powers that are necessary to provide for the person's needs in a manner consistent with the principle of employing the least restrictive alternative, i.e., the appointment of a guardian is appropriate to the individual and affords the person the greatest amount of self-determination and independence in light of his or her understanding and appreciation of his or her functional limitations.

Example #1

Client is in the beginning stages of Alzheimer's disease exhibiting some sporadic confusion and disorientation which results in difficulty managing finances.

Since Article 81 requires a functional approach, the court must take into consideration how the diagnosis affects the actual ability of the person to function in everyday life.

In this case since the client is in the beginning stages of Alzheimer's there is a strong possibility that he/she retains the ability to function in various aspects of his/her life. Here the court would grant only limited powers to the guardian which could then be expanded by a modification order as the disease progresses.

Example #2

Client is 42 years old with Multiple Sclerosis. He cannot walk and retains little use of his arms and hands. The disease is progressing and client has asked for help in managing various aspects of his life, in particular financial management.

Article 81 requires that the person is unable to meet personal care or property management needs and that the person agrees to the appointment or is incapacitated. Providing for an appointment of a guardian where the person agrees to it permits the court to fashion relief for individuals who are unable to meet their personal or property management needs because of a physical disability and welcome the appointment of someone to act on their behalf. In these cases it is essential to explore other options before petitioning for a guardianship. A Power of Attorney will often suffice for financial management unless there is no one available to act as attorney in-fact.

Example #3 and Example #4

An 81 year old client is on the verge of eviction for nonpayment of rent, even though she has substantial assets. She's been diagnosed with moderate to severe dementia with disorientation and memory loss. Upon discussing the matter with the caseworker, she agreed that she had an obligation to pay rent and added that people who did not pay rent were evicted and became homeless. Moments later she had no recall of the conversation or of her rent arrears.

Client is a 59 year old man who had a successful career until the onset of depression 10 years ago. He is delinquent in paying his bills, his apartment is cluttered with debris and infested with vermin, eviction is threatened and he has chronic medical problems left untreated. Upon examination client is found to be poorly nourished and to have poor personal hygiene but intellectually intact. He exhibited all the symptoms of severe and chronic depression but is not at risk for suicide. Client was aware of the dangers posed by his physical and social problems, distressed by them but unable to marshal sufficient effort to remedy them as a result of his paralyzing depression.

Article 81 is intended to give the court the flexibility to cover situations that these two examples illustrate.

WHERE TO FILE THE PETITION

Section 81.04

The Petition shall be filed with the Supreme Court in New York City and the County Courts outside the city. The petition may also be filed in Surrogates Court when the alleged incapacitated person has an interest in an estate proceeding.

Section 81.05

The proceeding may be brought:

1) in the county where the person resides;
2) in the county where the person is physically present; or
3) in the Surrogates Court where an estate proceeding, in which the person is interested, has been brought;
4) if the person is 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 a change of venue request;
5) if the initial court order needs to be changed, i.e. the Guardian needs more powers, the proceeding is to be brought in the same court which granted the order.

WHO MAY BRING A GUARDIANSHIP PROCEEDING?

Section 81.06

A proceeding for a guardian may be commenced by the filing of the petition with the court by:

1) the alleged incapacitated person;
2) a presumptive distributee, (person entitled to take or share in the estate of the alleged incapacitated person) of the alleged incapacitated person;
3) an executor or administrator of an estate when the alleged incapacitated person is or may be a beneficiary;

4) a trustee of a trust when the alleged incapacitated person is or may be the grantor or beneficiary;
5) the person with whom the alleged incapacitated person resides;
6) a person otherwise concerned with the welfare of the alleged incapacitated person (which may include a corporation or public agency, including the department of social services in the county where the alleged incapacitated person resides);
7) the chief executive officer, or the designee of the chief executive officer of a facility in which the alleged incapacitated person is a patient or resident.

Advocacy Tips:

1) The Petitioner's role is to bring the matter to the attention of the court and explain why a guardian may be needed. The petitioner is not necessarily appointed guardian. Thus, agencies or professionals not able to act as guardian may still initiate a proceeding for clients needing assistance. For instance, districts are mandated to petition for persons who meet the PSA client characteristics and need a guardian. For other persons who do not meet the PSA eligibility criteria but who do meet the legal standard for Article 81 a local district may choose to bring a petition on their behalf.

2) For clients who wander from county to county it may be difficult to establish the appropriate district in which to initiate the proceeding. Workers should note: the amount of time spent in each location, where the person stays and any relatives or friends he/she has contact with in each location; where the client votes; what does the client use as a mailing address etc. Documentation and communication between the districts involved will be paramount so a decision can be made in a timely manner to insure that the needs of the person are promptly addressed.

SERVICE and NOTICE

Section 81.07

An Article 81 proceeding shall be commenced upon the filing of the petition. The court shall set the date on which the order to show cause is heard no more than 28 days from the date of the signing of the order to show cause. The notice shall be written in large type, in plain language and in a language other than English if necessary.

Because of confidentiality concerns regarding medical and financial information contained in the petition and supporting affidavits there is a specific prohibition against any court requirement for the attachment of medical information to the order to show cause as supporting papers. Likewise no deficiency can be found in the petition or order to show cause because of the absence of medical information. Limitations are set on who is to receive a full set of papers in the service and notice provisions of the statute.

SERVICE:

What Information is to be Served?

The following documents are to be served:

1) the order to show cause;
2) the notice; and
3) the petition and any supporting papers such as a medical affirmation and financial statements.

Who is to be Served?

The following parties shall be served:

1) the alleged incapacitate person;
2) his/her attorney; and
3) the court evaluator.

How are the Parties to be Served?

The manner and time frames for service are as follows:

1. the order to show cause and a copy of the petition shall be personally delivered to the alleged incapacitated person not less than 14 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 alleged incapacitated person 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.

2. 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 fax, provided that the fax 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 attorney or the appearance of an attorney retained by the alleged incapacitated person.

NOTICE:

What Must the Notice Contain?

Other interested persons are entitled only to Notice of the proceeding.

The Notice of the proceeding shall contain:

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 and place where the order to show cause shall be heard;
5. The object of the proceeding and the relief sought;
6. The name address and telephone number of the petitioner's attorney.

Who Must Be Given Notice of the Guardianship Proceeding?

Notice of the proceeding together with a copy of the order to show cause shall be mailed, not less than fourteen days prior to the hearing date on the order to show cause, to the following persons:

1. the spouse, parents, siblings and children of the AIP;
2. persons with whom the AIP resides;
3. agents under a power of attorney or health care proxy;
4. any person or organization that has demonstrated a genuine interest in the wellbeing of the AIP;
5. the local department of social services if appropriate;
6. if the AIP resides in a facility the chief executive officer of that facility;
7. the mental hygiene legal service if the AIP resides in a mental hygiene facility; and
8. other persons as directed by the court.

Comments:

Notification of appropriate persons in a guardianship proceeding is very important. The section mandates the form of notice including a warning in large bold face type, the manner of service and the time in which it must be accomplished. The notice must include a warning which describes the nature and seriousness of the proceeding, and the person's right to due process. The legend advises the person that a court evaluator will be appointed to conduct an investigation of the claims made in the petition, that the person has the right to object to the court evaluator's inspection of his or her medical and psychiatric records, the right to an attorney, and the right to request a jury trial.

The time periods established in the statute for service and notice are designed to encourage the prompt resolution of a guardianship proceeding while at the same time allowing sufficient time for the petitioner's attorney to accomplish service within reasonable time constraints.

The order to show cause must set the date for the hearing on the same date the order to show cause is returnable and the hearing date may be adjourned only for good cause shown. This provision is also designed to encourage prompt resolution of the proceeding. The section further provides that the court may shorten time periods for service and for the holding of the hearing for good cause shown in order to respond to the needs of the allegedly incapacitated person.

How Long Will It Take to Get a Guardian Appointed?

Since time limitations are written into the statute the proceedings for appointment of a guardian should rarely take longer than three months.

1. a proceeding under this Article is entitled to a preference over all other cases in the court, unless the court for good cause shown orders otherwise.
2. the hearing must be held no more than 28 days from the signing of the Order to Show Cause. (81.07(b))
3. the decision shall be rendered within 7 days after the hearing, unless the court extends the time for good cause.(81.13)
4. the commission is to be issued to the Guardian within 15 days of the decision.(81.13)

It should be noted that the court may for good cause shown set a hearing date earlier than the 28 day time frame. For example, a hearing on a petition for a temporary guardian could be held as early as the court directs for good cause shown.

PETITION

What Must The Petition Contain?

Section 81.08

The petition shall include the following information:

1) the name, age, address and telephone number of the alleged incapacitated person;
2) the name, address and telephone number of any persons with whom the alleged incapacitated person 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 being sought with respect to personal needs of the alleged incapacitated person, specific facts must be alleged as to the personal actions, or other actual occurrences involving the alleged incapacitated person which are claimed to demonstrate that the person is likely to suffer harm because he/she cannot adequately understand and appreciate the nature and consequences of his/her inability to provide for personal needs;
5) if powers are being sought with respect to property management for the alleged incapacitated person, specific facts must be alleged as to the financial transactions or other actual occurrences involving the alleged incapacitated person which are claimed to demonstrate that the person is likely to suffer harm because he/she cannot adequately understand and appreciate the nature and consequences of his/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 section 81.21;
6) the particular powers being sought and their relationship to the functional level and needs of the alleged incapacitated person;
7) the duration of the powers being sought;
8) approximate value and description of the financial resources of the alleged incapacitated person, and whether the alleged incapacitated person is a recipient of public assistance;
9) the nature and amount of any claim, debt, or obligation of the alleged incapacitated person;
10) the name, address and telephone number of the person proposed as guardian and standby guardian, their relationship to the alleged incapacitated person and reasons why they would be suitable to exercise the powers necessary to assist the alleged incapacitated person;
11) any provisional remedies being sought (temporary guardian or injunction);
12) the "available resources", if any, that have been considered by the petitioner and the petitioner's opinion as to their sufficiency and reliability;
13) any other information that will assist the court evaluator in completing his/her investigation and report (such as any conflicts of interest between the petitioner and the alleged incapacitated person or the alleged incapacitated person and the proposed guardian).

Comments:

Five general categories of information are to be included in the petition. They are:

1) an explanation of the functional level of the person alleged to be incapacitated;
2) the reasons for the guardianship;
3) the available alternative resources that have been explored;
4) the particular powers sought and their relationship to the functional level of the person;
5) the proposed guardian and the reasons why the proposed guardian is suitable.

In addition, any provisional relief that is sought pursuant to section 81.23 must be set forth in the petition.

Advocacy Tips:

1. Remember, ability to carry out activities of daily living can vary with the time of day and days of the week. An alleged incapacitated person may be thinking quite clearly when the physician examines her for an hour. However you may know personally that the alleged incapacitated person often becomes disoriented and confused. These observations should be communicated to the doctor and recorded in the case record in a descriptive and timely manner.

2. The person's medications must also be examined carefully. Frequently, older person do not react to medications in the same way as do younger persons; age increases the likelihood of adverse drug reactions. Among the elderly, over-medication and multiple medications frequently lead to problems such as depression or adverse drug interactions. If the person has been on a drug for too long a period or at too high a dosage, the person may experience disorientation, euphoria, hallucinations or other reactions. Failure to take medication, failure to take the proper dosage, or failure to take the medicine at the prescribed intervals may also lead to abnormal behavior.

Since an analysis of this information is to be part of a determination of a person's incapacity, if the worker is aware of medications prescribed for the alleged incapacitated person this should be noted and recorded in the case notes along with any personal knowledge of how and when the medication is taken.

3. Since the definition of "functional limitations" points to the behavior of the alleged incapacitated person, the case record should contain descriptive, objective entries regarding the client's behavior and how it impairs the ability to provide for personal and/or financial needs.

The application process for an Article 81 Guardianship begins when the petition is filed. This document is to contain all the pertinent facts explaining to the court why a guardian is needed and what powers the guardian should have. The caseworker will need to document the evidence as it occurs in the client's record. An affidavit detailing the facts as observed by the worker should be prepared by the county attorney and included as part of the petition. Following are two fact patterns with a discussion of what could be included in the Petition to meet the requirements of Section 81.08(a).

Example A:

Client A is an 82 year old man who lives alone in his own home. Caseworker finds stacks of unpaid bills in client A's house (phone, utilities, mortgage etc.). There are recent notices from the bank regarding overdue mortgage payments and a utility shut-off notice. Worker also finds three un-cashed Social Security checks.

When questioned about the bills the client states, "I've never been late paying my bills. These bills are all taken care of."

When the worker shows client the mortgage and shut-off notices client states, "Yes, see, they're all paid up".

Client A then proceeds to ask the worker who all the "letters" are for. Caseworker has noted in the client file over the past 2 months incidents of forgetfulness, confusion and disorientation to time.

Example B:

Client B is a 78 year old woman who lives alone. Client has peripheral vascular disease with a very recent ulceration of the right foot. The foot is swollen, reddened and oozing a foul smelling fluid. Caseworker suspects the foot is badly infected, however client refuses to allow any home care or other medical intervention. It is now difficult for her to walk unassisted and attend to her personal care needs.

The caseworker discussed the condition with the client and stressed the danger of leaving the foot unattended. Client replied that she has had the condition for years and that it was healing itself. The client also added, "it's just a little scratch".

Caseworker has noted in the client's progress notes over the past 4 months episodes where Mrs. B has been unable to remember her income, phone number, birth date, day of year and time of day.

Mrs. B's only income is a social security check and she has no resources. The agency has been Representative Payee for the Social Security check for the past year at Mrs. B's request.

Description of Functional Level:

Section 81.08(a)(3)

The case worker can assist the court in its functional evaluation of the alleged incapacitated person by supplying information about the person's basic needs and how they are met or not met. For example:

Basic needs	**How needs are or are not met**
1. income adequacy and spending patterns	• physical ability to write checks and manage currency • whether income checks arrive on time • ability to budget and allocate resources • knowledge of existing accounts payable and their balances • knowledge of own income and resources
2. adequacy of food, clothing, shelter	• ability to buy and prepare food • ability to eat and choice of diet • ability to maintain personal hygiene • ability to dress and undress • adequacy of laundry facilities • upkeep of shelter • warmth and ventilation • cleanliness of environment • safety of home
3. physical functioning	• ability to see, hear, feel, walk, climb stairs • ability to react in ways that do not endanger health or safety • control bowel and bladder • hand and arm movement and coordination
4. access to helpful resources	• available relatives and friends and the extent to which they are willing and able to be involved • does alleged incapacitated person have a treating physician or access to a physician • access to emergency facilities • access to some form of transportation

5. satisfaction with circumstances	• satisfaction with present circumstances • desire for change • specific assistance the person wishes
6. emotional factors	• loneliness • anxiety
7. mental status	• orientation to reality • memory functioning • reasoning ability • understanding and appreciation of the nature and consequences of any inability to manage basic needs. [i]

Understanding and Appreciation of Inabilities

Section 81.08(a)(3)

As part of the description of the alleged incapacitated person's functional level the petition requires a description of the person's understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living. This is a key issue as it determines whether the legal standard of "incapacity" is met. It must be shown that not only is the person likely to suffer harm because of their inability to meet needs but also that the person cannot adequately understand and appreciate the nature and consequences of such inability.

Unpaid bills, mortgage arrears, shut-off notices and an ulcerous foot are evidence of the client needs in cases A and B. Client statements (direct quotes) timely recorded in the file and progress notes of observations by the caseworker are evidence of inability to understand these needs.

It is clear from the interactions between the worker and clients in the above cases that the clients do not comprehend the danger, i.e. unpaid bills and an untreated ulcerous foot, nor do they appreciate the consequences of not attending to these needs, i.e. utility shut-off, foreclosure and a life threatening infection.

Likelihood of Suffering Harm

Section 81.08(a)(4),(5)

The petition must also contain specific facts that demonstrate the alleged incapacitated person is likely to suffer harm because he/she cannot understand and appreciate the inability to meet certain needs. These facts must build upon and re-emphasize what has already been discussed in the petitions.

The petition for case A must discuss Mr. A's ability to write checks, whether his income checks arrive on time, his ability to budget and allocate his resources, knowledge of existing accounts payable and their balances and knowledge of his income and resources. Deficits in these areas are directly related to the harmful results of utility shut-off, mortgage foreclosure and homelessness.

The petition for case B will focus on Mrs. B's physical functioning. How does the condition of her foot interfere with her ability to walk and stand unassisted, to climb stairs, climb in and out of the shower or bath, ability to buy and prepare food, dress and undress? Does Mrs. B have access to transportation, a treating physician and emergency medical facilities? Again deficits in these areas will result in health and safety hazards in her home resulting in physical harm.

Powers Being Sought

Section 81.08(a)(6)

Once the functional abilities and understanding and appreciation of any inabilities have been discussed the petitioner must request specific powers be granted the guardian and show their relationship to the client's functional level.

Case A shows a need for financial management powers because of the unpaid bills and threat of foreclosure and client's inability to appreciate this situation. At present, the client appears to be functioning in every area except property/financial management. The petitioner would need to consider requesting powers under Section 81.21 such as power to:

- manage finances
- manage property
- provide for maintenance and support of the client
- enter into contracts

Case B requires powers over the person, in particular power to consent to medical intervention to treat the ulcerous foot and other medical problems. The petitioner will consider requesting powers under Section 81.22 to:

- decide who will provide personal care
- determine whether the person should travel if it relates to her medical condition
- authorize access or release of confidential records
- apply for government benefits (i.e. Medicaid to pay for medical care)
- consent to or refuse routine or major medical treatment.

Since Mrs. B only has a social security check and the agency is already her Representative Payee no powers over property are needed.

Short Term Remedies Needed

Section 81.08(a)(13)

If any short term remedies such as a temporary guardian or injunction are sought they must be requested in the petition. Both cases have the potential for "danger in the foreseeable future" and thus should consider a temporary guardian.

Case A could use a temporary guardian to immediately deal with the bank foreclosure action and utility shut-off. The temporary guardian could access client funds to pay the past due bills.

If the client's foot in case B puts her in “imminent risk” the case worker could initiate a STIPSO (Short Term Involuntary Protective Services Order) to have Mrs. B removed to a hospital for observation (NY Social Services Law Section 473-a). The guardianship petition could be brought simultaneously. Since a STIPSO is not specifically intended to authorize intrusive medical intervention the guardianship petition could request a temporary guardian to consent to treatment of her ulcerous foot since it appears she does not comprehend the seriousness of her condition.

Available Resources

Section 81.08(a)(14)

The petition needs to address any available resources that have been considered and their sufficiency and reliability. This allows the court to review such resources as required by Section 81.02(a)(2), and to determine whether the person's needs can be met without the appointment of a Guardian.

The definitions for "least restrictive intervention" and "available alternative resources" require the petitioner to thoroughly explore any other legal or non-legal option that would meet the needs of the individual. Before appointing a guardian the court must see that these options have been explored and found to be inadequate. When exploring these options the worker must carefully document contacts made with potential service providers such as home care agencies, adult day care and senior centers etc. and why these alternatives would not be appropriate. This documentation will be used in the petition to fulfill this statutory requirement.

Case A, for example, with its focus on financial management would consider the use of a power of attorney, trust or representative payee. In looking at these alternatives the petitioner needs to assess the amount and type of property that needs to be managed, what would be the most appropriate mechanism to manage it and why other alternatives are not available.

Case B requires looking at visiting nurses, home health aides, homemakers, etc. These resources will address the client's medical and personal care needs. The sufficiency and reliability of these services must be discussed along with the issue of client consent.

It should be noted that much of the evidence needed to initiate a guardianship proceeding should already be recorded in the client's file. If this information is timely recorded in a descriptive and objective manner, as required by the Department Administrative Directive 91 ADM-10 “PSA Revised Process Standards”, it may be used in the Petition and attached affidavits.

THE COURT EVALUATOR

Section 81.09

The court appoints a court evaluator at the time the order to show cause is issued. The court may dispense with the appointment only when counsel is appointed for the alleged incapacitated person. Some courts may automatically appoint counsel and waive the court evaluator's appointment. This practice depends on the particular judge.

Who Is The Court Evaluator?

Any person drawn from a list approved by the Office of Court Administration with knowledge of property management, personal care skills, problems associated with disabilities, and the private and public resources available for the type of limitation the person is alleged to have. For example, the evaluator may be an attorney, physician, psychologist, accountant, social worker, nurse or other professional.

The court also had the option of appointing the Mental Hygiene Legal Service (MHLS) of that county whether or not the alleged incapacitated person is in a facility. Because MHLS charges a lower fee than many other professionals who may be appointed, and, in some instances, waives its fee, the petitioner may wish to suggest the appointment of MHLS in cases where the alleged incapacitate person has minimal or no assets. If MHLS is appointed as court evaluator and the Mental Hygiene Legal Services already represents the person as counsel because the person is in a mental hygiene facility, or MHLS is of the opinion that the person should have counsel, it will inform the court and the court will relieve MHLS from the appointment of court evaluator.

The court may appoint a not-for-profit corporation as court evaluator in lieu of appointing an individual.

What Are The Duties Of The Court Evaluator?

1. meeting, interviewing and consulting with the alleged incapacitated person;
2. determining if the alleged incapacitated person understands English or only speaks another language, and explaining in an understandable manner, the nature and consequences of the proceeding;
3. determining if the alleged incapacitated person wants or needs legal counsel;
4. interviewing the Petitioner (if PSA is the petitioner, the court evaluator will ask to speak to staff who have been working with the alleged incapacitated person);

5. investigating and making a written report and recommendations to the court. The report is to be based on the personal observations of the evaluator and to include information in response to 17 listed questions;
6. interviewing or consulting with professionals having specialized knowledge in the area of the persons alleged incapacity;
7. where appropriate, retaining an independent medical expert with court approval;
8. attending all court proceedings and conferences.

Special Authority of the Court Evaluator

1. The evaluator may apply to the court for permission to inspect records of medical, psychological/psychiatric examinations of the alleged incapacitated person, if it can be shown that such records are likely to contain information which will assist the court evaluator in completing his/her report to the court. The alleged incapacitated person is informed of this possibility in the notice and has a right to contest this authority.
2. Authority to take steps necessary, without court approval, to preserve property of the alleged incapacitated person pending the hearing if the property is in danger of waste, misappropriation or loss. The court evaluator must immediately advise the court of any such actions he or she has taken and include in his/her report to the court an explanation of the actions taken and the reasons for such actions. While this limited authority of the court evaluator may eliminate the need for a temporary guardian in some narrow set of circumstances, when some emergency decision making is needed regarding health care or living arrangements, petitioner should not rely on the court evaluator's limited authority; rather the petitioner should seek the appointment of a temporary guardian.

Comments:

The twin statutory goals of assessing a person in terms of the person's functional level and imposing the least restrictive dispositional alternative are supported by the appointment of the court evaluator. The court evaluator is intended to act as an independent investigator to gather information to aid the court in reaching a determination about the person's capacity, the availability and reliability of alternative resources, and assigning the proper powers to the guardian, and selecting the guardian. This section clarifies this role and distinguishes it from the advocacy role of counsel described in section 81.10

Note:

Section 81.09 (d) allows the court evaluator to inspect medical, psychological or psychiatric records of the alleged incapacitated person provided that the person consents or the court evaluator has obtained a court order authorizing such inspection. The court order satisfies HIPAA requirements regarding individually identifiable health information of the alleged incapacitated person. The court evaluator's access to certain health information may be limited by statutes with particular requirements. For example, federal confidentiality regulations of alcohol and drug abuse patients would mandate that when the alleged incapacitated person is a participant in any federally assisted alcohol or drug abuse program the court evaluator can only obtain records maintained by these programs either with the consent of the patient or by a court order of disclosure accompanied by a subpoena. (42 C.F.R. Section 2.31 and 2.64)

Furthermore, when attempting to access confidential HIV related information the court evaluator is subject to standards set forth in New York's Public Health Law Sections 2782 and 2785. The disclosure requirements under these sections are analogous to the federal requirements for alcohol and drug abuse patients. There may be other confidentiality statutes which further limit disclosure.

Advocacy Tip:

As part of the statutory duties the court evaluator must interview the petitioner. If PSA is the petitioner, the evaluator will want to interview the persons within the Agency that are most familiar with the alleged incapacitated person's condition, affairs and situation. Normally this will be the case worker and supervisor involved.

When being interviewed by the court evaluator, try and be as cooperative as possible. In particular, the evaluator will need to know the specific problems the alleged incapacitated person has, the history of the case and the alternatives that were tried to meet the needs of the alleged incapacitated person before bringing the guardianship petition. The case worker may share information with the court evaluator without the client's consent as long as it's reasonably necessary in order to provide protective services and Department directives on confidentiality are followed (90 INF-16; 92 INF-26; NYS Social Services Law Section 473-e).

Example:

Your client, 83, who is blind and frail, lives alone. He has income checks which he gives to his cousin who then cashes them and gives your client the money. Client keeps the cash in the house and you believe there is over $30,000 presently hidden in his home. The cousin has been known to help himself to the cash.

The court evaluator has the authority to take steps, without court approval, to preserve the property of the alleged incapacitated person, pending the hearing, if it is in danger of loss, misappropriation or waste. Rather than leaving the cash in the house where it could be stolen or misappropriated by the cousin, the court evaluator has the authority to open a bank account for the money. The court evaluator must report this temporary action to the court immediately and include a written explanation of these actions in the formal written report to the court.

COUNSEL

When Will Counsel Be Appointed For The Alleged Incapacitated Person?

Section 81.10

A person alleged to be incapacitated has the right to choose and engaged counsel of his or her choice. If the court has already appointed counsel, which is often the case if the petition requests the authority to transfer the person to a nursing home or to consent to major medical or dental treatment without the person's consent, appointed counsel will continue his or her duties until the court is satisfied that the retained counsel has been chosen freely and independently by the alleged incapacitated person.

The court must appoint counsel in certain situations when the person does not have counsel. The appointment of counsel is mandated in the following situations:

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 2801 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 temporary powers 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.

Comment:

The role of counsel is to represent the person alleged to be incapacitated and ensure that the point of view of the person alleged to be incapacitated is presented to the court. At a minimum the representation should include conducting personal interviews with the person; explaining to the person his or her rights and counseling the person regarding the nature and consequences of the proceeding; securing and presenting evidence and testimony; providing vigorous cross-examination; and offering arguments to protect the rights of the allegedly incapacitated person.

In recognition of the fact that counsel's advocacy role will provide protection for the allegedly incapacitated person, and that some estates may be financially over-burdened by the expenses of both the court evaluator and counsel, the court may dispense with or suspend the appointment of the court evaluator if counsel is appointed.

Advocacy Tip:

Keeping the attorney appointed by the court until the court can determine the circumstances under which counsel was retained by the alleged incapacitated person allows the court to consider whether any undue influence was exerted on the alleged incapacitated person by an abuser who wishes to assert additional control over the alleged incapacitated person. Even if the court has not appointed counsel, this provision alerts the court that there may be circumstances where the person asserting that he or she is representing the alleged incapacitated person has a serious conflict of interest.

Example:

Your client has serious health problems, including several chronic and severe illnesses, and dementia. Your office has brought a guardianship proceeding claiming, among other things, that certain persons purporting to be your client's attorneys-in-fact are interfering with your ability to deliver home care services for the woman and are exploiting her. An attorney appears in the proceeding on behalf of the alleged incapacitated person and requested several adjournments. You realize that this same attorney has been working with the attorneys-in-fact. The attorney notarized the illegible signature of your client on the power of attorney document, and the attorney and her husband were witnesses to a will she prepared for your client, revoking her previous will and granting all her assets to the attorneys-in-fact. The attorney's purported representation of your client in the guardianship proceeding creates a serious conflict of interest that should be brought to the court's attention, if the court is not already aware of it.

SHORT TERM SOLUTIONS

What Can Be Done While The Guardianship Appointment Is Pending?

Section 81.23

Article 81 provides for two short term solutions: 1) appointment of a temporary guardian with limited powers and 2) the issuance of an injunction and temporary restraining order.

In What Circumstances is a Temporary Guardian Appropriate?

If the petitioner can show 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 property of the alleged incapacitated person, the court may appoint a temporary guardian at the beginning of the proceeding (when the petition is filed) or at any subsequent time prior to the appointment of the guardian. The temporary guardian shall only be given powers and duties which are appropriate to meet the needs alleged and which are specified in the order and must report to the court all actions taken. The appointment of a temporary guardian will in most instances require that a hearing be held as soon as the court directs.

Notification of the appointment of a temporary guardian must be given to the alleged incapacitated person and any person having custody or control over the person or property of the alleged incapacitated person.

What Other Short Term Solutions Are Available?

This section also authorizes the court to issue an injunction or restraining order while the proceeding is pending or at any time after the appointment of a guardian. This allows the court to stop any person who is attempting to transfer or otherwise dispose of the property or is acting in a manner which threatens to endanger the health, safety or welfare of the person who is alleged to be incapacitated or who has been determined to be incapacitated.

Advocacy Tips:

1. The hearing for a temporary guardian need not always be a full hearing. The attorney could request a less formal hearing such as a conference call if appropriate. There is no guarantee of an immediate hearing so the caseworker must make a strong case for exigent circumstances

2. Since a temporary guardian can address personal needs such as consent to medical treatment and financial needs such as paying past due bills, the petitioner has the option of requesting a temporary guardian at the outset to meet these needs until a full hearing can be held. These are usually crisis situations. Case workers should note another intervention available to meet a crisis is the STIPSO (Short Term Involuntary Protective Services Order). In comparing the two interventions the STIPSO legal standard of "imminent risk" is difficult to meet and allows only a maximum of six days intervention time whereas the "dangerous" standard for the temporary guardian is much lower and can remain in effect until the issuance of the commission. Also a temporary guardian may consent to medical treatment whereas a STIPSO only provides for non-intrusive medical intervention. However, the Social Services Law not only mandates that a STIPSO petition shall have preference in court but also that the hearing be held within 48 hours. Thus if the legal standard can be met and time is of the essence a STIPSO may be the intervention of choice. A guardianship and STIPSO may be initiated simultaneously thus benefiting from the short term crisis intervention of the STIPSO and the long term effects of the guardianship.

There may be instances where the petition did not request a temporary guardian and the client's situation deteriorates while the guardianship petition is pending. If there is danger to the health, well being or property of the client then the case worker should immediately notify the county attorney and seek the appointment of a temporary guardian in the interim.

Example:

The agency accepts a referral from the manager of a housing complex regarding a 78 year old man, Mr. X, who lives alone. The man speaks little English and often wanders through the complex, disrupting other tenants and appears to be confused and disoriented. Because of these disruptive episodes Mr. X may be evicted. He is also an insulin-dependent diabetic with poor eating habits and poor insulin management. The bank had recently notified the housing manager when Mr. X, accompanied by a "young friend", withdrew $50,000 from his savings account.

The agency plans to petition for guardianship however, it is felt he is at risk now because of the health and safety factors and possible financial exploitation. At the commencement of the proceeding the petitioner should request the appointment of a temporary guardian pursuant to Section 81.23. The fact that Mr. X lives alone with uncontrolled diabetes, wanders about in a state of confusion and will possibly be evicted are all good indications of "danger in the reasonably foreseeable future."

A temporary guardian could address the potential eviction problem and arrange for home care services to attend to Mr. X's diabetes and to monitor his whereabouts. If the facts indicate, the petition may also seek an injunction and temporary restraining order on Mr. X's bank account to protect his assets from dissipation. If assets have been misappropriated by the "friend" the guardian, once appointed, can pursue recovery of the funds through a legal action under Section 81.43.

Notes:

1) Uncontrolled diabetes is often exhibited as mental confusion and disorientation. It is possible that once Mr. X has his diet and insulin regulated his confusion will clear up. This possibility must be thoroughly explored by the court evaluator and included in his/her report to the court.

2) Since Mr. X speaks little English the notice of the guardianship proceeding that is served upon him must be in a language he understands (see Section 81.07).

HEARING

When Is A Hearing Held?

Section 81.11

A hearing must always be held before a guardian can be appointed for any person. In the absence of a hearing there is no basis for evaluating whether the guardian's powers are the least restrictive alternative properly tailored to the needs of the alleged incapacitated person and whether the petitioner met its burden of proof of demonstrating incapacity by clear and convincing evidence. Article 81 requires a hearing be held 28 days after the signing of the order to show cause. This timeframe is frequently extended because of the schedule of the various parties. Nevertheless, the parties should expect the hearing will occur reasonably soon

What Rights Does The Alleged Incapacitated Person Have At The Hearing?

At the hearing both the alleged incapacitated person and the Petitioner have the right to: present evidence, call witnesses (including expert witnesses), cross examine witnesses and be represented by counsel of choice. In addition, there is some authority for the proposition that the alleged incapacitated person has the right to remain silent and cannot be compelled to testify. However, while this principle is well established in criminal law, it is not clear that this right can be asserted in a civil action such as a guardianship proceeding. Some would argue that the liberties at stake in a guardianship proceeding are as significant as the liberties at stake in a criminal matter and thus a right to remain silent applies. However, the issue is not yet resolved conclusively in favor of a right to remain silent.

The alleged incapacitated person is presumed to be competent. If the alleged incapacitated person does not agree to the appointment of a guardian, the petitioner must prove by clear and convincing evidence that the person is incapacitated. The standard of clear and convincing evidence is the most stringent standard in a civil matter.

The rules of evidence apply in a contested proceeding. When the rules apply, certain types of testimony, such as hearsay, are inadmissible. Hearsay testimony would include statements by the witness on the stand about what third persons not present in court told the witness, it would also include letters written by physicians and other individuals not present in court. The court may waive the rules of evidence and be flexible about what testimony and documents it allows to become part of the record of the hearing.

Will The Alleged Incapacitated Person Be Present At The Hearing?

The appointment of a guardian can be made only after a hearing either at the courthouse or where the person 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 alleged incapacitated person resides unless:

1. the person resides out of state; or
2. all the information before the court clearly establishes (i) that 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.

Does The Alleged Incapacitated Person Have A Right To A Trial By Jury?

If there are issues of fact regarding the appointment of a guardian to be decided, the alleged incapacitated person or his or her counsel has the right to demand a trial by jury.

Can the hearing be closed to the public?

While guardianship proceedings are presumptively open, the court can close the hearing upon a finding that there is good cause to do so. In making that determination the court will consider the privacy of the individual and the nature of the proceeding.

Comments:

Article 81 demonstrates how seriously it regards the deprivation of a person's rights that may occur with the appointment of a guardian by requiring a hearing be held in every case and by requiring the presence of the person at the hearing unless a narrow exception applies.

Requiring the presence of the person at the hearing satisfies many important goals. It allows the judge to make first hand observations and draw first hand impressions of the allegedly incapacitated person. Judges have substantial expertise in evaluating the persons who testify in court not only by their testimony but also by their appearance and demeanor. That expertise and experience prove very valuable in observing a person alleged to be incapacitated particularly because disparities often exist between what is written on paper and what is deduced from observing the person first hand.

The allegedly incapacitated person's presence also permits the person to be part of the decision making process, thereby recognizing, respecting and preserving the person's dignity. Additionally, the person's presence may allow the person to accept the appointment of a guardian more easily than someone who has been excluded from the process even by the best of intentions.

Advocacy Tips:

1) If the caseworker feels that no meaningful participation will result from the presence of the client at the hearing, an application for an exception to the presence requirement can be made in the petition. However, the worker should take note that the concept of participation is a broad one and can take a wide variety of forms. Thus, extreme care should be exercised in seeking this exception. For example, even if the allegedly incapacitated person cannot communicate verbally, his or her appearance and demeanor can convey information to the judge which will help the judge assess, among other things, his or her ability to manage activities of daily living, the consequences to the person resulting from the inability to manage daily activities, whether the present place of abode is best suited to the needs of the individual, and the appropriate scope of the guardian's authority.

Since the intent of the statute clearly requires presence the exceptions will only come into play when such application will not compromise the integrity and fairness of the court's decision. Thus, the caseworker must assist the client in making any special arrangements needed to get to the hearing. Likewise, if the client is unable to go to court the caseworker may need to assist in arranging for the judge and court reporter to hold the hearing where the client is residing. Courts often hold the entire or a least part of a hearing at a hospital or a nursing home so the caseworker should not be intimidated in suggesting this alternative.

2) If the caseworker believes that the alleged incapacitated person would be reluctant to testify about abuse if the abuser is in the courtroom, and is fearful of retribution, the caseworker should discuss with the attorney representing the Agency or the court evaluator the possibility of requesting that the court exclude the abuser while the alleged incapacitated person takes the stand or is questioned by the judge.

ALTERNATIVES TO APPOINTING A GUARDIAN

Section 81.16

What Are The Alternatives To Appointing A Guardian?

If the alleged incapacitated person is found not to be incapacitated the court will dismiss the petition. If the alleged incapacitated person is found to be incapacitated, the court may provide for protective arrangements and single transactions without appointing a (long term) Guardian.

How Does A Protective Arrangement Or Single Transaction Work?

The court may authorize, and oversee any transaction or series of transactions necessary to achieve any security, service or care arrangement meeting the foreseeable needs of the incapacitated person or authorize and oversee any contract, trust or other transaction relating to the property or financial affairs of the incapacitated person. When considering this alternative the court must consider the interest of dependents and creditors of the person, whether the transaction is necessary as a means for providing for personal needs and/or property management, and in light of the person's functional level, whether the continuing protection of a guardian is needed.

The petitioner will go through the required notice and hearing process with the appointment of a court evaluator to assure due process protection for the alleged incapacitated person. At the hearing the court will explore the alternatives discussed above and make a decision based upon the evidence presented.

What Is A Special Guardian?

The court may appoint a special guardian to serve as the incapacitated person's agent in providing for protective arrangements or in concluding the transaction and receiving the services. The special guardian's authority is limited to those activities specified in the court order and must report to the court all the actions that have been taken pursuant to the order. The special guardian remains subject to the power of the court until discharged. Like a (long term) guardian, the special guardian may receive reasonable compensation for services rendered; however, that compensation may be reduced or denied if the special guardian fails to discharge his or her duties satisfactorily in any respect.

Comments:

The list of alternatives available to the court emphasizes the statute's underlying goal of promoting the least restrictive alternative. The court's ability to provide for protective arrangements and single transactions fills a gap in New York's law, namely, where a person may require assistance but does not require the equivalent of a guardian. The court can fashion remedies to provide for the foreseeable needs of the incapacitated person without depriving the person of independence and autonomy.

Among the types of protective arrangements and transactions which the court may be requested to authorize or ratify are payment, delivery, deposit or extension of funds or property; entry into an annuity contract, a contract for life care; sale, mortgage or lease or other transfer of property; establishment or addition to a trust; contracting with health care, adult day care, and senior center providers for the payment and provision of services and authorizing the receipt of such services or of any other available resources for the incapacitated person.

Example #1

PSA Client is a 62 year old woman with below average intelligence. She lives on her own. Her father left her a considerable amount of money in a trust. Client's sister is the trustee and is her only living relative.

Over several months the caseworker notices the client's bills are not being paid and the client is not receiving her monthly allowance from her sister. In the same time period the trustee sister has made several large purchases for herself. The caseworker knows the sister has no resources and her only source of income is a monthly social security check that barely covers her expenses. Caseworker is afraid the trustee sister may be using the trust funds for her own needs.

The court in this situation is allowed under Section 81.16 to authorize a trust-related transaction for the alleged incapacitated person if the court determines that the transaction is necessary as a means of providing for personal needs and/or property management for the client. Depending upon the evidence, this situation may warrant removal of the trustee under the Estates Powers and Trusts Law (i.e. if the acts or omissions by the trustee endanger the trust property, show a lack of honesty, reasonable fidelity to the trust, or proper capacity to administer the trust.) The court could appoint a Special Guardian to oversee the removal of the trustee and the appointment of a successor.

Since the client seems to manage on her own as long as her trust funds are properly administered and the agency continues to do case management, it is unlikely she will need the ongoing protection of a guardian.

NOTE: Depending upon the facts, the worker may need to seek injunctive relief under Section 81.23 to protect the trust funds pending the hearing.

Example #2

Mr. and Mrs. C have been clients for 3 months. Mr. C, who is in the advanced stages of Alzheimer's Disease, has just been placed in a local skilled nursing facility. Mrs. C, who was appointed Mr. C's agent under the Health Care Proxy Law, was able to consent to his placement.

Mr. and Mrs. C have $100,000 in resources all of which is in Mr. C's name. When the caseworker speaks with the attorney about petitioning for a guardianship for Mr. C the attorney suggests that the petition request that the court invoke Section 81.16 allowing for a series of transactions necessary to achieve Mr. C's care arrangements and Mrs. C's financial security without appointing a guardian.

Under this section the court could appoint a Special Guardian to transfer from Mr. C to Mrs. C the community spouse resource allowance under New York Medicaid law to provide for her financial well being. Likewise the Special Guardian would set up Mr. C's burial account and spend down his remaining resources to the Medicaid level.

Since Mrs. C is able to visit her spouse regularly and make medical decisions for him, it is doubtful that he will need the ongoing protection of a guardianship.

APPOINTMENT OF A GUARDIAN

Section 81.16

If the court determines that the appointment of a guardian is necessary, the court must tailor the order by limiting the powers of the guardian to those which are necessary to assist the incapacitated person. The order of appointment of a guardian should delineate the exact scope of the guardian's authority because it will be the reference document for those with whom the guardian will interact on behalf of the incapacitated person.

If a guardian is appointed, the order of appointment must identify all persons entitled to notice of all further proceedings. Service of notice on the persons so identified will satisfy the notice requirements of section 81.07 and eliminate the need to renew the search for the persons entitled to service.

Who Can Serve As Guardian?

Section 81.17

The alleged incapacitated person may nominate a guardian in the petition or other written document.

Section 81.19

Any individual over eighteen years of age, 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, a corporation authorized to act with respect to financial affairs, and any community guardian program operating pursuant to the provisions of title three of article nine-B of the social services law that is found by the court to be suitable to exercise the powers necessary to assist the incapacitated person may be appointed as guardian. The community guardian program can be appointed only if the proceeding was commenced by APS and the person for whom a guardian is appointed is in the community or intends to return to the community. There are only a limited number of community guardian programs in New York.

The following specific persons are not eligible 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:

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.

This section also provides that in determining who should be appointed guardian priority should be given 1) to a person who is nominated by the allegedly incapacitated person in the petition or in a writing filed in the proceeding: and 2) in the absence of such a nomination, to a person nominated orally or by conduct by the person alleged to be incapacitated during the hearing or trial.

Comment:

The criteria that the court must consider in selecting the guardian address the relationship between the proposed guardian and the incapacitated person, the needs of the alleged incapacitated person, and the experience of the proposed guardian.

Advocacy Tip:

The court should not appoint as guardian the person who acted as the court evaluator or as the alleged incapacitated person's counsel unless there are extraordinary reasons why no other person is appropriate, such as no one else eligible and willing to serve and there are limited assets in the incapacitated person's estate.

GENERAL DUTIES OF THE GUARDIAN

What Are The Basic Duties Of The Guardian?

Section 81.20

This section provides that the guardian shall, among other things:

1. exercise only the powers the guardian is authorized to exercise;
2. exercise the utmost care and diligence when acting on behalf of the incapacitated person;
3. exhibit the utmost degree of trust, loyalty, and fidelity in relation to the incapacitated person;
4. file an initial and thereafter annual reports;
5. visit the incapacitated person not less than four times a year or more frequently as specified in the court order.

Advocacy Tip:

The guardian is a fiduciary in the eyes of the law and thus held to a high standard. If the guardian fails to adhere to this standard and fails to carry out his or her statutory duties, the guardian can be removed.

Are There Any Education Requirements?

Section 81.39

Every guardian is required to participate in a court approved training program which emphasizes the legal duties and responsibilities of the guardian and provides an introduction to medical terminology, particularly that related to the diagnostic and assessment procedures. This training requirement may be waived by the court.

Training programs are offered by The Brookdale Center on Aging of Hunter College, the New York Bar Association and various local bar associations. Since the training programs are offered privately rather than by the court, a set schedule is not available.

Information about various trainings can be obtained by checking with the Office of Guardian and Fiduciary Services, 140 Grand Street, White Plains, NY 10601. Tel: 914-682-3210; Fax: 212-457-2608; website; http://www.courts.state.ny.us/ip/gfs/index.shtml.

Guardians can obtain information about the role of guardian from the National Guardianship Association which publishes a Code of Ethics for Guardians. NGS is located at 1604 N. Country Club Road. Tucson, AZ. 85716-3102. Tel: 520-326-2467; Fax: 520-325-7925; website: www.guardianship.org

What Are The Duties Of The Guardian Who Is Given Authority with Respect to Property Management?

1. The guardian with authority over property management must:
1. 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;
2. preserve, protect, and account for such property and financial resources faithfully;
3. 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;
4. use the property and financial resources and income available to maintain and support the incapacitated person, and to maintain and support those persons dependent upon the incapacitated person;
5. at the termination of the appointment, deliver such property to the person legally entitled to it;

6. 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
7. perform all other duties required by law.

These powers are potentially very broad. Although Medicaid planning will not be part of a guardianship of a Commissioner of Social Services, it should be noted that Medicaid planning plays a significant role in many guardianships.

What are the Duties of a Guardian Who is Given Authority Relating to Personal Needs?

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.

Comments:

This section emphasizes the guardian's unique relationship to the incapacitated person. The guardian is required to exercise the utmost care and diligence in acting on behalf of the incapacitated person. Decision-making is a fundamental part of the guardian's role. In order to carry out this responsibility in the most careful and diligent manner, the guardian should develop a personal relationship with the ward, in the event one does not exist, so that the guardian can understand the decision's impact from the incapacitated person's perspective and involve the incapacitated person in the decisions to the greatest extent possible. This can be done through an interview with the incapacitated person and through discussions with family and friends to ascertain the preferences of the incapacitated person. In situations where there is no indication of the incapacitated person's prior competent preferences, the guardian must make decisions in accordance with the best interests of the person.

The guardian's relationship to the incapacitated person is that of a fiduciary. As a fiduciary, the guardian must exhibit the utmost degree of trust and loyalty and fidelity in the relationship. The guardian is in a position of special trust and his or her motives and actions should be above reproach. The guardian has the obligation to make well-reasoned decisions that protect personal and pecuniary interests of the incapacitated person.

POWERS OF THE GUARDIAN

To What Extent Can the Guardian Have Power Over the Incapacitated Person's Property?

Section 81.21

The guardian may be authorized 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.

Can The Guardian Make Transfers For The Incapacitated Person?

Yes. The court may authorize a guardian with power over property management to transfer 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/she had the capacity to act. Transfers may be in any form that the incapacitated person could have used if he/she had capacity (see listed transfer powers Section 81.21(a)(1-10).

If the petitioner or guardian seeks 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 petitioner or guardian must provide the court with information sufficient to show that the incapacitated person would have made the transfer if he/she had capacity to act including information regarding 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; the property of the incapacitated person that is the subject of the present application; the proposed disposition of such property and the reasons why such disposition should be made; whether the incapacitated person has sufficient capacity to make the proposed disposition (if the incapacitated person has such capacity, his or her written consent has to be attached to the petition); whether the incapacitated person has previously executed a will or similar instrument and if so, the terms of the most recently executed will.

If transfer authority is being sought the petitioner or guardian must give notice of their request to appropriate persons (see Section 81.21 (c))

Comment:

This section provides assurance that the prior competent choices of the person will be given effect. It also details the matters which the court must consider in approving transfers and other arrangements. Most particularly, the court should consider whether a competent reasonable person in the position of the incapacitated person would be likely to perform the act or acts under the same circumstances. If the person has manifested a prior intent inconsistent with the act for which approval is sought, it must be shown that the person is likely to have changed such intention under the circumstances existing at the time of the petition.

It is significant to note that the end of this section clearly states that it does not impose any duty on the guardian to transfer assets of the incapacitated person and furthermore, the guardian will not be liable or accountable to any person for having failed to transfer assets.

Advocacy Tip:

The guardian can bring a proceeding to discover withheld property under Section 81.43. This is a key power which allows a guardian to compel the testimony of individuals whom the guardian believes is holding property that belongs to the incapacitated person. This is a key power for a guardian who has been appointed in a situation where financial exploitation is suspected. The guardian can obtain a court order to compel the suspect to testify as to the property and if it appears that the guardian is entitled to the property, the guardian can obtain a court order compelling the exploiter to turn the property over to the guardian.

What Powers May A Guardian Obtain With Respect to the Personal Needs of the Incapacitated Person?

Section 81.22

With respect to personal care the guardian may be granted those powers necessary to provide for the personal needs, including food, clothing, shelter, health care or safety, of the incapacitated person, and the power to establish the place of abode of the incapacitated person within or without the state. The powers are listed in this section.

What Must The Guardian Consider When Making Medical Decisions?

To the extent the guardian is authorized to consent to generally accepted routine or major medical or dental treatment, the guardian must make treatment decisions in accordance with the patient's wishes, including the patient's religious and moral beliefs, or if the patient's wishes are not known and cannot be ascertained with reasonable diligence, in accordance with the person's best interests, including a consideration of the dignity and uniqueness of every person, the possibility and extent of preserving the person's life, the preservation, improvement or restoration of the person's health or functioning, the relief of the person's suffering, the adverse side effects associated with the treatment, any less intrusive alternative treatments, and such other concerns and values as a reasonable person in the incapacitated person's circumstances would wish to consider.

Can A Guardian, Who Has Powers Pertaining To Personal Needs, Make Decisions Regarding Withholding or Withdrawal of Life Sustaining Treatment?

"Life Sustaining Treatment" in Article 81 means medical treatment including artificial nutrition and hydration, which is sustaining life functions and without which, according to reasonable medical judgment, that patient will die within a relatively short time period.

This is a very sensitive area of decision-making. Article 81 neither authorizes nor prohibits the court from allowing a guardian to make these types of decisions. If the guardian is the incapacitated person's appointed agent according to a health care proxy the guardian has authority under the public health law to make life sustaining decisions. (Decisions regarding nutrition and hydration may only be made by the guardian who is agent if the proxy form states he/she has such power).

In the absence of a health care proxy, the guardian cannot make end-of-life decisions unless there is clear and convincing proof of the incapacitated person's prior competent wishes regarding the end of life care. While end-of-life decision making raises sensitive issues, a more significant issue is the guardian's role in assuring that palliative care is available to the incapacitated person at the end of his or her life. One of the key components of palliative care is pain management. Assuring that the individual is comfortable and able to cope with pain is an important advocacy role for the guardian.

What Must The Guardian Consider When Making Decisions About Living Arrangements?

To the extent the guardian is authorized to choose the place of abode for the incapacitated person, the choice of abode must be consistent with 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 and the needs of those with whom the incapacitated person resides. Placement of the incapacitated person in a nursing home or residential care facility 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.

Are There Personal Decisions The Guardian May Not Make?

This section restricts the guardian from consenting to the voluntary formal or informal admission of the incapacitated person to a mental hygiene facility under Articles 9 or 15 of the Mental Hygiene Law or revoking Powers of Attorney, Do Not Resuscitate Orders, Health Care Proxies or Living Wills which express the wishes of the incapacitated person with respect to health care.

It should be noted that the court may revoke a power of attorney if it determines that the attorney-in-fact has violated his or her fiduciary responsibilities to the incapacitated person or if the person executed the power of attorney when he or she lack the necessary capacity to do so.

The issue of whether a guardian can consent to the administration of psychotropic medication over the objection of the incapacitated person remains unsettled. Even if the order of appointment provides that the guardian has the authority to consent to major medical treatment which includes administration of psychotropic medication, if the need to administer such medication arises, the wise course would be to seek court approval of such a decision.

Comments:

This section identifies the types of powers that the court may authorize the guardian to exercise with respect to meeting the personal needs of the person. The list set out in the statute is meant to be illustrative rather than exclusive.

Any powers granted under this section must be 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.

Consistent with New York State's policy of encouraging the creation of Durable Powers and Springing Durable Powers of Attorney, Do Not Resuscitate Orders, Health Care Proxies, and Living Wills, Article 81 specifically prohibits a guardian from revoking any such advance directive. However, the court may modify, amend or revoke any previously executed appointments, powers or delegations made by the incapacitated person prior to the appointment of a guardian if the court finds the documents were executed while the person was incapacitated. (See Section 81.29 (d)).

It is important to remember that even though a guardian has been appointed, the incapacitated person retains all powers and rights except those powers and rights which the guardian is granted. (See Section 81.29) If the incapacitated person's situation should change and the guardian needs more powers or less powers, the court may modify the order (See Section 81.36).

Example #1:

PSA accepts a referral regarding Lillian, an 89 year old woman who is a practicing attorney. Her friend makes the referral stating Lillian has not paid her mortgage for three months. She is also losing weight, disoriented to time and has fallen several times. Lillian lives alone and has no living relatives.

During the initial PSA assessment, the worker discusses the possibility of some assistance in the home for Lillian but she refuses, declaring she's fine. The worker discovers several unpaid bills and Lillian admits she may need some help with her finances. The worker also notes that Lillian is unsteady on her feet and noticeably forgetful and confused. A medical and mental health evaluation of Lillian determines she is suffering from a slow and progressive form of dementia.

The agency files a guardianship petition. Lillian's lifestyle, until recently, attests to her independence and capability in managing her affairs, therefore, the request for powers should be limited to the areas of functional incapacity. The guardian would need powers over Lillian's property and finances to pay her bills but should consider setting aside some funds for Lillian to access at will. The guardian may need power to make some personal decisions such as hiring an aide or homemaker to assist with walking, chores and meal preparation. Depending upon the diagnostic assessment and prognosis, the guardian may need full medical consent powers. It doesn't appear that the guardian should be making decisions regarding social environment, place of abode and travel.

The petitioner should consider requesting a temporary guardian be appointed to pay Lillian's mortgage arrears. This type of temporary action should not be left to the court evaluator.

Example #2:

The agency is applying for appointment of a guardian for an 86 year old man with heart disease, high blood pressure and glaucoma. The agency is already representative payee of his social security check and he has no resources. The petitioner is requesting power over personal needs and in particular to consent or refuse routine or major medical treatment. The client's mental status fluctuates. Some days he is able to make his own decisions and other days he is very confused and disoriented. The petitioner is not sure how much medical decision-making power should be requested.

Since Article 81 emphasizes limited powers it is best to leave as much decision-making to the client as possible. Given the client's mental capacity fluctuates it would be essential to at least get medical decision-making powers in the area of any pre-existing condition and any events that would likely follow from that condition. Therefore, the guardian needs to have medical consent powers in the area of the client's heart disease, high blood pressure and glaucoma. This would include consenting to all related medications and their dosages and diagnostic tests. It would follow that the power would extend to conditions related to the pre-existing diagnoses such as stroke, heart attack and cataracts. If the client has several chronic medical conditions, it would be advisable to seek full medical consent powers allowing the guardian to make all medical decisions. As a practical matter, many courts will grant broad powers to reduce the number of multiple petitions to expand the guardian's powers.

NECESSARY DOCUMENTATION

What Records Must The Guardian Keep?

A guardian must keep detailed and accurate records of the transactions entered into on the ward's behalf as well as a record of any decisions regarding health care and personal matters for which powers were granted. The law requires the guardian to file an initial report with the court within 90 days of appointment and annual reports thereafter.

What Is An Initial Report?

Section 81.30

The guardian must file an initial report with the court within ninety days of receiving his/her commission. The report is to state what steps the guardian has taken to fulfill his or her responsibilities. The report must contain the following information:

1. If the Guardian has powers over the property- a complete inventory of all property and financial resources of the incapacitated person.
2. If the Guardian has powers over personal needs:
   - report of the Guardian's personal visits with the incapacitated person,
   - steps taken to provide for the personal needs of the person,
   - the Guardian's plan for providing for the personal needs of the person such as:
     - the medical, dental or mental health services to be provided;
     - social and personal services to be provided;
     - any physical, dental and mental health examinations necessary to determine appropriate health care needs;
     - how these services will be paid for, i.e. the application of health or accident insurance and other private government benefits; and
     - copies of any advance directives.
3. any necessary change in the powers authorized by the court; and
4. proof of completion of the guardian education requirement.

Copies of the initial report should be provided to the incapacitated person by mail unless the court orders otherwise , the court evaluator and counsel for the incapacitated person at the time of the guardianship proceeding unless the court orders otherwise , the court examiner, and if the incapacitated person resides in a facility, the chief executive officer of that facility, and if the incapacitated person resides in a mental hygiene facility, the mental hygiene legal service of the judicial department in which the residence is located.

Comment:

The initial report is intended to fulfill several purposes. First, it clarifies the guardian's responsibilities and the course of action to be taken. Second, it gives the guardian an opportunity to assess the circumstances of the incapacitated person and whether any changes need to be made in the guardian's powers. Third, the plan provides a tool for evaluating the guardian's performance. In addition, the report must be filed with the court within 90 days after the issuance of the commission. This time frame establishes the limits within which the guardian must complete the required training program (See section 81.39).

Advocacy Tip:

The initial report is an opportunity to reassess what steps are necessary to ensure the safety of the incapacitated person. If there is a need to change the powers of the guardian, that need should be documented in the report.

What is an Annual Report?

Section 81.31

The annual report is a yearly accounting to the court of the status of the incapacitated person. The guardian must file this report each year in May. The report must include the following information:

1) present address and telephone number of the guardian;
2) present address and telephone number of the incapacitated person (if the person is a resident of a facility include the name of the administrator);
3) major changes in physical or mental condition and any substantial change in medication;
4) date of last medical exam and purpose of visit and a statement by a professional, who has evaluated the incapacitated person within three months of filing the report, regarding the person's condition and current functional level.
5) If the guardian has power over the personal needs:
    - statement as to appropriateness of present residence of the person;
    - summary of any medical treatment received by the person in the previous year;
    - plan for medical, dental and initial health treatment in the coming year;
    - information concerning the social condition of the person.

6) If the guardian has powers over property management the report must contain an accounting of all property and finances (this includes statements of all income received and monies paid out).
7) Facts indicating the need for modification in powers of the guardian.

The annual report must be served on the incapacitated person, and the court examiner. If the incapacitated person resides in a facility, the guardian must send a copy 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 must 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. In addition, a copy of the report must be filed in the office of the clerk of the court which appointed the guardian.

Comments:

The information required to be contained in the annual report concerns the personal status of the incapacitated person, and/or the condition of the person's finances and property, to the extent that the guardian has any authority with respect to those two areas. Given the loss of liberties involved in the guardianship process and the vulnerability of persons under guardianship, it is critical that the court regularly receive and review basic information about the well-being of the ward.

Because Article 81 imposes significant informational requirements on the guardian in completing his or her annual report this performs a significant monitoring function. These additional requirements should benefit the guardianship process in several ways. Primarily, these requirements will aid the court in determining whether the incapacitated person is maintained in the least restrictive environment. Secondly, the imposition of more detailed reporting requirements will focus the guardian on the fulfillment of his or her duties to the incapacitated person. Third, regular and detailed reporting requirements should effectively aid the courts in ensuring that the overall guardianship system is functioning properly.

Advocacy Tip:

The initial and annual reports are reviewed by a court appointed court examiner. The court examiner monitors the conduct of the guardians and serves to discover any failures of the guardian to comply with statutory duties, Copies of the initial and annual report must be served on the incapacitated person unless the court orders otherwise.

When Is A Final Report Required?

Section 81.33

When the guardian dies, is removed, suspended, discharged or allowed to resign the guardian must submit a final report to the court. This report is to include the same information as is required in an annual report.

Advocacy Tip:

If the incapacitated person dies, the guardian must file a final report. Nothing in article 81 sets a deadline for filing the final report in the event of the death of the incapacitated person; however, be mindful of the fact that probate of any will or the treatment of the intestacy of a person who dies without a will must be processed in Surrogate's Court so a timely filing of the final report in the guardianship court will bring the guardianship proceeding to a conclusion in a timely fashion and allow the surrogate's court jurisdiction.

CHANGE IN GUARDIANSHIP

Who May Request A Discharge Or Modification Of A Guardianship?

Section 81.36

An application for discharge or modification of powers may be made by the guardian, the incapacitated person or any person entitled to bring a guardianship proceeding.

What Procedure Does The Court Follow Upon Request For Discharge Or Modification?

The court shall discharge a guardian or modify the powers of the guardian for the following reasons:

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 dies; 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.

The court can dispense with a hearing for a discharge or modification increasing the powers of the guardian if it sets forth the reasons for dispensing with the hearing.

Comment:

This section authorizes the court to modify the power of the guardian either increasing or decreasing them if it appears that such modification is necessary. The modification may occur only after a hearing on notice to the persons entitled to notice as ordered by the court in the order of appointment of the guardian. It provides a means for determining whether powers of the guardian are still consistent with the incapacitated person's needs. If the relief sought is the termination or reduction of the powers of the guardian, the burden of proof of establishing clear and convincing evidence that the guardian's authority should not be reduced or terminated is on the person objecting to such relief. These differing burdens of proof lessen the difficulty of an incapacitated person seeking to gain more control over his or her life.

How Can a Guardian Be Removed?

Section 81.35

A motion to the court for removal of a guardian can be made by the incapacitated person, the court examiner (person assigned by the court to examine initial and annual reports) and any person entitled to bring a guardianship proceeding. A guardian may be removed when the guardian fails to comply with a court order, is guilty of misconduct, or for any other just cause.

Advocacy Tip:

Remember that the guardian is a fiduciary so that any failure to observe the statutory requirements can form the basis for the guardian's removal.

May A Guardian Resign?

Section 81.37

The court appointing a guardian may allow the guardian to resign or may suspend the powers of the guardian.

Section 81.38

If a vacancy is created by the death, removal, discharge, resignation or suspension of the guardian as previously discussed, the court may appoint an interim guardian to serve for ninety days or until a final accounting is filed and a successor guardian is appointed.

To avoid such vacancies the court may, at the time of the appointment of the guardian, appoint a standby and alternate standby guardian who would assume the duties of office immediately upon the death, resignation, removal, discharge, suspension or incapacity of the guardian.

Endnote:

Article 81 provides for the continuation of conservators and committees even after April 1, 1993. In other words, any orders, determinations or decisions by the court under Article 77 and 78 of the Mental Hygiene Law shall continue in force and effect until modified or abrogated by a judge pursuant to Article 81. Article 81 has been amended by Chapter 438 of the Laws of 2004, effective December 13, 2004. The amendments enacted several substantive changes in the law, while also making many technical corrections. The 2005 Manual revision includes these amendments.

PSA

Protective Services for Adults
NYS OCFS Adult Services

ARTICLE 81 GUARDIANSHIP

PSA Legal Intensive Training
for County Attorneys, Commissioners
and Caseworkers

Participant Manual

2008

New York State
Office of
Children & Family
Services

BROOKDALE CENTER
for Healthy Aging & Longevity
Hunter College / The City University of New York

HUNTER IS CUNY

PSA

Protective Services for Adults
NYS OCFS Adult Services

ARTICLE 81 GUARDIANSHIP

For PSA Clients

For Commissioners, Case Workers and County Attorneys

Participant Manual, Part 1

(Overview)

2008

New York State Office of Children & Family Services

Brookdale Center for Healthy Aging & Longevity
Hunter College / The City University of New York

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Developed under contractual agreement between the

New York State Office of Children and Family Services

Division of Protective Services for Adults

Bureau of Training

and

The Brookdale Center for Healthy Aging and Longevity

of Hunter College / The City University of New York

(Revised May 22, 2007)

NOTE: This curriculum was developed for the Office of Children and Family Services (OCFS) in conformance with OCFS training standards. Any modifications in content or delivery are solely the responsibility of the entity organization making such modifications. Every attempt has been made to provide currently accurate and complete information. However, no express or implied guarantees are made. It is important to check for updates and modifications to any information contained herein.

ABOUT THE TRAINER

Debra Sacks, L.P.N., J.D.

Debra Sacks has been the Senior Staff Attorney at the Brookdale Center for Healthy Aging & Longevity Sadin Law Institute for over 17 years. She is also the Director of the Jacob Reingold Elder Abuse Project. Debra has lectured extensively and is involved in legislative reform in the areas of Medicare, Adult Protective Services, Elder Abuse, Guardianship and Case Management Liability. Debra has conducted all the legal training for NYS Adult Protective Service workers for the past 16 years and gives a yearly PSA Legal Update Teleconference.

Debra has authored chapters on Medicare and Protective Services in the New York State Elder Law Handbook, chapters in Guardianship Practice in New York State and co-authored, with Rosemary Bailly, A Guide to Adult Guardianship. Ms. Sacks previously worked as an Associate Attorney for three years with a New York City Elder Law firm. She also has a Certificate in Aging Studies and has worked as a Geriatric Nurse.

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§ 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.

Mental Hygiene Law
Article 81.02

LEGAL STANDARD

Unmet needs
(person/property)

AND

Agree/Prove incapacity

INCAPACITY

Clear and Convincing Evidence that a
person is likely to suffer harm because:

Unable to provide for person/property needs

AND

Cannot adequately understand and
appreciate their situation

Functional Evaluation
Mental Hygiene Law
Article 81.03

Income adequacy and spending patterns (physical ability to write checks and manage currency and determine whether pension checks and disability payments arrive on time);

Adequacy of food, clothing and shelter (ability to prepare food; ability to eat and choice of diet; ability to dress and undress; adequacy of laundry facilities; upkeep of shelter, warmth and ventilation; cleanliness of environment; safety of home);

Physical functioning (ability to walk, climb stairs, reach and get in and out of chair or tub);

Sensory functioning (ability to see, hear, feel, react in ways that do not endanger health or safety);

Access to helpful resources (such as friends, relatives, physicians, emergency facilities, and transportation);

Satisfaction with present circumstances (desire for change and specific assistance the person wishes);

Emotional factors (loneliness and anxiety); and

Mental status (orientation to reality, memory functioning, reasoning ability)

Protective Services for Adults
Mental Health Evaluation Referral Instrument

Section I – Referral Information

Agency Referred To: _____ **Referral Date:** _____

Urgency of this referral: **as soon as possible** **1 wk.** ☐ **2 wks.** ☐ **30 days** ☐

Referring Agency: _____

Address: _____

Case Worker: _____ **Phone #:** _____

Section II – Client Information

Name: _____ **D.O.B.:** _____ **Social Security #:** ___-__-____

Address: _____ **Phone:** _____

Insurance or Payment Method: _____ **I.D. & Group #:** _____

Client Contact Person: _____ **Relationship:** _____ **Phone:** _____

Section III – Client Information
(To be completed by local district)
Continue information on reverse if necessary, using the appropriate numbers as reference.

1. Reason for this referral:

2. Information that is needed for this evaluation:

3. Client's current situation and presenting problems:

continued on next page

Client's current situation and presenting problems: (continued)

4. Medications being taken:

Medication	Dosage	Frequency	Compliance

5. History: (drug/alcohol use, health, education, hospitalizations, other service providers, relevant social history

6. Available support systems, such as family, programs, agencies:

Section IV – Evaluation of Capacity and Risk
To be completed by mental health clinician

	YES	NO	COMMENT/EXPLANATION
1. Does this individual have the capacity to make reasoned decisions?			
2. Does this individual have the capacity to understand the consequences of his or her decisions?			

3. Do the individual's choices have a basis in fact and reality?			
4. Is this individual able to function independently?			
5. Functional deficits:			
Orientation			
Memory			
Intellect			
Affect			
6. Is this individual able to provide for personal needs independently?			
6a. If not able to provide for personal needs independently, able with assistance?			
7. Is this individual able to manage finances independently?			
7a. If not able to manage finances independently, able with assistance?			

To be completed by mental health clinician

8. Is this individual likely to suffer harm because of his or her inability to provide for personal or property management needs?			
9. Is this individual at risk of serious harm or death?			
10. Does this individual have the potential for harm to others?			
11. Does this individual require 24 hour supervision?			

Section V – Evaluation Narrative

Please attach an evaluation narrative, which includes the following:

Diagnosis
Please provide a specific diagnosis as this will impact any possible legal intervention.

Recommendations
Please recommend services or interventions, if any, which you determine necessary to meet deficit needs. (e.g. medications, Visiting Nurse, home health aide, mental health counseling, homemaker services, 24-hour supervision, representative payee, out of home placement or other necessary services).

Prognosis
In your opinion, what is the likelihood of this individual's acceptance and cooperation with recommended treatment/services, and the likelihood of the effectiveness of recommended treatment/services?

This mental health evaluation is submitted by:

_____ _____
Signature Date

_____ _____
Title Phone

At a _____ Part _____ of the Supreme Court of the State of New York, held in and for the Count of _____, at the Courthouse, located at New York City and State of New York on the _____ day of _____, 200_.

PRESENT:

HON. _____,

JUSTICE

X----------X

In the Matter of the Application of _____,
As Commissioner of Social Services of the City of New York,
Petitioner,

For the Appointment of a Guardian of the Person and Property
Of _____, Respondent

ORDER TO SHOW CAUSE
Index No.: _____

X----------X

IMPORTANT

AN APPLICATION HAS BEEN FILED IN COURT BY THE COMMISSIONER OF SOCIAL SERVICES OF _____ WHO BELIEVES, YOU MAY BE UNABLE TO TAKE CARE OF YOUR PERSONAL NEEDS OR FINANCIAL AFFAIRS.

THE COMMISSIONER IS ASKING THAT SOMEONE BE APPOINTED TO MAKE DECISIONS FOR YOU. WITH THIS PAPER IS A COPY OF THE APPLICATION TO THE COURT SHOWING WHY THE COMMISSIONER 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, 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 ANY MONEY TO DO SO.

On reading and filing the annexed petition of _____ as Commissioner of Social Services of _____ duly verified the _____ day of _____, 200_, and the affirmation of _____, M.D., dated _____, 200_, and the affirmation of _____, Esq., dated _____, 200_, and the affidavit of _____, PSA Caseworker, dated _____, 200_, and Exhibit _____ annexed hereto, from which it appears that _____, the alleged incapacitated person herein, resides at _____ is unable to provide for his/her personal needs and/or to manage his/her property and financial affairs.

It is ORDERED that _____, the alleged incapacitated person, the Court Evaluator, and the attorney for the alleged incapacitated person, hereinafter named, show cause at Part _____, Room _____ of this Court, to be held at the Courthouse located at _____, on the _____ day of _____, 200_, at 9:30 in the forenoon of that day, or as soon thereafter as counsel can be heard, why an Order should not be entered:

1. Appointing a Guardian for personal needs or property management of the alleged incapacitated person who shall have the power to: manage the alleged incapacitated person's financial affairs and property matters, provide the alleged incapacitated person with home care services, hire an attorney to represent the alleged incapacitated person in his/her landlord-tenant proceeding, place the alleged incapacitated person into a nursing home, arrange for medical care and treatment, prepare and execute a trust agreement, reimburse the medical home care services, enter the alleged incapacitated person's apartment to perform a heavy duty cleaning;
2. Appointing a temporary guardian for the personal needs or property management of the alleged incapacitated person who shall have the power to:
3. Awarding reasonable counsel fees to the petitioner herein;
4. Granting such other, further or different relief as may be just and proper; and it is further

ORDERED that _____, telephone number (___) _____, upon filling his/her consent and affidavit of responsibility be and hereby is appointed Court Evaluator for the above-named alleged incapacitated person to appear for and protect his/her interests in this proceeding, upon duly qualifying and consenting according to law, complying with Part 36 of the rules of the Chief Judge and filing the certificate required by §36.1(d) and the notice of appointment required by §36.3 of the Rules of the Chief Judge; and it is further

ORDERED that _____ at _____, telephone number (___) _____, upon filling his/her notice of appearance be and hereby is appointed attorney for the above-named

alleged incapacitated person to appear for and represent the alleged incapacitated person in this proceeding, and it is further

ORDERED that _____ at _____, telephone number (___) _____, upon issuance of the commission of temporary guardianship be and hereby is appointed temporary guardian for the above-named alleged incapacitated person with the following powers and duties

STATEMENT OF ALLEGED INCAPACITATED PERSON'S RIGHTS

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.

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.

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.

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 be represented by the 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.

If any party to the proceeding on or before the return date designated in the order to show cause raises issues of fact regarding the need for an appointment under this article and demands a jury trial of such issues, the court shall be deemed a waiver of the right to trial by jury.

SUFFICIENT CAUSE APPEARING THEREFORE,

Let fourteen (14) days service by personal delivery of a copy of this Order to Show Cause and petition upon the alleged incapacitated person, be deemed good and sufficient and let service of a copy of this Order to Show Cause and petition by regular mail or delivery to the office of the Court Evaluator, _____, and Court Appointed Attorney, _____, on or before the _____ day of _____, be deemed good and sufficient.

ENTER:

_____

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____

In the Matter of the Application of
[Enter Name of Petitioner] **Index**

as PETITIONER pursuant to Article 81 of
the Mental Hygiene Law for the Appointment **PETITION**
of a Guardian of

[Enter Name of Alleged Incapacitated Person],

an ALLEGED INCAPACITATED PERSON.

_____

TO THE SUPREME COURT OF THE STATE OF NEW YORK: COUNTY OF_____

The petition of _____ respectfully states and alleges:

1. That _____ is an alleged incapacitated person who is ____ years of age and resides at _____, in the _____ judicial district of the State of New York. Said person's telephone number is (_____)_____.

2. The alleged incapacitated person resides with the following person(s) [Enter Name(s)] _____ at [Enter Address(es)] _____. Said person(s) telephone number(s) is/are _____.

3. [Set forth and 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, set forth specific 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, set forth 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.]

6. [Set forth the particular powers being sought and their relationship to the functional level and needs of the person alleged to be incapacitated.]

7. [Set forth the duration of the powers being sought.]

8. [Set forth 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. [Set forth 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. [Set forth 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.] (If they are unknown or cannot be reasonably ascertained, so state.)

11. [The name, address and telephone number of your petitioner are as follows: [Enter Name] [Enter address] [Enter telephone number].

12. The name, address and telephone number of the person or persons, proposed as guardian and standby guardian is/are [Enter Name] [Enter address] [Enter Telephone number] (if none, so state). The relationship of the

proposed guardian or standby guardian to the person alleged to be incapacitated are as follows: [Set forth reasons].

13. [Set forth any relief sought pursuant to section 81.23 of this article (Provisional remedies such as temporary guardian, injunction and temporary restraining order).]

14. [Set forth the available resources, if any, that have been considered by the petitioner and the petitioner's opinion as to their sufficiency and reliability.]

15. [Set forth 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.]

16. No previous application has been made to any other court or judge for the relief requested herein. (If there has been, recite the history).

WHEREFORE, your petitioner respectfully requests that the court sign the order annexed hereto requiring [Enter name of alleged incapacitated person, the named court evaluator and anyone else entitled to notice] to show cause why a guardian should not be appointed pursuant to Article 81 of the Mental Hygiene Law of the State of New York for the above reasons and with the powers requested herein, and for such other and further relief as to the court may seem just and proper in this case.

_____
SIGNATURE OF PETITIONER

STATE OF_____
ss:
COUNTY OF_____

[Enter name of petitioner] (being duly sworn) (affirm) that I am the petitioner herein, that I have read the foregoing petition and that the same is true to the best of my knowledge and belief.

_____
SIGNATURE OF PETITIONER

Sworn (Affirmed) to before me

this _____ day of _____, 20____.

_____
NOTARY PUBLIC

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

X----------X

In the Matter of the Application for Appointment of a Guardian for Personal Needs and/or Management (Pursuant to MHL Article 81) of _____, Alleged Incapacitated Person.	AFFIRMATION OF PHYSICIAN Index No. _____

X---------- X

_____, M.D., a physician licensed to practice in the State of New York, affirms that the following is true under penalties of perjury:

1. I am affiliated with _____ Hospital/Agency as (title) _____ _____. I also maintain an office at _____.

2. My medical specialty is _____.

3. I saw and evaluated _____ on (date(s)) _____ _____, at (location) _____.

4. I found the age, mental condition, and diagnosis of the Alleged Incapacitated Person to be:
(Age and date of birth) _____
(Medical Condition) _____
(Diagnosis) _____

5. If diagnosis is of a type of dementia, state cause (if known); whether condition is reversible, or can be treated; describe any residual mental capacity.

6. Regarding the ability of the alleged incapacitated person to manage activities of daily living, I find him/her to be incapacitated in the following ways: (Note all physical limitations and conditions [such as incontinence or need for medication to be administered or monitored] which affect mobility, need for assistance, or which place the person at risk): Does the person understand the nature and consequences of his/her functional limitations?

7. His/her mental and emotional status are: (Include person's own wishes and perceptions of his/her circumstances. [Can s/he express or make choices for his/her own care?])

8. The Alleged Incapacitated Person is not able to manage his/her property because: (Be as specific as possible.)

9. (If applicable) I have discussed needs with his/her caretaker/treating physician/nurse/social worker/home care worker (circle one) who states that the following assistance is necessary:

10. List any medications taken, whether or not by prescription.

I recommend the following testing, evaluation or specialist treatment for this person:

11. The prognosis for this person is:

In view of this prognosis, I recommend the following plan for his/her care: (If proposed plan is temporary, or limited to particular needs, state expected duration and type of services needed. If a more restrictive environment or placement is recommended, state reason.)

12. If person is incapacitated to the extent that it would be impossible or detrimental for him/her to appear in Court, please so state and give basis for opinion.

Dated: County of _____, New York
_____, 200_

_____
(Signature) M.D.
(Print name underneath)

CERTIFICATION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

CERTIFICATION PURSUANT TO CPLR 4518 (C)

In the Matter of the Application of the
ALBANY COUNTY DEPARTMENT OF SOCIAL SERVIES,

Petitioner,

Affidavit of
Steven D. K, M.D.

Index No.:
RJI No.:

Pursuant to Article 81 of the Mental Hygiene Law, for the Appointment of a Guardian for
M F,

An Alleged Incapacitated Person.

I Steven D. K, M.D., a Psychiatrist for the Albany County Department of Mental Health, certify and authenticate the annexed record relating to the competency assessment of M F.

I further certify that the Albany County Department of Mental Health, Albany, New York is an agency duly approved to perform geropsychiatric assessments by New York State Department of Health.

I further certify that the annexed record was made in the regular course of business of this agency, and that it was in the regular course of business of this agency to make such report, and that such report was made at the time of the administration and analysis of Mr. F.

All said Certificates of Qualification and Permits are in full force and effect on the date this affidavit was executed.

Dated: June ____, 2005.

_____
Steven D. K, M.D.
Albany County Department of Mental Health
260 South Pearl Street
Albany, NY 12202
(518) 447-4555

Sworn to before me this _____th day of June, 2005.

_____
Notary Public
My commission expires: _____

At a Regular Term of this Court held in and for the County of Albany at the County Courthouse in the City of Albany, New York, on the 21st day of July 2005.

STATE OF NEW YORK
SUPREME COURT **COUNTY OF ALBANY**

In the Matter of the Application of the
ALBANY COUNTY DEPARTMENT
OF SOCIAL SERVICES,
Petitioner,

Affidavit of
S D. K, M.D.

Index No.:
RJI No.:

Pursuant to Article 81 of the Mental Hygiene
Law, for the Appointment of a Guardian for
M F,
An Alleged Incapacitated Person.

STATE OF NEW YORK)
) SS:
COUNTY OF ALBANY)

Steven D. K, M.D., being duly sworn, deposes and says that:

1. I am a Consultant Psychiatrist for Albany County Department of Mental Health, and I make this affidavit in support of the Petition of the Albany County Department of Social Services to have a guardian of the person and property appointed for **M F**, the alleged incapacitated person in this proceeding.

2. I completed my Degree in medicine at Albany Medical College in 1984. I have been employed in the field as a psychiatrist for 15 years.

3. I have been licensed to practice medicine in the state of New York since 1985, I have interned at Albany Medical Center in Albany, New York, and I am a member of American Psychiatric Association.

4. During the course of my professional practice I have been called on numerous times to conduct the type of geropsychiatric assessment, as I performed on **Mr. F.**

5. I have evaluated **Mr. F** and reviewed his medical records. **Mr. F** is a 93 year old widowed gentlemen, having been born on August 22, 1911 who was referred by the Albany County Department of Social Services Adult Protective Unit (hereinafter "ACDSS") for a psychiatric assessment based on the fact that there are concerns that **Mr. F** could no longer live out in the community safely on his own. The evaluation was conducted at his home at

Avenue in Altamont, NY. Annexed hereto, as Exhibit "A", and made a part of this affidavit is a true copy of the geropsychiatric assessment.

6. Diagnostically **Mr. F** has Alzheimer's Type Dementia of Mild Severity with prominent recent memory deficits and he displays poor insight into his deficits in hygiene and nutrition as well as deficits in activities of daily living which render him unable to take care of himself. Based on **Mr**. **F's** physical condition and mental status ACDSS made the determination that a geropsychiatric assessment was necessary.

7. Based on my professional assessment, **Mr. F** does not adequately understand and/or appreciate the nature and consequences of his functional limitations when it comes to his management of activities of daily living. His safety and well-being are at risk. He has poor insight into his memory deficits, is currently unaware of his healthcare needs or basic nutritional and hygiene needs, and he is unable to make well-informed decisions pertaining to independent activities of daily living.

8. Based on the foregoing, and the fact that **Mr**. **F** shows clinical signs of Alzheimer's type dementia, I believe **Mr. F** lacks the capacity to make reasonable judgments as

to his activities of daily living, medical treatment and personal management powers and guardianship is appropriate to ensure that his needs are appropriately tended to.

9. In my opinion, based on my assessment of **Mr. F's** functional limitations that he is likely to suffer harm, because he is unable to provide for his personal needs, and he cannot adequately understand the consequences of this inability. It is evident that he is unable to make decisions for himself concerning his personal needs, he is in need of ongoing medical examination and treatment, and that he is not able to live independently without ongoing close supervision.

10. In my opinion, based on my assessment of **Mr. F's** functional limitations, he does not adequately understand and/or appreciate the nature and consequences of his financial affairs. **Mr. F's** daughter has assumed the role of financial overseer, taking care of all his financial affairs, such as securing his income and paying his monthly bills. I also believe that he could not possibly safely manage his property and/or financial affairs on his own accord.

11. Based on the foregoing, I respectfully request that the relief requested in the application of Albany County Department of Social Services for appointment of a Guardian of the person and property of **M F** under Article 81 of the Mental Hygiene Law be granted, and that the guardian of the person and property be given the power to place **Mr. F** be in a skilled nursing facility if deemed appropriate.

Dated: June _____, 2005

_____

Steven D. K, M.D.
Albany County Department of Mental Health
260 South Pearl Street

Albany, NY 12202
(518) 447-4555

On this _____ day of June, in the year of two thousand and five personally came before me the undersigned, a Notary Public in and for said State, personally appeared Steven D. K, personally known to me or proved to me on the basis of satisfactory evidence, to be the individual whose name is subscribed to on the within instrument, and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____
Notary Public: State of New York
County of Albany
My Commission expires:

SUPREME COURT
STATE OF NEW YORK **COUNTY OF ALBANY**

In the Matter of the Application of
Albany County Department of Social Services,
Petitioner,

Pursuant to Article 81 of the **NOTICE OF PROCEEDING**
Mental Hygiene Law for the Appointment
Of a Guardian of the Person and Property of

Index No.:
C C, **R.J.I. No.:**
An Alleged Incapacitated Person.

To: **Counsel**
Timothy H. Esq.
Law Firm X
State Street
Albany, NY 12207

Court Evaluator
Albert H., Esq.
Law Firm Y
Beaver Street
Albany, NY 12207

The Director of the Legal Division of the Albany County Department of Social Services has filed an Order to Show Cause (attached) and petition (attached) pursuant to Article 81 of the New York State Mental Hygiene Law, seeking guardianship of the person and property of **C C**

Mr. C resides at Drive Selkirk, NY 12158-2158

The Order to Show Cause is returnable before the Honorable Joseph R. Cannizzaro, J.S.C., on the 30th of June 2005, 9:30 o'clock in the morning at the Albany County Courthouse, 16 Eagle Street, Room 269, Albany, New York, 12207.

The name and address of the Petitioner is , Director of the Legal Division, Albany County Department of Social Services, 162 Washington Avenue, 7th Floor, Albany, NY 12210.

The following persons have been given notice of this proceeding and a copy of the Order to Show Cause.

M & E N

Thank you for your attention.

M. D., Esq.
Staff Attorney for the Petitioner
Albany County Department of Social Services
162 Washington Avenue, 7th Floor
Albany, NY 12210
(518) 447-7736

SUPREME COURT
STATE OF NEW YORK **COUNTY OF ALBANY**

In the Matter of the Application of
Albany County Department of Social Services,
Petitioner,

Pursuant to Article 81 of the **NOTICE OF PROCEEDING**
Mental Hygiene Law for the Appointment
Of a Guardian of the Person and Property of

Index No.:
R.J.I. No.:
An Alleged Incapacitated Person.

To: **M & E N**
Edgewood Drive
Selkirk, NY 12158-2158

The Director of the Legal Division of the Albany County Department of Social Services has filed an Order to Show Cause (attached) and petition pursuant to Article 81 of the New York State Mental Hygiene Law, seeking guardianship of the person and property of **C C**

Mr. C resides at Edgewood Drive, Selkirk, NY 12158-2158.

The Order to Show Cause is returnable before the Honorable Joseph R. Cannizzaro, J.S.C., on the 30th day of June, 2005, at 9:30 o'clock in the morning at the Albany County Courthouse, 16 Eagle Street, Room 269, Albany, New York, 12207.

The name and address of the Petitioner is Director of the Legal Division, Albany County Department of Social Services, 162 Washington Avenue, 7th Floor, Albany, NY 12210.

The following persons have been given notice of this proceeding, along with a copy of the Order to Show Cause and Petition:

Albert H, Esq. - Court Evaluator

Timothy H., Esq.- Counsel for AIP

Thank you for your attention.

M Day, Esq.
Staff Attorney for the Petitioner
Albany County Department of Social Services
162 Washington Avenue, 7th Floor
Albany, NY 12210
(518) 447-7736

THE DUTIES OF THE COURT EVALUATOR

Section 81.09 (c)

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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 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 Article 81.

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

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:

1. Does the person alleged to be incapacitated agree to the appointment of the proposed guardian and to the powers proposed for the guardian?

2. 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 Article 81 otherwise appropriate?

3. Can the person alleged to be incapacitated come to the courthouse for the hearing?

4. If the person alleged to be incapacitated cannot come to the courthouse, is the person completely unable to participate in the hearing?

5. If the person alleged to be incapacitated cannot come to the courthouse, would any useful purpose be served by the person's presence at the hearing?

6. Are available resources sufficient and reliable to provide for personal needs or property management without the appointment of a guardian?

7. 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.*

8. What is the person's understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living?

9. What is the approximate value and nature of the financial resources of the person alleged to be incapacitated?

10. What are the person's preferences, wishes, and values with regard to managing the activities of daily living?

11. Has the person alleged to be incapacitated made any appointment or delegation pursuant to section 5-1501, 5-1505, or 5-1506 (powers of attorney and durable powers of attorney) of the general obligations law, section two thousand nine hundred sixty-five (DNR orders) or two thousand nine hundred eighty-one (health care proxy) of the public health law, or a living will?

12. What would be the least restrictive form of intervention consistent with the person's functional level and the powers proposed for the guardian?

13. What assistance is necessary for those who are financially dependent upon the person alleged to be incapacitated?

14. Is the choice of proposed guardian appropriate 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?

15. 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?

16. What potential conflicts of interest, if any, exist involving the person alleged to be incapacitated, the petitioner, and the proposed guardian?

17. Are there any additional persons who should be given notice and an opportunity to be heard?

§ 81.10. Counsel for the AIP

(a) Any person for whom relief under this article is sought shall have the right to [fig 1] 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 [fig 1] 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) [fig 1] 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 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.

At IAS Part 39 of Supreme Court of The State of New York, held in and For the County of New York at 60 Center Street, New York, NY 10007 On the _____ day of _____, 2003.

PRESENT:

_____

Justice

X----------X

In the Matter of the Application of

_____, Petitioner,

For the Appointment of a Guardian

for the Person and Property of

_____, Respondent

X----------X

ORDERAPPOINTING

CO-GUARDIANS

Index No.

The petition in writing, duly verified on the _____ day of _____, 200_, by the petitioner therein named, having been duly presented to the Supreme Court of the State of New York, County of New York, at an IAS Part 39 thereof, wherein it was alleged that one _____, alleged to be incapacitated as defined by §81.02 subdivision(b) of the Mental Hygiene Law, requires a guardian pursuant to Article 81 of Mental Hygiene Law, and the Court by order to Show Cause dated the _____ day of _____, 200_, having required notice of the presentation of the said petition to be given to the presumptive distributes of the person alleged to be incapacitated as defined by §103 subdivision (42) of the Surrogate's Court Procedure Act to others and proof of due service was filed with the Part Clerk upon: _____.

The Court having thereupon duly considered the said petition and the proofs and allegations then and there presented and due deliberations having been had: and a hearing having been held on the _____ day of _____, 200_, and _____, Esq. having appeared for the Incapacitated Person, and on reading and filing the report and recommendations of _____, Esq. having appeared for the Incapacitated Person, and on reading and filing the report and recommendations of _____, Esq. and the Court Evaluator appointed herein.

AND upon the testimony presented at the hearings held before this Court on the _____ day of _____, 200_.

AND it appearing to the satisfaction of the Court by clear and convincing evidence that _____ is incapacitated as defined in §81.02, subdivision (b) of the Mental Hygiene

Law, that it is necessary to appoint a Guardian of the Person and Property of _____, upon all the aforementioned testimony, and upon the findings of the Court on the record made on the _____ day of _____, 200_, and after due deliberations,

NOW, upon motion of _____, attorney for the petitioner, it is

ORDERED AND ADJUDGED that _____ of _____, New York, NY 100__, and _____, Esq. of _____, New York, NY 100__, County of New York, City and State of New York, be and hereby are appointed Co-Guardians of the Person and Property of _____. The Bond is waived and conditioned that the Co-Guardian will faithfully discharge the powers granted by this Court, obey all directions of the Court in regard to the powers, and make and render a true report of the Co-Guardians acts in the Administration of their powers, whenever so required to do so by the Court and upon their further filing with the Clerk of this Court an oath of Co-Guardians and a Designation, duly executed and acknowledged, of the Clerk of this Court or the Clerk's successor in office as a person on whom service of any process may be made in like manner and with effect as if it were served personally upon the Co-Guardians, whenever they cannot, with due diligence, be served within the State of New York; and it is further

ORDERED AND ADJUDGED that within five (5) days after the Co-Guardians have filed the above Oath and Designation, the Clerk of this Court shall issue Commission stating the title of this proceeding, and the name, address, and telephone number of _____, the Incapacitated Person; the name, address and telephone of Co-Guardians, and the <u>specific</u> powers of the Co-Guardians, the date when the appointment of the Co-Guardians was ordered by this Court, and the date on which the appointment of the Co-Guardian terminates, and it is further

ORDERED AND ADJUDGED that the duration of the Co-Guardianship is indefinite; and it is further

ORDERED AND ADJUDGED that the duration of the Co-Guardians shall have the following powers:

a. Marshal the assets of _____, the Incapacitated Person, and to invest and reinvest such assets as would a prudent person of discretion and intelligence in such matters seeking reasonable income and to apply so much of the income and principal as necessary for the comfort, support, maintenance and well being of the incapacitated person, said funds to be held in accounts titled, _____ and _____, Co-Guardians for _____, Incapacitated Person.

b. To collect all income of the incapacitated person, including, but not limited to the social security and dividend income of the Incapacitated Person.

c. To provide for the Maintenance and Support of the Incapacitated Person.

d. To determine who shall provide personal care and assistance for the Incapacitated Person, and to pay for said services.

e. To make decisions regarding the social environment and other social aspects of the life of the Incapacitated Person.

f. To authorize the release of confidential records.

g. To consent to or refuse routine major medical or dental treatment (as defined in M.H.L. 81.03) where the Incapacitated Person does not consent, except those prohibited by statute.

h. To retain counsel subject to court approval of fees.

i. To determine if thee is a will. In the vent of the death of the Incapacitated Person, if there is a will, notify the person(s) listed in that will.

j. To pay funeral expenses of the Incapacitated Person.

ORDERED AND ADJUDGED that the Co-Guardians will file an initial report within ninety days after issuance of the Commission to the Co-Guardians in accordance with the provisions of §81.30 of the Mental Hygiene Law; and it is further

ORDERED AND ADJUDGED that the Co-Guardians shall file during the Month of May, in the Office of the Clerk of the County of New York, in which _____, the Incapacitated Person was last resident, or in the County which appointed the Co-Guardians, an annual report in accordance with the provisions of §81.31 of the Mental Hygiene Law, and shall send a copy of said report to _____, the Court Examiner, _____, the Incapacitated Person, by mail, and if the Incapacitated Person is at _____ Nursing Home located at _____ to that nursing home, and to Mental Hygiene Legal Services, 41 Madison Avenue, New York, NY 10010 (Mental Hygiene Legal Services accepts papers for all sites in the First Department at this address); and it is further

ORDERED AND ADJUDGED that the Co-Guardians shall visit the Incapacitated Person not less than four times a year; and it is further

ORDERED AND ADJUDGED that the Co-Guardians who are given authority with respect to property management for the Incapacitated Person shall:

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 and appreciation of his or her functional limitations and personal wishes, preferences and desires with regard to managing the activities of daily living.

Preserve, protect and account for such property and financial resources faithfully.

Use the property and financial resources and income available there from to maintain and support the Incapacitated Person.

At the termination of the appointment, deliver such property to the persons legally entitled to it, pursuant to Court Order; and it is further

ORDERED AND ADJUDGED that the Co-Guardians file the notice required by §81.21(a)(6)(vi) if this Incapacitated Person is possessed of any real property; and it is further

ORDERED AND ADJUDGED that Co-Guardians who are 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; and it is further

ORDERED AND ADJUDGED that all persons are hereby directed and commanded to deliver to the said Co-Guardians, upon demand and presentation of a certified copy of the said commission, all the property and income of the said Incapacitated Person, which may be in their possession or under their control; and it is further

ORDERED AND ADJUDGED that the following is appointed Court Examiner

Name _____

Address _____

Phone/Fax _____ Email _____

ORDERED AND ADJUDGED that any appointee shall comply with Part 36 of the Rules of the Chief Judge by filing OCA form 830.1 with the Office of Administration and OCA form 830.3 with the appointing Justice. Any subsequent Affidavit or Affirmation of Service submitted to this Court must contain a statement indicating such compliance and be accompanied by a properly completed OCA form 830; and it is further

ORDERED AND ADJUDGED that the Persons entitled to notice of all further proceedings are:

_____, _____,

_____.

_____

JUDGE

ORDERS - (sample clauses)

NAMI Clause
Albany County has used the following NAMI (net available monthly income) clause for Medicaid purposes to help cost share the expenses related to the Article 81 proceedings (submitted by Marshall Day, Esq.).

ORDERED AND ADJUDGED, that the guardian, prior to making any other payments, shall first pay, as priority administrative payments, out of the assets, income and funds of the IP, including but not limited to her Supplemental Security Income (SSI), social security/governmental benefits, pension benefits and/or her assets and/or the proceeds from the sale of said assets, the fees and awards associated with this proceeding to assigned counsel and the appointed court evaluator.

HIPAA Clause

ORDERED AND ADJUDGED, the guardian having medical decision making powers is to be considered the Personal Representative of Mary Smith, the Incapacitated Person, with full access to Protected Health Information of said IP pursuant to 45 CFR Section 164.502(g) of the Health Insurance Portability and Accountability Act.

Miscellaneous Clauses

- Ability of the guardian to consent to the administration of psychotropic medication and electroconvulsive therapy for the IP
- Name the "Commissioner or his/her Successor" in Order and Commission
- If IP is in another county the Order could delegate the visits to that county PSA program or a social worker in that community
- Include the power to pay the cost of maintaining assets, even after the IP has died, this will allow the county to continue to pay taxes on IP's real estate until it is sold
- Include sale of the IP's home after the IP dies if there is no family and no will for example - the guardian could sell the house but only the Realtor could enter and show the house
- For the Final Report (81.33) - Power to waive step 1, the "Application to submit the Final Report "and proceed on to Submission of the Final Inventory and Account

GUARDIANSHIP PROCEDURE

Check List

1. **ADULT GUARDIAN REFERRAL** (Received form Adult Protective)
   a. time stamp the document _____
   b. create file and card _____
2. **REVIEW**
   a. give to assigned attorney for review _____
      1). if, deemed appropriate to pursue guardianship, the referral will be sent back to the paralegal to prepare a rough draft of the OTSC and PETITION
3. **INVESTIGATION**
   a. gather all information necessary to complete the petition _____
4. **PREPARE DRAFT OF PETITION AND ORDER TO SHOW CAUSE**
   a. give to assigned counsel to proof read by e-mailing drafts _____
5. **SUPPORTING DOUMENTATION**
   a. while the OTSC and Petition is being reviewed by the attorney, prepare the supporting documents
      1). Supporting documents include:
         - VERIFICATION _____
         - INDEX NUMBER _____
         - RJI-Request for Judiciary Intervention _____
           (Have assigned attorney sign RJI - make 2 (two sided) copies, so you end up with an original and 2 copies)
         - NOTICE OF PENDENCY _____
           (only made, if the AIP has any ownership interest in Real Property)
6. **SET-UP DOCUMENTS FOR SERVICE** _____
   a. Once Petition and OTSC are completed, prepare backer titled **ORDER TO SHOW CAUSE AND PETITION**.
      1) Assemble with OTSC on top, PETITION next, and the Verification followed by any exhibits. These are all **ONE** document, attached to the backer

   ***Always** keep one completed copy of the OTSC/Petition and attached exhibits in the file, just in case the documents are somehow misplaced at the courthouse.

TAKING IT TO COURT

1. **Take OTSC and Petition, the application for an Index Number, and the original plus two copies of the RJI to County Clerk's Office. In the County Clerk's Office give them all the above documents. They will assign an Index and RJI # and date stamp the OTSC and Petition.**
   a. **The bottom portion of the Application for Index number, two copies of the RJI and the document are given right back to us.**
2. **Take all the documents to the Supreme Court Clerk's office for the assignment of the Judge off the wheel. The Supreme Court Clerk will take the OTSC and Petition, assign the judge and make sure the RJI and Index number are printed on the document.**
3. **Take the OTSC and Petition to assigned judge for signing.**
   a. **The judge may sign it right away or ask that it be left for him to review.**
      1) **If left for his review, we will then be contacted as to when to go back down and pick up the signed OTSC.**
4. **Once the OTSC is signed by the Judge, take it back down to Supreme Court Clerk's office. They will keep entire original OTSC and Petition and date stamp it in.** Request that they copy the signed OTSC only (not the petition) after it is time stamped in.
   a. **The copy of the time stamped, signed OTSC is now ready to be brought back to our office for assembly of OTSC, Petition and exhibits, for service upon respective counsel (see below for procedure).**

NOTICE OF THE PROCEEDING

1. **Persons required to be put on notice of proceeding**

   (each of these individuals shall **receive a copy of the OTSC, Petition and supporting documents)**

   a. AIP _____
      1) **must** be put on notice of the proceeding by personal service
   b. COUNSEL _____
      1) a copy of OTSC and Petition by facsimile **within** 3 business days **following** appointment (exhibits don't have to be faxed)
         - a copy of the OTSC, Petition and supporting documents **shall** follow immediately after faxing of documents*

   c. COURT EVALUATOR _____
      1) a copy of OTSC and Petition by facsimile **within** 3 business days **following** appointment (exhibits don't have to be faxed)
         - a copy of the OTSC, Petition and supporting documents **shall** follow immediately after faxing of documents*
   d. TEMPORARY GUARDIAN _____
      1) a copy of OTSC and Petition by facsimile **within** 3 business days **following** appointment (exhibits don't have to be faxed)
         - a copy of the OTSC, Petition and supporting documents **shall** follow immediately after faxing of documents*

      * The Court Evaluator, Counsel and Temporary Guardian can also be served by delivery of the papers personally, or by overnight delivery (these are done only if fax can not be accomplished)

2. **Additional persons required to be put on notice of proceeding**

   (each of these individuals are entitled to receive notice **(basically a cover letter) and**

   a copy of the OTSC, by mail)

   a. RELATIVES _____
      1) Spouse, parents, siblings and adult children of AIP and persons with whom AIP resides
   b. **ADMINISTRATOR OF A FACILITY** _____
      (if AIP is institutionalized in a Nursing Home, Adult Home, Hospital or MH facility)
   c. MHLS _____
      (**only** if AIP is institutionalized in Mental Hygiene facility)
   d. POA _____
   e. Any person or organization that has demonstrated a genuine interest in promoting the best interest of the AIP
   f. ACDSS (File copy, one with backer, one without) _____
   g. ETC. _____

3. Send AIP's copy of OTSC and Petition to process server _____
4. Make affidavit of service by mail _____
5. Once affidavit of personal service is received from process server, file a copy of the affidavit of service by mail and personal service affidavit with the county clerk's office (requesting that a time stamped copy be returned to the Department) _____
6. Once returned from the clerk's office fax the filed copy of the personal service affidavit and affidavit of service by mail to the Court Evaluator _____
7. If the AIP owns real property, a Notice of Pendency **must** be filed in the clerk's office _____

FINALIZING THE ORDER

1. Once the Court appoints a guardian at the hearing the following process shall be followed.
   - ***a.*** **A Proposed ORDER AND JUDGMENT & FINDING OF FACTS and CONCLUSION OF LAW is drafted, and sent to all opposing counsel for their review and comments, by fax or e-mail (put time limit on their response time)**
     - **After comments and proposed changes are received from respective counsel, the amendments are incorporated in the Order and Findings, and sent to the Court for the Judge's signature** _____
     - **While the Order and Findings are being reviewed by the Court, the following documents can be prepared:**
       - **Oath and Designation,** if _____
         - **Department is named guardian, have Commissioner sign document** and **prepare the affidavit designating an employee to act in her stead** if _____ _____
         - **Relative is named guardian,** immediately _____ **send out document, with a self addressed stamped envelope, so the guardian can sign and return to the Department**
       - **Commission** _____
       - **Statement 81.20 (a)(6)(vi)** _____ **(only, prepared if AIP has real property)**
         - Once the designation is returned, and a signed Order is received from the court (and entered), the Commission can be finalized, and the documents are sent to the County Clerk's office for the clerk's signature and filing _____ (there should be 6 drafted Commissions sent, 5 with orders attached)
         - The original Court Order, Findings and one Commission is filed with the clerk (along with any court exhibits that we may have in our possession), and the rest (along with our copy of the Commission) are returned to the Department to be forwarded to the guardian (one copy should be put in the case file) _____
           - The commissioner's affidavit should also be sent (2 copies, one to be filed, and one to be returned to the Department) **,only if we are** _____

Guardian

       - Finally, a copy of the signed/entered Order should be sent to the following individuals:
         - AIP _____
         - Court Evaluator _____
         - All respective counsel _____
         - Murray Carr, Esq., Examiner, 1683 Western Ave. Albany NY 12203, _____
         - Appellate Division, Third Department PO Box 7288, Capitol Station, Albany, NY 12224 _____
         - MHLS and Administrator of a health/nursing facility, if involved _____
           - **If**, the Department is named guardian a copy of the order and commission should be sent to APS _____
           - **If**, the AIP is in a Nursing Home a copy of the order should be sent to Chronic Care _____

Article 81 Special Remedies

Protected Arrangements and Single Transactions 81.16 (b)

1. AIP is found to be incapacitated

2. The court, without appointing a guardian, can take actions that are necessary to provide for the personal needs and/or property management of the AIP

    - 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 IP.

    - Authorize, direct or ratify any contract, trust or other transaction relating to the IP's property and financial affairs

3. The court shall consider the interest of the dependents and creditors of the AIP and whether or not the person needs the continuing protection of a guardian

4. The court may appoint a special guardian to accomplish the protective arrangements and report to the court

Provisional Remedies 81.23

1. Temporary Guardian

    - Appointed at the commencement of the proceeding or at any stage of the proceeding prior to appointment of a guardian

    - Legal standard – danger in the reasonably foreseeable future to the health and well being of the AIP, or danger of waste misappropriation, or loss of the property of the AIP

    - Powers and duties are specifically enumerated in the Order of Appointment

    - Temporary Guardian must report to the court all actions taken

2. Injunction and Temporary Restraining Order

- May be issued while proceeding is pending or at any time after the appointment of the guardian

- Issued to protect the AIP or property of the AIP

Demand for Fiduciary Accounting 81.29 (d)

Amendment to Article 81.29/effective 12/04

- Courts power to vacate POA and HCP extended to permit the exercise of that power for breach of fiduciary power in addition to invalid execution.

- The court has jurisdiction to demand an accounting for acts and omissions during the entire period of agency.

- Thus within Art 81 there is created a new cause of action and subject matter jurisdiction for an accounting of attorneys-in-fact found to have violated their fiduciary duty.

Discovery and Turnover Proceedings 81.43

Bifurcated summary proceeding; Order to Show Cause and Petition (may need to simultaneously apply for Temporary Restraining Order and Preliminary Injunction 81.23 (b) to protect assets in the interim).

1. Discovery Proceeding

- Commenced by the guardian to locate real and personal property of the IP
- An investigation to inquire as to the whereabouts of the IP's property
- An investigation to track income and assets of the IP to the Respondent's account/possession (conversion)
- May need to request a court ordered subpoena over the Respondent's accounts
- Inquiry will be held where Respondent must appear

2. Turnover Proceeding

- Commenced by the guardian to recover property of the IP
- A hearing is held as to title of the property
- The order requires the Respondent to turn over all property of the IP in his/her possession or control to the guardian

Tips for the Property Management Guardian

Burial Expenses

- If your IP is on Medicaid, you may set aside $1,500 [not $1,200, as the manual says] in a "burial trust" savings account. This is set up exactly the same way as a guardianship account (in the IP's Social Security number but "your name as guardian for IP's name, an incapacitated person) but with the title "Burial Fund" You may not put more that $1500, but whatever interest funds earn in the account will not count toward the Medicaid resource limit.
- You may also pre-pay for funeral expenses and a burial plot out of the IP's funds is the IP is on or going on Medicaid.

Marshalling Assets

- Finding all the accounts and investments your IP has. If you think your IP has more accounts than you know for sure, you may fill out IRS Form 4506T (Request for Transcript of a Tax Return). Check #8 and information about all the accounts that have sent information to the IRS will be sent to you in about two months.
- Search the NY unclaimed funds website: http://www.osc.state.ny.us/
- The National Association of Unclaimed Property Administrators, www.naupa.org, has links to unclaimed property in each state such as: tax refunds, insurance reimbursement, neglected bank accounts, etc.
- Make sure all bank accounts and other resources of the IP have been located and combined into new guardianship accounts titled, "Bob Jones, Commissioner of Adult Services, NYSOCFS as guardian for Mary Smith (client), an incapacitated person".

Taxes

- You are to file federal, state and local tax returns for your IP before April 15th each year. If you can't finish the taxes in time, you can request an extension for six months later using IRS form 4868 (Application for Automatic Extension of Time). You may still have to pay penalties and interest for your IP when you have an extension.
- Attach a photocopy of your certified commission to any tax form you send to the IRS or state tax authorities, and sign as "Bob Jones, Commissioner of Adult Services, NYSOCFS as guardian for Mary Smith (client), an incapacitated person". If your IP's finances are more complicated, you can attach a copy of form 56 (Notice Regarding Fiduciary Relationship).
- If you file this year's taxes for your IP, the IRS will ask you for any past returns it is missing. You can also file an IRS form 4506 (Request for Copy of Tax Return) to get old ones, but this costs $39 per return.
- If you need to hire an accountant to do your IP's taxes, ask the court for permission first, both to hire an accountant and to approve the fee.

NOTE: Federal IRS (Internal Revenue Service) forms are available through its website, www.irs.gov , or at 1-800-829-3676).

Creditors

Social Security and SSI payments are exempt from seizure by creditors (42 USC Section 407) EXCEPT for:

- Refunds of Title II or Title XVI overpayments;
- An IRS levy for income tax purposes;
- Court ordered child support or alimony; and bank account fees.

Investments

Generally the guardian is to use the prudent investor standard with a duty to maximize returns but not risk loss on the overall investment (EPTL Section 11-2.3)

SAMPLE LETTER TO CREDITORS

44 Wing Away Drive
N.Y., N.Y. 10010
October 1, 200_

National Express Card Company
P.O. Box 8823
Boston, MA 19805

RE: Appointment of Representative Payee
to manage the Social Security and/or Supplemental Security
Income benefits of John Smith (Account No. 98-505-70-113)

Dear National Express Card Company:

Please be advised that on September 5, 200_, the Social Security Administration appointed the Commissioner of Social Services of _____County as Representative Payee for John Smith. In that capacity, the Commissioner has the authority to manage Mr. Smith's Supplemental Security Income benefits on his behalf.

According to the U.S. Code of Federal regulations:

"A payee may not be required to use the benefit payments to satisfy a debt of the beneficiary, if the debt arose prior to the first month for which payments are certified to a payee. *If the debt arose prior to this time, a payee may satisfy it only if the current and reasonably foreseeable needs of the beneficiary are met."* 20 C.F.R. 416.645.

In addition, as your know, neither Social Security nor Supplemental Security Income benefits can be attached by a creditor, regardless of whether it has obtained a court judgment. 42 U.S.C. Section 407.

My legal obligation, therefore, is to use Mr. Smith's government benefit (currently $437.00 a month) for his current basic needs such as shelter, food and clothing. He has no other income or assets and his monthly payment barely covers his basic needs so he has no funds to pay your company. Because he has no extra funds and because the debt was incurred prior to the first month before the SSA appointed me Representative Payee for Mr. Smith, I am not legally obligated to direct the payment, which the National Express Card Company seeks.

Please contact me if you have any questions.

Sincerely,

Representative Payee

(AARP Representative Payee Program Coordinator Handbook)

Medical Aspects of Guardianship

THE AGING PROCESS

Biological changes in aging are both physical (changes in skin, hair texture and in the skeletal system) and physiological (lowered muscle strength and reduced action time). These changes are visible but are not easily understood.

Two sets of theories concerning the aging process and why every living thing eventually dies are:

1. The events leading to death are genetically programmed; they may occur progressively and inexorably with passage of time, more or less independently of the environment.

2. Extrinsic or environmental factors, such as disease or injury contribute to and accelerate aging.

It is most probably a combination of both genetic and environmental factors which are the cause of all aging. It is often hard to distinguish disease related changes from normal aging changes.

M MILD SENSORY LOSS:

1. Vision - after 50 years old, many people require glasses

2. Hearing - loss of high frequency sounds, particularly in males

3. Between ages 75-85, losses in smell, taste and tactile sensation deteriorates.

M GENERAL DECREASE IN ABILITY TO RESPOND TO STRESS:

1. Resistance to cold

2. Resistance to blood loss

3. Work time until exhaustion

4. Utilization of oxygen

M ORGAN SYSTEMS SUFFER A STEADY DECLINE IN FUNCTION WHEN A PERSON PASSES MATURITY:

1. Muscles
   Loss in size and strength of muscle
   - may be due to decreased availability of oxygen in the blood because of lessened ability of lungs.
   - less exercise
   - decreases in the speed of nerve impulses

2. Heart
   Increase in resistance to blood flow - arteriosclerosis
   - blocked blood flow can also cause functional problems in the brain as well as heart and other important tissues

3. Kidneys
   Loss of function

Lower rate of blood flow
Decreases in filtration and excretion rates

4. Liver
Decreased ability to detoxify foreign compounds
- elderly can be very sensitive to drugs/alcohol

5. Skin
More sensitive
- bruises more easily and heals more slowly
- mottled look from accumulation of "aging pigments"

6. Bones
Fragile / loss of bone mass
- osteoporosis
Joints stiffen

7. Hormones
Female - decrease in estrogen
Other hormones do not decrease dramatically - they are present in the blood but the tissues do not respond to the hormones

8. Cells and Enzymes
Limitation of cell growth and replacement
Some enzymes increase, decrease, stay the same - there is no rational patter

M COGNITIVE FUNCTIONING

Ability to learn and general intelligence does not normally decline with age. Speed of response may decrease giving the impression that an older person does not know the correct answer.

Memory

- loss of memory is attributed to loss of cells and/or neurochemical changes in the central nervous system

- loss of long-term memory does not normally occur

- short-term memory tends to decline with advance age

All of these biological changes tend to cause changes in other areas of life such as psychological and social areas - especially in society's acceptance and view of an older person's value as well as in a person's self-image.

MEDICAL ABBREVIATIONS

ABBREVIATION	EXPLANATION
A.B.R.	ABSOLUTE BED REST
A.C.	BEFORE MEALS
ACF	ADULT CARE FACILITY
ADL	ACTIVITIES OF DAILY LIVING
ALC	ALTERNATIVE LEVEL OF CARE
AD LIB	AS DESIRED
B.I.D.	TWICE A DAY
B.P.	BLOOD PRESSURE
C.B.C.	COMPLETE BLOOD COUNT
CHHA	CERTIFIED HOME HEALTH AGENCY
C.N.S.	CENTRAL NERVOUS SYSTEM
CPR	CARDIO-PULMONARY RESUSCITATION
C.V.A.	CEREBROVASCULAR ACCIDENT (STROKE)
CATH	CATHETERIZED
DNR	DO NOT RESUSCITATE
DRG	DIAGNOSTIC RELATED GROUPING
EEG	ELECTROENCEPHALOGRAM

MEDICAL ABBREVIATIONS - Continued

ABBREVIATION	EXPLANATION
EKG	ELECTROCARDIOGRAM
E.N.T.	EAR, NOSE & THROAT
FX	FRACTURE
H.S.	BEDTIME
Hb or Hgb	HEMOGLOBIN
I & O	INTAKE AND OUTPUT
I.C.U.	INTENSIVE CARE UNIT
I.M.	INTRAMUSCULAR
I.V.	INTRAVENOUS
LTHHCP	LONG TERM HOME HEALTH CARE
N.P.O.	NOTHING BY MOUTH
N.V.D.	NAUSEA, VOMITING AND DIARRHEA
NG FEEDING	NASO-GASTRIC FEEDING TUBE
OD	DAILY
O.D.	RIGHT EYE
O.S.	LEFT EYE
O.U.	BOTH EYES
OOB	OUT OF BED
OS	MOUTH
OT	OCCUPATIONAL THERAPY

MEDICAL ABBREVIATIONS - Continued

ABBREVIATION	EXPLANATION
P.C.	AFTER MEALS
P.O.	BY MOUTH
P.R.N.	WHENEVER NECESSARY
PCA	PERSONAL CARE AIDE
PRI	PATIENT REVIEW INSTRUMENT
PT	PHYSICAL THERAPY
q.	EVERY
q.2h	EVERY TWO HOURS
q.d.	EVERY DAY
q.h.	EVERY HOUR
q.i.d.	FOUR TIMES DAILY
q.o.d.	EVERY OTHER DAY
ROM	RANGE OF MOTION
$\overline{C}$	WITH
S, $\overline{S}$, $\dot{S}$, $\overline{O}$	WITHOUT
S.O.B.	SHORTNESS OF BREATH
SNF	SKILLED NURSING FACILITY
STAT	AT ONCE
T.I.A.	TRANSIENT ISCHEMIC ATTACK
T.I.D.	THREE TIMES A DAY
T.P.R.	TEMPERATURE, PULSE, RESPIRATION
UR	UTILIZATION REVIEW
W.N.	WELL NOURISHED
WC	WHEEL CHAIR

Health Insurance Portability and Accountability Act - HIPAA
(45 C.F.R. Subpart E Selected Provisions)

160.103 Definitions

Covered Entity (CE) - *Covered entity* means:

1. A health plan.
2. A health care clearinghouse.
3. A health care provider who transmits any health information in electronic form in connection with a transaction covered by section 1173(a)(1) of the Health Insurance Portability and Accountability Act of 1996.

Individually Identifiable Health Information (IIHI) - *Individually identifiable health information* is information that is a subset of health information, including demographic information collected from an individual, and:

1. Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
2. Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
   i. That identifies the individual; or
   ii. With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

Protected Health Information (PHI) - *Protected health information* means individually identifiable health information:

1. Except as provided in paragraph (2) of this definition, that is:
   i. Transmitted by electronic media;
   ii. Maintained in electronic media; or
   iii. Transmitted or maintained in any other form or medium.
2. *Protected health information* excludes individually identifiable health information in:
   i. Education records covered by the Family Educational Right and Privacy Act, as amended, 20 U.S.C. 1232g;
   ii. Records described at 20 U.S.C. 1232g(a)(4)(B)(iv); and
   iii. Employment records held by a covered entity in its role as an employer.

Health Care Provider – is defined broadly by the Privacy Rule to include an organization that furnishes "care, services or supplies related to the health of an individual," including but not limited to "preventive, diagnostic, rehabilitative, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the physical or mental condition, or functional status, of an individual…" 45 CFR 160.103 A Health Care Providers may lawfully disclose the Protected Health Information of its patients/clients to other Health Care Providers without the patient's consent in order to carry out their treatment activities on behalf of the patient. 45 CFR 164.506 (c) (2).

HIPAA Disclosure Exceptions

45 C F R 164.512

Use or Disclosures required by law

Section 164.512(a)

1) A covered entity may use or disclose PHI to the extent it is required by law and is limited to the relevant requirements of such law.

2) A covered entity must meet the requirements of sections c, e, or f of this section.

Disclosures about Victims of Abuse, Neglect or Domestic Violence

Section 164.512 (c)

Standard: disclosures about victims of abuse, neglect or domestic violence.

1. *Permitted disclosures*. Except for reports of child abuse or neglect permitted by paragraph (b)(1)(ii) of this section, a covered entity may disclose protected health information about an individual whom the covered entity reasonably believes to be a victim of abuse, neglect, or domestic violence to a government authority, including a social service or protective services agency, authorized by law to receive reports of such abuse, neglect, or domestic violence:
   i. To the extent the disclosure is required by law and the disclosure complies with and is limited to the relevant requirements of such law;
   ii. If the individual agrees to the disclosure; or
   iii. To the extent the disclosure is expressly authorized by statute or regulation and:
      A. The covered entity, in the exercise of professional judgment, believes the disclosure is necessary to prevent serious harm to the individual or other potential victims; or
      B. If the individual is unable to agree because of incapacity, a law enforcement or other public official authorized to receive the report represents that the protected health information for which disclosure is sought is not intended to be used against the individual and that an immediate enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure.
2. *Informing the individual*. A covered entity that makes a disclosure permitted by paragraph (c)(1) of this section must promptly inform the individual that such a report has been or will be made, except if:
   i. The covered entity, in the exercise of professional judgment, believes informing the individual would place the individual at risk of serious harm; or
   ii. The covered entity would be informing a personal representative, and the covered entity reasonably believes the personal representative is responsible for the abuse, neglect, or other injury, and that informing such person would not be in the best interests of the individual as determined by the covered entity, in the exercise of professional judgment.

Disclosures for Judicial and Administrative Proceedings

Section 164.512(e)

Standard: disclosures for judicial and administrative proceedings.

1. *Permitted disclosures*. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:
   i. In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or
   ii. In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:
      A. The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or
      B. The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.
   iii. For the purposes of paragraph (e)(1)(ii)(A) of this section, a covered entity receives satisfactory assurances from a party seeking protecting health information if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:
      A. The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address);
      B. The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and
      C. The time for the individual to raise objections to the court or administrative tribunal has elapsed, and:
         1. No objections were filed; or
         2. All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.
   iv. For the purposes of paragraph (e)(1)(ii)(B) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:
      A. The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to

the court or administrative tribunal with jurisdiction over the dispute; or

B. The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.

v. For purposes of paragraph (e)(1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:

A. Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and

B. Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

vi. Notwithstanding paragraph (e)(1)(ii) of this section, a covered entity may disclose protected health information in response to lawful process described in paragraph (e)(1)(ii) of this section without receiving satisfactory assurance under paragraph (e)(1)(ii)(A) or (B) of this section, if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of paragraph (e)(1)(iii) of this section or to seek a qualified protective order sufficient to meet the requirements of paragraph (e)(1)(iv) of this section.

2. *Other uses and disclosures under this section*. The provisions of this paragraph do not supersede other provisions of this section that otherwise permit or restrict uses or disclosures of protected health information.

Disclosures for Law Enforcement Purposes

Section 164.512(f)

1. Permitted disclosures: pursuant to process and as otherwise required by law. A covered entity may disclose protected health information:

(i) As required by law including laws that require the reporting of certain types of wounds or other physical injuries, except for laws subject to paragraph (b)(1)(ii) or (c) (1)(i) of this section; or

(ii) In compliance with and as limited by the relevant requirements of:

A. A court order or court-ordered warrant, or subpoena or summons issued by a judicial officer;

B. A grand jury subpoena; or

C. An administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized by law, provided that:

1. The information sought is relevant and material to a legitimate law enforcement inquiry;

2. The request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and

3. De-identified information could not reasonably be used.

PERSONAL REPRESENTATIVES

[*45 CFR 164.502(g)*]

Background

The HIPAA Privacy Rule establishes a foundation of Federally-protected rights which permit individuals to control certain uses and disclosures of their protected health information. Along with these rights, the Privacy Rule provides individuals with the ability to access and amend this information, and the right to an accounting of certain disclosures. The Department recognizes that there may be times when individuals are legally or otherwise incapable of exercising their rights, or simply choose to designate another to act on their behalf with respect to these rights. Under the Rule, a person authorized (under State or other applicable law, e.g., tribal or military law) to act on behalf of the individual in making health care related decisions is the individual's "personal representative." Section 164.502(g) provides when, and to what extent, the personal representative must be treated as the individual for purposes of the Rule. In addition to these formal designations of a personal representative, the Rule at 45 CFR 164.510(b) addresses situations in which persons are involved in the individual's health care but are not expressly authorized to act on the individual's behalf.

How the Rule Works

General Provisions. Except as otherwise provided in 45 CFR 164.502(g), the Privacy Rule requires covered entities to treat an individual's personal representative as the individual with respect to uses and disclosures of the individual's protected health information, as well as the individual's rights under the Rule.

The personal representative stands in the shoes of the individual and has the ability to act for the individual and exercise the individual's rights. For instance, covered entities must provide the individual's personal representative with an accounting of disclosures in accordance with 45 CFR 164.528, as well as provide the personal representative access to the individual's protected health information in accordance with 45 CFR 164.524 to the extent such information is relevant to such representation. In addition to exercising the individual's rights under the Rule, a personal representative may also authorize disclosures of the individual's protected health information.

In general, the scope of the personal representative's authority to act for the individual under the Privacy Rule derives from his or her authority under applicable law to make health care decisions for the individual. Where the person has broad authority to act on the behalf of a living individual in making decisions related to health care, such as a parent with respect to a minor child or a legal guardian of a mentally incompetent adult, the covered entity must treat the personal representative as the individual for all purposes under the Rule, unless an exception applies. (See below with respect to abuse, neglect or endangerment situations, and the application of State law in the context of parents and minors). Where the authority to act for the individual is limited or specific to particular health care decisions, the personal representative is to be treated as the individual only with respect to protected health information that is relevant to the representation. For example, a person with an individual's limited health care power of attorney regarding only a specific treatment, such as use of artificial life support, is that individual's personal representative only with respect to protected health information that relates to that health care decision. The covered entity should not treat that person as the individual for other purposes, such as to sign an authorization for the disclosure of protected health information for marketing purposes. Finally, where the person has authority to act on the behalf of a deceased individual or his estate, which does not have to include the authority to make decisions related to health care, the covered entity must treat the personal representative as the individual for all purposes under the Rule. State or other law should be consulted to determine the authority of the personal representative to receive or access the individual's protected health information.

Who Must Be Recognized as the Individual's Personal Representative. The following chart displays who must be recognized as the personal representative for a category of individuals:

If the Individual Is:	The Personal Representative Is:
An Adult or An Emancipated Minor	A person with legal authority to make health care decisions on behalf of the individual *Examples*: Health care power of attorney Court appointed legal guardian General power of attorney
An Un-emancipated Minor	A parent, guardian, or other person acting *in loco parentis* with legal authority to make health care decisions on behalf of the minor child *Exceptions*: See parents and minors discussion below.
Deceased	A person with legal authority to act on behalf of the decedent or the estate (not restricted to health care decisions) *Examples*: Executor of the estate Next of kin or other family member Durable power of attorney

Protective Services for Adults Financial Exploitation Investigations

New York State Social Services Law 473 and Regulations 18 NYCRR Part 457 require that local social services departments, through their Protective Services for Adults program, receive and investigate reports of impaired individuals who may be in need of protection from financial exploitation. Financial exploitation is defined as the improper use of an adult's funds, property or resources by another individual, including but not limited to fraud, false pretenses, embezzlement, conspiracy, forgery, falsifying records, coerced property transfers or denial of access to assets.

In conducting these investigations, social services officials often need to contact banks and other financial institutions to determine if exploitation may have occurred. **Social Services Law 144-a** governs information that officials of any banking or financial organization or institution must furnish to officials of the department and of social services districts. **Section 4 of the Banking Law** contains similar provisions.

Federal laws also govern banking transactions. **The Right to Financial Privacy Act** (RFPA) provides that in most circumstances, a customer must be given prior notice and an opportunity to challenge the government's action in court before the government can obtain customer information. However, the RFPA applies only to the federal government and it therefore places no restrictions on the action of state and local agencies in obtaining financial records and information.

The Financial Services Modernization Act of 1999 also known as the Gramm-Leach-Bliley Act is comprehensive legislation concerning all manner of financial transactions. Title V of Gramm-Leach-Bliley, Subtitle "A" contains strong privacy protections concerning "Disclosure of Nonpublic Personal Information". However, Section 502(e) contains several exemptions that permit disclosure without prior notice to the customer. This section appears in the U.S. Code as 15 U.S.C. 6802

Exemptions that permit the disclosure of non-public personal information:

- 6802(e)(3)(B) permits disclosure "to protect against or prevent actual or potential fraud, unauthorized transactions, claims or other liability"
- 6802(e)(5) permits disclosure "to the extent specifically permitted or required under other provisions of law"
- 6802(e)(8) permits disclosure "to comply with Federal, State, or local laws, rules and other applicable legal requirements"

Banks that continue to be concerned about liability should be advised of the provisions contained in Social Services Law (SSL) 473-b. This law provides immunity from civil liability to any person who in good faith refers an endangered adult whom they believe may need protective or other services. This section also covers reporting or testifying in any judicial or administrative proceeding.

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

NY CLS Soc Serv § 144-a (2007)

§ 144-a. Information to be given to officials of the department and of social services districts

Any inconsistent provision of law notwithstanding, if requested by an authorized representative of the department or by an official of any town, city or county who is responsible for administering a program authorized by this chapter, the officials of any banking or financial organization or institution doing business in the state whether chartered under state law, federal law, or the laws of another jurisdiction, shall furnish to such governmental officials such information as such officials have as to whether any present applicant for or recipient of any assistance, care or services authorized by this chapter, has or had funds, securities or other property on deposit or in the custody of such banking or financial organization or institution, and the amount or probable value thereof. Such information shall be provided, to the extent practicable, in the format specified by such governmental officials (except that any banking or financial institution may discharge its obligation by supplying such matching information on cartridge, tape or diskette media in the American National Standard Code for Information Interchange file format). These provisions shall be inclusive of and in addition to the provisions of section four of the banking law and may be administered and enforced in any manner consistent with the provisions of this chapter or in any other manner authorized or permitted by the laws and courts of this state.

BANKING LAW
ARTICLE I. SHORT TITLE; DEFINITIONS; MISCELLANEOUS PROVISIONS
NY CLS Bank § 4 (2007)

§ 4. Information to be given to social services officials, state department of social services, state department of mental hygiene, the mental [fig 1] hygiene legal service, representatives of boards of child welfare and children's court by banking organizations

1. If requested by an authorized representative of the state department of mental hygiene, the mental hygiene legal service, or of the state department of social services, or by the authorities charged with the duty of administering laws relating to public assistance or care or hospital care at public expense in any town, city or county, the officials of any banking organization shall furnish to such representative such information as such officials have as to whether any inmate of any state institution, or any applicant for or any person who is or was a recipient of hospital care at public expense, or any applicant for or any person who is or was a recipient of any form of public assistance or care under the social services law, named in such request or the husband or wife, or other relative legally responsible for the support of such inmate, applicant, or recipient has or had funds, securities or other property on deposit or in the custody of such banking organization, and the amount or probable value thereof.

2. If requested by an authorized representative of the state department of social services, or a social services district child support enforcement unit established pursuant to section one hundred eleven-c of the social services law, the officials of any financial institution, as defined in paragraph one of subdivision (d) of section four hundred sixty-nine A of the federal social security act, shall enter into an agreement with the state department of social services or a social services district child support enforcement unit to develop and operate a data match system, using automated data exchanges to the maximum extent feasible, in which each such financial institution shall provide for each calendar quarter the name, record address, social security number or other taxpayer identification number, and other identifying information for each individual who maintains a demand deposit account, checking or negotiable withdrawal order account, savings account, time deposit account, or money-market mutual fund account at such institution and who owes past-due support, as identified by the state department of social services or a social services district child support enforcement unit by name and social security number or other taxpayer identification number. Nothing herein shall be deemed to limit the authority of a local social services district support collection unit pursuant to section one hundred eleven-h of the social services law.

3. No financial institution which discloses information pursuant to subdivision two of this section, or discloses any financial record to the state department of social services or a child support enforcement unit of a social services district for the purpose of enforcing a child support obligation of such person, shall be liable under any law to any person for such disclosure, or for any other action taken in good faith to comply with subdivision two of this section.

Financial Elder Abuse Cases

People v Antilla, 77 N.Y.2d 853 (1991)
Defendant's conviction of grand larceny in the second degree is affirmed where the evidence established that defendant withdrew, and subsequently lost, large sums of money from a joint money market account where he had persuaded his 84 year old widowed great-aunt to open and fund. The People had presented sufficient evidence to support the inference that defendant induced his great-aunt to acquiesce in the opening of the joint account by virtue of his false promise to manage her assets. Although the defendant could not be convicted of misappropriating money by the unauthorized withdrawals from the joint account it was the larcenous creation of the joint account, not the withdrawals from it, which provided the basis for his conviction.

People v Camiola, 225 A.D.2d 380 (1st Dept. 1996)
An accountant for an elderly, increasingly senile woman maintained a pattern of thefts from her over a two year period. The victim passed away by the time of the trial. The defense argued that the victim consented to the transferred funds as gifts to the defendant. The Court held that the jury, in evaluating the definition of larceny, was properly instructed that it could consider the victim's capacity to form consent in order to determine whether there had been a trespass for purposes of the larceny statute.

People v Gbohou, 186 Misc.2d 324 (2nd Dept. 2000)
If a defendant opens a joint account with funds obtained from a mentally incapacitated person, a larceny charge may be brought. The defendant, a home health aide, had created a joint account with her impaired clients' funds at a time when she knew that they had significant mental incapacity. If property is taken or obtained from a person who is mentally unable to consent to the transfer by someone who is aware of that person's inability to consent, the taking or obtaining constitutes a trespassory taking, a form of larceny actionable under Penal Law Section 155.05 (2).

People v Phyllis Mercier, NY Slip Op 40078U (Sullivan County 2001)
The defendant was charged with endangering the welfare of a vulnerable elderly person (PL 260.34(1)and(2)) for an alleged reckless and intentional assault at the defendant's residence by striking her 67 year old mother-in-law about the head and face and refusing to provide medical treatment. The defendant is the sole care provider for her mother-in-law disabled with Alzheimers disease and suffering from dementia. The issue before the court was to what extent the prosecution may call the victim's treating physician as a rebuttal witness. Unfortunately this case does not render a verdict on the alleged charge.

Penal Law

Endangering the Welfare of an Incompetent or Physically Disabled Person (Penal Law Section 260.25)
A person is guilty of endangering the welfare of an incompetent or physically disabled person when he knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a person who is unable to care for him or herself because of physical disability, mental disease or defect.

Endangering the Welfare of a Vulnerable Elderly Person (Penal Law Sections 260.30, 260.32 260.34)
These laws significantly increase penalties where a person who is a Caregiver intentionally assaults or sexually abuses a vulnerable elderly person in his/her care.
A caregiver is a person who is responsible for care pursuant to a court order or receives monetary or other valuable consideration .A vulnerable elderly person is 60+ years old suffering from a disease or infirmity manifested by demonstrable physical, mental or emotional dysfunction so that the person is incapable of adequately providing for his/her own health or personal care

Keeping the IP at Home

Housing Court and the AIP

140 W. Equitie v. Fernandez (N.Y. Civ. Ct.) N.Y.L.J., June 29, 2000
Surrey Hotel Assoc. LLC v. Sabin (N.Y. Civ. Ct.) N.Y.L.J., June 29, 2000
124 Macdougal Street Assoc. v. Hurd (N.Y. Civ. Ct.) N.Y.L.J., June 29, 2000
Parras v. Riccardi 185 Misc.2d 209, 710 N.Y.S.2d 792

In the Landlord–Tenant cases cited above (eviction and nuisance proceedings) the Respondent Tenant was incapacitated or under a disability. Courts have held that the Land Lord cannot evict unless the guardian is part of the proceeding even if no guardian is yet appointed. If Respondent is under a disability a guardian ad litem (GAL) must be appointed. The cases specify that the Landlord, Commissioner of Social Services (PSA), attorneys, relatives of the tenant, and other persons interested in the tenant's welfare have standing in summary eviction proceedings to make a motion for the appointment of a guardian ad litem in Housing Court.

Loans

Consumer Installment Loans: used to pay for personal expenses (i.e. car, computer) and repaid in equal monthly payments, or installments for a specific period of time.

Home Loans: home loans are secured by the home.

- Refinancing: a process by which an existing home loan is paid off and replaced by a new loan (usually at a lower interest rate).
- Home Equity Loan: a loan that is secured by the property (home) of the borrower. The amount of equity is the value of the property minus the debt. Home equity loans can generally be used for any purpose.
- Reverse Mortgage: a loan against your home that you do not have to pay back as long as you live there. With a reverse mortgage, you can turn the value of your home into cash without having to move or repay a loan each month.

Debts

- *Attachment*: A lien against personal property.
- *Bankruptcy*: A legal declaration of insolvency. Bankruptcy will not fix credit record problems, and will be part of your credit history for up to 10 years.
- *Foreclosure*: A legal proceeding initiated by a creditor to take possession of collateral that secured a defaulted loan.

- *Garnishment*: A process granted by a court order by which a lender obtains, directly from a third party such as an employer, part of an employee's salary to satisfy an unpaid debt. Part of the employee's salary will be taken out in each pay period until the debt is fully paid.

- *Judgment*: A court order placing a lien on a debtor's property as security for a debt owed to a creditor.

- *Lien*: A creditor's claim against property to secure repayment of a debt.

- *Repossession*: Seizure of collateral that secured a loan in default.

In the Matter of the Application of Robert Doar as the Commissioner of Social Services of the City of New York, Petitioner, For the Appointment of a Guardian of the Personal Needs and Property Management of Eugenia M. A Person Alleged to be Incapacitated, Respondent.

100329/07
SUPREME COURT OF NEW YORK, KINGS COUNTY
2008 NY Slip Op 51301U; 2008 N.Y. Misc. LEXIS 3787
June 26, 2008, Decided

COUNSEL: [**1] For Petitioner: Ralph Young, Esq., of Counsel to Roy A. Esnard, Special Assistant Corporation Counsel to Michael Cardozo, Corporation Counsel of the City of New York.

For Respondent: Michael D. Neville, Esq. of the State of New York Mental Hygiene Legal Service, Second Judicial Department.

JUDGES: Betsy Barros, J.

OPINION BY: Betsy Barros

OPINION

Betsy Barros, J.

The Court writes this decision and order dismissing the petition and awarding fees to the Mental Hygiene Legal Services as Court-appointed Counsel.

THE PETITIONER

The Petitioner in this action is Robert Doar, Commissioner of Social Services of the City of New York (hereinafter ,the Commissioner). Pursuant to Social Services Law § 473 the Commissioner is charged with providing in accordance with state and federal regulations protective services for adults who because of mental or physical impairments are unable to manage their own resources, carry out the activities of daily living, or protect themselves from sexual, physical, or emotional abuse. Said adults may be subject of passive or active neglect from others, or may be subject to self neglect, may be victims of financial exploitation, or may face hazardous situations. Additionally said protective services [**2] are triggered only when no one is available, willing, and able to assist said adults responsibly. The Commissioner has established a subdivision titled Adult Protective Services (hereinafter, APS), to comply with his mandate to protect endangered adults. The Commissioner is statutorily charged with receiving and investigating reports of seriously impaired adults who may be in need of protection. (See Social Services Law §473.1(a), emphasis added). The Commissioner is likewise charged with arranging for medical and psychiatric services to evaluate and whenever possible to safeguard and improve [*2] the circumstances of adults with serious impairments (See Social Services Law § 473 (1) (b), emphasis added.) The Commissioner is authorized to commence non-voluntary proceedings to protect such individuals provided that less restrictive alternatives are unavailable (See Social Services Law §473 (1) (c)).

The statutory scheme reveals that APS is a reactive agency, becoming aware that there is a potential client only after it receives a report of someone with serious impairments. See Social Services Law §473 (1) (a).

THE RESPONDENT

The respondent is an allegedly incapacitated person (hereinafter, the [**3] AIP). She is ninety five years old and lives alone in a cooperative apartment. APS has never obtained any information about the AIP's next of kin or about anyone entitled to notice of the guardianship proceeding. [1] APS became aware of the AIP when the AIP's landlord made a report to the APS hotline sometime prior to March 2007. The report indicated, at least in part, that the AIP's apartment was in need of repair. APS investigated the report, accepted the AIP as a client, and had the AIP examined by Dr. Charles Hayes, a psychiatrist, in March of 2007.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -
1 See M.H.L. § 81.07 (g).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -
PROCEDURAL HISTORY

The instant action was commenced by petition and order to show cause signed by this Court on January 14, 2008 seeking the appointment of a Personal Needs and Property Management Guardian for the AIP. In said order to show cause, this Court appointed Mental Hygiene Legal Services (MHLS) as Counsel to represent the interests of the AIP and waived the appointment of a Court Evaluator pursuant to M.H.L. § 81.10 (g).

The matter was originally to be heard on February 8, 2008 at 11:00 a.m. The AIP however, misread the return date as February 6, 2008 [2] and appeared in the courtroom on February 6, 2008. [**4] She came to court by herself, using public transportation and found the correct court part, on her own initiative.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -
2 The return date as written in the order to show cause is faint. It is reasonable to read the 8th day of February and the 6th day of February.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

At that time, court personnel spoke to the AIP, who expressed her unequivocal desire to remain without a guardian. Upon the Court's direction, the part clerk contacted the Petitioner's office and MHLS to see if the matter could be advanced to accommodate the ninety-five year old AIP, who had come to court via public transportation in the cold of winter to object to the appointment of a guardian. MHLS sent an attorney to the Part, but the Petitioner's office failed to send an attorney.

The AIP informed the MHLS attorney and court personnel that she would not return to court, did not want a guardian, and did not want an attorney to be appointed for her. The AIP then left.

On February 8, 2008 the matter was adjourned because the Petitioner did not have an [*3] affidavit of personal delivery (See M.H.L.§ 81.07 (e) (2) (i)) [3]

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -
3 On February 6, 2008 the AIP showed the Court Personnel a copy of the Order to Show Cause.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

After several adjournments and an order [**5] authorizing nail and mail service, the Court scheduled the matter for hearing on May 20, 2008.

Petitioners's counsel appeared for the hearing on May 20, 2008 as did the AIP's counsel. However, the AIP did not appear.

Prior to the start of the hearing, the Petitioner's attorney stated that the AIP currently refused to allow anyone entry into her apartment, would only open her door slightly for her APS caseworker, and would speak only briefly to the case worker. The Petitioner suggested yet another adjournment to attempt personal delivery on the AIP and suggested that during the adjournment the Petitioner might make an application for an Order to Gain Access so that Dr. Hayes, the psychiatrist who had evaluated the AIP in March 2007, could enter the AIP's residence with the police and a locksmith and again evaluate the AIP (See Social Services Law § 473-c). The AIP's counsel Michael Neville, Esq., senior attorney with MHLS, opposed the adjournment. He contended that an adjournment to obtain an Order to Gain Access against the AIP was against the AIP's interest and he suggested that because the AIP left her apartment daily to go shopping and the like, that the evaluation could occur at [**6] such times. Moreover, Mr. Neville argued that Petitioner had alleged no danger or risk to the AIP of enough import to warrant an Order to Gain Access.

Mr. Neville argued that any request by Petitioner for an Order to Gain Access was motivated by Petitioner's a desire to obtain additional evidence against the AIP since the Petitioner's nine month delay in filing its case and the various adjournments required to effectuate service had rendered the Petitioner's case stale and that this motive did not constitute sufficient reason to authorize the Petitioner's expert witness as well as police officers and a locksmith, if necessary, to forcibly enter the AIP's residence.

The Court denied Petitioner's request for an adjournment and notes that to use an Order to Gain Access to collect evidence in an M.H.L. Art. 81 proceeding is impermissible. The sole permitted use of an Order to Gain access is for assessing an individual's need for adult protective services. (See Social Services Law §473-c (1) (g).) Additionally, to obtain an Order to Gain Access, the Petitioner would have to demonstrate to the Court the lack of success of "the efforts made by the social services official to gain access to the [**7] person who may be in need of protective services" (See Social Services Law §473-c

(1) (d) emphasis added) If the person the social services agency seeks to evaluate is in fact available for observation and evaluation or if the social services agency has failed to make adequate efforts to gain access to the person it seeks to evaluated then the Court is duty bound to deny the application. In the instant matter, the Petitioner has had access to the AIP and has had the opportunity to gain such access. According the Petitioner's own Counsel, the AIP has spoken with the Petitioner's caseworker by opening her apartment door slightly and speaking through said narrow opening.According to her counsel, the AIP is available for observation and interview, to whatever extent she chooses, when she daily leaves her apartment to shop. The Petitioner can easily speak with the doorman of the AIP's building and find out when the AIP performs her errands and thus have opportunity [*4] to observe her and try to engage her in an evaluation. [4] The Petitioner in fact already evaluated the AIP in March 2007 and made a determination that the AIP is in need of adult protective services including the involuntary appointment [**8] of a M.H.L. Art 81 guardian of person and property.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

4 This Court also notes that granting an order to gain access does not compel the AIP to subject herself to an evaluation. During the execution of an order to gain access an AIP is within her rights to simply refuse or fail to cooperate with the evaluation.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

After Petitioner's request for an adjournment was denied, the Petitioner presented his case which consisted of only one witness, Dr. Charles Hayes.

PETITIONERS CASE

Dr. Hayes testified that the only time he met with the AIP was in March 2007, in her apartment. He testified that the AIP's apartment needed to have a few floor boards replaced and that the ceiling in her bathroom was in need of repair as was her bathtub. He was unable to testify about the current condition of her apartment. He did observe that she had food in her refrigerator but could not recall if she had a functioning stove.

Dr. Hayes testified that AIP had an unsteady gait. According to Dr. Hayes the AIP told him that she pays all her bills, does her own banking, does her own shopping, has medical coverage through HIP, does not use her tub or shower but instead takes sponge baths. In response to his inquiry regarding [**9] her failure to fix her bathroom, she complained that she had previously been overcharged for work in her apartment and did not want this to happen again. Dr. Hayes noted that she attempted to convince the super who had accompanied him to the interview to make the repairs on the spot. Dr. Hayes testified that her hygiene and grooming were passable. He made a diagnosis of age- related cognitive decline. Dr. Hayes further testified that the AIP was guarded and was somewhat hard of hearing and that it took great deal of coaxing and persistence to gain entry into her apartment and to conduct a full evaluation. The Petitioner's attorney did not ask for any negative inference based upon the non-appearance of the AIP. [5]

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

5 New York case law recognizes fifth amendment protections in favor of the AIP in M.H.L. Art 81 proceedings because liberty interests are at stake since a personal needs guardian can often make decisions against his ward's wishes regarding the residence and social environment of his ward. An indigent AIP who opposes the appointment of a Personal Needs Guardian is entitled to Court Appointed Counsel. Matter of St. Luke's-Roosevelt Hosp. Ctr., 89 NY2d 889, 890, 675 N.E.2d 1209, 653 N.Y.S.2d 257 (1996), and an AIP [**10] cannot be compelled to testify against himself in a M.H.L. Art 81 case. Matter of A.G., 6 Misc 3d 447, 785 N.Y.S.2d 313 (2004). There has been no determination as to whether a negative inference can be taken by the non-appearance of the AIP in an application to have a Property Needs Guardian appointed as opposed to having a Personal Needs Guardian appointed.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Dr. Hayes testified that the AIP told him that she was raised in foster care and was never married and that she had no children.

BURDEN OF PROOF AND FINDINGS OF FACT

M.H.L.§ 81.02 governs the standards a Court must use in determining whether or not an AIP needs the appointment of a guardian. The court must find by clear and convincing evidence that "the appointment is necessary to provide for the personal needs of that person including [*5] food, clothing, shelter, health care or safety and/or to manage the property and financial affairs of that person" (See M.H.L.§ 81.02 (b) and M.H.L. §81.02 (a) (1).)

The court must also determine by clear and convincing evidence that the AIP is likely to suffer harm because she is unable to provide for her personal needs and/or property management and that she cannot adequately understand and appreciate the nature and [**11] consequences of such inability. (See M.H.L. §81.02 (b) (1)and (2).)

In reaching its determination the court must give primary consideration to the functional level and functional limitations of the AIP. The court's determination must include an assessment of the how the AIP manages her activities of daily living such as eating, shopping, dressing and the like. The court must also make a determination of whether or not the AIP appreciates the nature and consequences any functional limitations or inabilities from which the AIP suffers. The court must determine the AIP's preferences, wishes, and values with regard to the management her activities of daily living. The court must assess the demands placed upon the AIP due to her personal needs, financial affairs and property interest. See MHL §81.02 (c) 1-4.

The court must also consider all other relevant facts and circumstances about the AIP's functional level and understanding and appreciation of the nature and consequences of her functional limitations See M.H.L. §81.02 (d) (1) & (2).

THE COURT'S FINDINGS

The Court finds that the Petitioner has established that the AIP pays all her bills, does her own shopping and cooking, feeds herself, that her [**12] hygiene is adequate and that

although her apartment is in need of some repair, there is no evidence that she is unaware of same or has not acclimated to the problems in her apartment

This Court finds that the only functional limitation established at the hearing is that the AIP has an unsteady gait. Petitioner has failed, however, to establish that the AIP does not understand and appreciate the nature and consequences of her functional limitation. What the Petitioner has established is that the AIP has accommodated to her functional limitations by using her shopping cart to assist her when she ambulates and by taking sponge baths instead of using the shower bath tub.

The Petitioner submitted no evidence as to whether or not the AIP's apartment had heat in the winter or if it has proper air-conditioning in the summer. These are two issues that the Court would have wanted to know, but that the Petitioner failed to address at the hearing [6].

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -
6 There is nothing in this decision that prevents the Petitioner from ascertaining if the AIP has adequate heat in the winter or air-conditioning in the summer. The appointment of a Court Evaluator might have resolved these unanswered questions, but the [**13] Petitioner still would have had the burden of proving his case and cannot rely upon the Court evaluator to establish the Petitioner's case for him.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

The argument set forth at the hearing by the Petitioner's attorney that the AIP's unsteady gait in conjunction with some missing floor boards places the AIP at imminent risk of physical injury is likewise unpersuasive. For more than a year since the AIP was voluntarily evaluated by the petitioner, the AIP has successfully navigated about her apartment as well as in the street.

The Petitioner's attorney also argued at the close of the hearing that the AIP's landlord, who had originally called in a report on the AIP, based upon the conditions of her apartment, [*6] may start an eviction action against her. A potential eviction proceeding is not a failure to perform any activity of daily living. Moreover a possible future eviction proceeding is highly speculative in nature and is therefore not clear and convincing evidence upon which to base the appointment of a guardian.

The Petitioner's attorney also argued that if the AIP, at some time in the future, became a respondent in a housing court proceeding that the AIP might "fall through the cracks" [**14] of APS subdivision and be left homeless before the Petitioner could seek to stay any eviction in the future against the AIP. [7] The appointment of guardian must be based upon clear and convincing evidence and not on speculation about hypothetical future legal events or hypothetical future negligence on the part of the Petitioner.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -
7 The Petitioner often brings an order to show cause to stay housing court proceedings against APS clients by arguing, as a friend of the Court, that the APS client suffers from a disability that warrants the appointment of a Guardian ad Litem in housing court See

CPLR 1201 and 1202. The Petitioner also often seeks a stay of housing court proceedings as part of an M.H.L. Art. 81 petition.

- - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

The petitioner has failed to meet his burden of proof and the case is dismissed without prejudice.

ATTORNEY FEES

The Court has the statutory mandate to determine the reasonable compensation for the mental hygiene legal service (hereinafter MHLS) or any attorney appointed by the Court. M.H.L. §81.10(f) reads in pertinent part:

The court shall determine the reasonable compensation for mental hygiene legal service or any attorney appointed pursuant to this section. The person alleged [**15] 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 the petitioner pay such compensation for the person alleged to be incapacitated… (emphasis added)

Pursuant to M.H.L. § 81.10 (f) if the Petitioner was indigent she would not be liable for the fee of MHLS in this action regardless of whether or not this matter is dismissed. The Petitioner, however, has failed to demonstrate that the AIP is indigent. The testimony of the Petitioner's only witness, Dr. Hayes, was that the AIP was current with all her bills and was believed to be the owner of the her cooperative apartment. There was no testimony about the value of the AIP's apartment, her monthly income, if any, or any assets she holds.

Because the Court has dismissed the instant petition, the Court pursuant to M.H.L.§ 81.10(f) has the discretion to direct the Petitioner to pay the legal fees this Court determines as reasonable compensation to the Mental Hygiene Legal Services, court appointed counsel to the AIP.

The legislature has recognized that the alleged incapacitated person may be entitled to some relief [**16] from the expenses of the litigation when the matter is dismissed and allows the Court to shift the expense of the Court appointed counsel in the instant matter Mental Hygiene Legal Services to the Petitioner especially where there is no showing that the AIP benefitted in any way from the proceeding. See, In the Matter of Rocco, 161 Misc 2d 760, 615 N.Y.S.2d 260 (1994). In exercising its discretion the Court takes note that the fee shifting provisions of M.H.L. Art. 81 are designed not [*7] only to be just, but are also intended to discourage frivolous guardianship petitions and those guardianship petitions motivated by avarice and bad faith. See In the Matter of Sylburn A. Peterkin, 2 Misc 3d 1011(A), 784 N.Y.S.2d 923, 2004 NY Slip Op 50284(U), see also, In the Matter of Lyles, 250 AD2d 488, 673 N.Y.S.2d 122.

In the [**17] instant matter it cannot be fairly maintained that the Petitioner was motivated by greed. However, given the threadbare allegations in the petition, the failure to call any witnesses other than one who had last seen the AIP more than a year earlier, or

to present any evidence of functional limitation other than the AIP's use of her shopping cart as a walker to accommodate her unsteady gait, the bona fide of the instant guardianship petition is clearly questionable.

It has been said on numerous occasions that the courts should not be engaged in futile acts, and the judicial imprimaturs sought by petitioners in this article 81 proceeding is not one which we believe was contemplated by the Legislature.

…. the appointment of a guardian is a drastic remedy which involves an invasion of the respondents's freedom and a judicial deprivation of his constitutional rights (see also, Matter of Seidner, NYLJ,Oct 8, 1997, at 28, col 4 [Rossetti J.]). Before petitioning for such relief, careful and serious consideration should be given to the foregoing and other relevant facts. Here that seemingly was not done. In the Matter of John Doe et al, 181 Misc 2d 787 at pgs 792-793, 696 N.Y.S.2d 384. In balancing the equities, [**18] this Court finds that the petitioner should pay the court determined fees of MHLS. MHLS has submitted an affirmation of services for 10 hours and twenty five minutes for services rendered in this matter and asks to be compensated the sum of $ 781.25 which the petitioner is directed to pay to MHLS.

In light of the foregoing, it is hereby

ORDERED, that the instant petition is dismissed pursuant to M.H.L. 81.16(a), and it is further

ORDERED, that the Petitioner pursuant to M.H.L. 81.10(f) shall pay MHLS the sum of $ 781.25 for services as court appointed counsel for the AIP.

This constitutes the decision and order of this Court.

Dated: June 26th, 2008

Brooklyn, New York

In the Matter of the Trust Made by MARY XX. LINDA A. McCALL, Appellant; KEYBANK NATIONAL ASSOCIATION, as Trustee of the Trust Made by MARY XX., Respondent.

500663

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

2006 NY Slip Op 7535; 822 N.Y.S.2d 659; 2006 N.Y. App. Div. LEXIS 12513

October 19, 2006, Decided
October 19, 2006, Entered

COUNSEL: Morris & McVeigh, L.L.P., Albany (Richard J. Miller Jr. of counsel), for appellants.

McNamee, Lochner, Titus & Williams, P.C., Albany (Richard D. Cirincione of counsel), for respondent.

JUDGES: Before: Peters, J.P., Spain, Mugglin, Rose and Lahtinen, JJ. Peters, J.P., Mugglin, Rose and Lahtinen, JJ., concur.

OPINION BY: Spain

OPINION: [**660] MEMORANDUM AND ORDER

Spain, J.

Appeal from an order of the Supreme Court (Teresi, J.), entered March 10, 2006 in Albany County, which denied petitioner's application for a compulsory accounting.

Petitioner petitioned Supreme Court pursuant to Mental Hygiene Law article 81 to be appointed guardian of the person and property of Mary XX., her aunt (her father's half sister), due to Mary's inability to care for herself as a result of dementia. In December 2000, Supreme Court appointed petitioner as guardian of Mary's person, but denied the petition to the extent that it sought appointment as guardian of her property, finding no need for the latter. [***2] As that order noted, respondent was the named successor trustee to a revocable trust created by Mary in 1989, later amended several times. The trust provided that during Mary's lifetime the trustees were to pay the net income to her and, in their discretion, to pay the principal as needed "to provide adequately and properly for the support, maintenance, welfare and comfort of [Mary]." Upon her death, the trust provided for certain pecuniary distributions to her half brother (or his children if he predeceased Mary), an employee (Charles Brennan) and a designated church; the trust would continue for the benefit of Mary's sister but, since she died in 2000, the balance would go to Brennan if living, or to Mary's half brother. [*2]

In addition to the ordinary statutory duties conferred upon a guardian of the person (*see* Mental Hygiene Law § 81.20 [a] [1]-[5], [7]), Supreme Court's order appointing petitioner as guardian provided that she:

"shall have the authority to direct Key Trust Company as attorney-in-fact under Power of Attorney dated May 3, 1995, and as Trustee [of the Mary XX. trust] as amended . . ., to pay for the [***3] care and maintenance of . . . [Mary] in accordance with the following plan:

It shall be the duty of the guardian *to examine all the relevant circumstances*, including the opinion of treating health professionals, *the existing financial circumstances*, and the existing physical environment as to what may be the best place for . . . [Mary] to reside in accordance with [Mental Hygiene Law § 81.22 (a) (9)] and the best arrangements for her continued care and treatment, including who shall provide care and assistance . . ., and what home improvements and hospital equipment may be necessary in order to allow . . . [Mary] to reside in her home comfortably and safely pursuant to [Mental Hygiene Law§ 81.22 (a) (1)]" (emphases added).

Petitioner thereafter requested certain documents from respondent, including bank statements, tax returns and an inventory of assets, and requested an accounting, which respondent refused premised upon petitioner's purported lack of standing. Petitioner then commenced this petition for a compulsory accounting in order to fulfill her obligation as guardian to examine Mary's financial [***4] circumstances, which respondent opposed. Supreme Court denied the requested relief, holding that petitioner's powers as guardian of the person "are limited to making demand of [r]espondent[] solely for payments of expenses acquired through the maintenance and support of Mary." The court noted that no guardian of the property had been appointed (*see* Mental Hygiene Law § 81.20 [a][6]; § 81.21) [**661] because respondent is acting as both trustee and attorney in fact of Mary, and indicated it had intentionally not conferred upon petitioner "powers relative to the financial assets of [Mary]."

Petitioner appeals, contending that refusing her access to Mary's financial information and status denies her the ability to carry out her court-ordered duties as guardian, specifically, to examine Mary's financial and other circumstances in order to facilitate decision making as to her care, treatment and living arrangements. Because we find that petitioner made a sufficient showing that the requested accounting is necessary in order to carry out her duties as guardian, we grant the relief in the petition.

While a Mental Hygiene Law article 81 guardian may exercise [***5] only those powers authorized by court order (*see* Mental Hygiene Law § 81.20 [a] [1]), Supreme Court can and did tailor the guardianship to the needs of the incapacitated person (*see* Mental Hygiene Law § 81.01). Under established principles, "Supreme Court possesses the jurisdiction to order an accounting when four factors exist. They are (1) a fiduciary relationship, (2) entrustment of money or property, (3) no other remedy, and (4) a demand and refusal of an accounting" (*Matter of Kent*, 188 Misc. 2d 509, 510, 729 N.Y.S.2d 352 [2001] [citation omitted]; *see 300 Broadway Realty Corp. v Kommit*, 37 Misc 2d 325, 235 N.Y.S.2d 205 [1962]). Respondent concedes that, as the trustee and her attorney-in-fact, it has a fiduciary relationship with Mary (*see Matter of Kent*, *supra* at 510; *see also Mantella v Mantella*, 268 A.D.2d 852, 701 N.Y.S.2d 715 [2000]; *Matter of Garson*, 2 Misc. 3d 847, 849, 774 N.Y.S.2d 644 [2003], *affd* 17 [*3] A.D.3d 243, 793 N.Y.S.2d 397 [2005]), and there is no question that Mary's money and property have been entrusted to respondent as trustee, which refused petitioner's [***6] demand for an accounting or financial information. Further, petitioner appears to be correct that since Mary is incapacitated, no one else except her guardian would have standing to compel an accounting during Mary's lifetime, not even the remainder beneficiaries of the trust (*see Matter of Malasky*, 290 A.D.2d 631, 632, 736 N.Y.S.2d 151 [2002]). This satisfies the final "no other remedy"

prong, entitling petitioner to compel an accounting (*Matter of Kent*, *supra* at 510). "There is no requirement that there be any allegation of wrongdoing" (*Matter of Garson*, *supra* at 850; *see Morgulas v J. Yudell Realty*, 161 A.D.2d 211, 213, 554 N.Y.S.2d 597 [1990]).

We reject respondent's contentions that there must be an independent fiduciary relationship between the guardian and respondent, and that its fiduciary relationship with Mary did not extend to her guardian. Mary would clearly have a right to compel an accounting; since she is incapacitated, petitioner was assigned to protect and provide for her person, as well as the duty to evaluate all her relevant circumstances related to health, finances and to otherwise make decisions in her best interests. [***7] "To fulfill these obligations a guardian [i.e., petitioner] must have the power to demand an accounting when the ward [i.e., Mary] has a right to such action and upon refusal the court must order it" (*Matter of Kent*, *supra* at 512).

While Supreme Court noted that respondent's status as sole trustee and attorney-in-fact obviated the need to appoint a guardian of the property and that it had not intended to give petitioner "powers relative to the financial assets of Mary," we note that petitioner does not herein seek the power to manage Mary's trust or [**662] financial affairs as a guardian of property (*see* Mental Hygiene Law § 81.20 [a][6]; § 81.21). Rather, she seeks only *information* to exercise those particular, limited powers conferred upon her in the guardianship order, which were never modified (*see* Mental Hygiene Law § 81.36 [a]). Relegating petitioner to making demands of respondent for payment of expenses, without any information as to her financial circumstances, is untenable. "By allowing a guardian to seek an accounting, the purpose and goal of article 81 are furthered by providing for [***8] the individual needs of the incapacitated person" (*Matter of Kent*, *supra* at 512; *see* Mental Hygiene Law § 81.01). Accordingly, the petition for an accounting is granted.

Peters, J.P., Mugglin, Rose and Lahtinen, JJ., concur.

ORDERED that order is reversed, on the law, with costs, and petition granted.

In the Matter of Lucia Garcia, Guardian for the Person and Property of Tomas Garcia, An Incapacitated Person.

12743/97
SUPREME COURT OF NEW YORK, QUEENS COUNTY
2007 NY Slip Op 51554U; 16 Misc. 3d 1123A; 2007 N.Y. Misc. LEXIS 5762
August 14, 2007, Decided

COUNSEL: Thomas Martha, Adam S. Cohen, Matthew M. Phillips, Sharon Terrell, Mghia Nguyen, Jeffrey M. Parrella, Stanley Goldman, and Joseph Zande.

JUDGES: Charles J. Thomas, J.

OPINION BY: Charles J. Thomas

OPINION

Charles J. Thomas, J.

Lucia Garcia, guardian of Tomas Garcia, an Incapacitated Person, moves for an Order vacating the hold on the Northfork Bank (Restraint Goldman Index No. 33165/06) entered September 14, 2006; to vacate the Information Subpoena and Restraining Notice served in the name of the Incapacitated Person upon North Fork Bank on September 11, 2006 by Jeffrey M. Parrella, Esq. of Goldman & Warshaw, P.C.; (now Goldman, Warshaw & Parrella, P.C.) and to vacate the underlying default judgment of Civil Court of the City of New York, Index No. 33165/06.

After being appointed personal and property management of Tomas Garcia, pursuant to Article 81 of the Mental Hygiene Law, Lucia Garcia, on July 13, 1999 paid off a credit card issued by Fleet Bank in the name of Tomas Garcia and closed out the account.

Lucia Garcia advised Fleet Bank in writing on July 13, 1999 that she had been appointed Guardian for Tomas Garcia and provided a copy of her commission issued by the Clerk of Queens County. On September 20, 1999 Ms. Garcia spoke to a Fleet Bank (hereafter "Fleet") customer service representative named David Wisher and he confirmed that the account had been closed. Mr. Wisher confirmed this again in writing in a letter dated the same date. This information was also provided to the Customer Service Department and acknowledged and confirmed again on October 2, 1999 in a letter from Stacey Chapman from the Customer Service Department.

Nevertheless, the account was re-opened by Fleet Bank without the guardian's consent and someone other than the guardian incurred debt of $ 3,366.16 (in cash advances) which appeared on a bill from Fleet Bank dated October 6, 1999. Said bill consisted of three successive cash advances; two in the amount of $ 2,000.00 each and a third in the amount of $ 200.00. The bill also had a $ 29.00 over limit fee and a finance charge of $ 9.16. The Guardian immediately contacted Fleet and advised the bank of her prior correspondence and telephone conversations.

On October 16, 1999, Ms. Garcia wrote by facsimile to Andrea Carter, at (719) 264-2009 regarding the problem. [1]

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -
1 Ms. Garcia wrote: "My ward, Tomas Garcia, has been declared legally incapacitated in accordance with the provisions of Section 81.31 of the Mental Hygiene Law. As you requested, I am faxing a copy of the Commission to Guardian, Index # 12743/97.

Although you have my address listed as the forwarding address, I prefer that you direct his correspondence to his P.O. Box number, so please change his address to: "Tomas Garcia, Ward," P.O. Box 1067, Long Island City, NY 11101-1067. Please close all accounts and do NOT send any credit cards unless you have my authorization."

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

At Ms. Carter's direction, Ms. Garcia wrote to Joseph Sanders, Chief Credit Officer again, directing that all the accounts be closed and that any correspondence be sent to her, not her ward, Tomas Garcia. [2]

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -
2 Her letter dated October 18, 1999 states: "Your representative, Ms. Andrea Carter, recommended that I contact the "Executive Offices" and generously provided your name as someone who can help solve a difficult situation.

On November 1997, I was appointed legal guardian for my brother, Tomas Garcia, who was adjudicated mentally incompetent under the Mental Hygiene Law. I informed Fleet in a timely fashion, sent copies of the Commission to Guardian accordingly, and proceeded to make all payments on behalf of my ward (all checks indicating TOMAS GARCIA, WARD, LUCIA GARCIA, LEGAL GUARDIAN). I did not feel it was necessary to close the account until the complete balance was paid. On

9/20/99 I called and closed the account. Since Tomas Garcia is not competent to enter into any contracts, I was always making sure that all information with Fleet was in order. I often called to confirm details of my guardianship and to ascertain that the account would not be opened nor credit cards be sent unless I authorized it.

On October 1, 1999, I was again assured that everything was in order. You can imagine my shock when I called at 2 p.m. on 10/2/99 and was told that there was new account activity. I spoke with Ms. Andrea Carter. She was very apologetic and understanding of the situation. She explained that another representative and her supervisor were pressured by Tomas Garcia to re-open the account and send a new credit card. This was a mistake in view of the fact that Fleet had timely notice of Tomas's incompetency and the Commission to Guardian was in Fleet's system. Ms. Carter proceeded to speak with her supervisor and reassured me that the matter will be turned over to the legal department. She stated that she did not believe I would be responsible for opening the account and the changes made were done so in error since "everything was in order and documents were on file." Changes that were made by the "rep" a few days earlier were changed back on October 2, 1999.

I have not been contacted by the legal department. However, I have just received the statement for October 6, 1999, and it shows a balance of $ 3,200. Needless to say, I am disputing these charges for Tomas Garcia is incompetent to enter into any contracts and Fleet had prior knowledge of this fact."

- - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Despite all Ms. Garcia's efforts, Fleet Consumer Credit reopened the account for Thomas Garcia and extended credit by a letter dated November 29, 1999, signed by Edward E. Bachman, Senior Vice President in charge of Fleet Consumer Credit.

In a letter dated February 11, 2000, Peter F. Vallone, Jr. Esq., the Court Examiner appointed by the Appellate Division, advised Fleet Bank as follows:

"Please be advised that I am a Court Examiner assigned to oversee the above matter. Lucia Garcia is the Guardian for Tomas Garcia, who has been adjudicated an Incapacitated Person by Supreme Court of New York. Therefore, Mr. Garcia was incapable of entering into a contract with your company and his Guardian is not responsible to repay any bills he has incurred. Please ensure that no further credit is extended to Mr. Garcia.

Please direct this letter to all appropriate parties, including your Legal Department". signed Peter Vallone, Jr., Esq.

In response to Ms. Garcia's dispute over the credit card, in a letter from Kamla Harinnandan, Fleet Bank on March 2, 2000, retaliated against Ms. Garcia by informing her that the bank would "terminate its account relationship" and closed the guardianship account.

Despite all the information provided by Ms. Garcia and the Court Examiner, Fleet Bank took no efforts to resolve the matter allowing interest and penalties to accrue and sent the account to Phillips and Cohen Associates, LTD. for collection. In a letter dated June 7, 2000 from Adam S. Cohen, Esq. Executive Vice President, Tomas Garcia was threatened with legal action against him.

Lucia Garcia immediately notified Mr. Cohen in writing of Tomas Garcia's status as a ward of the Court. Mr. Vallone also wrote advising Mr. Cohen of Mr. Garcia's status and advised Mr. Cohen that no payments could be made unless the Court determined the debt to be valid and authorized the payments. There was no attempt by Fleet Bank or Phillips & Cohen to obtain or verify the information provided or to resolve the matter with Ms. Garcia, Mr. Vallone, or the Court.

On November 11, 2002, a form letter from Asset Acceptance LLC (hereinafter "Asset") was sent offering Thomas Garcia an opportunity to settle the account (which now stood at $ 6,116.53) for the sum of $ 4,587.40. Once again, Ms. Garcia dutifully informed Sharon Turrell, the debt collector from "Asset" of the underlying facts and of her attempts to resolve the matter. On January 4, 2006 Joseph Zande, a staff attorney and debt collector, from the Legal Department of "Asset" sent a letter to Tomas Garcia, demanding payment of the now $ 8,679.97 balance on the account.

On January 31, 2006 Nghia Nguyen, Esq., an attorney from the firm of Goldman & Warshaw, P.C., (now Goldman, Warshaw & Parrella, P.C.) wrote to Tomas Garcia advising him of their intention to continue to pursue the debt. On February 25, 2006 and again on March 9th and March 26th, Ms. Garcia advised the attorneys at Goldman & Warshaw, P.C. (now Goldman, Warshaw & Parrella, P.C.) in writing, of Tomas Garcia's status and her efforts to resolve this matter.

Despite all the efforts of the guardian of Lucia Garcia and the Court Examiner to resolve the matter, on March 14, 2006 Jeffrey Parrella, Esq. of Goldman & Warshaw, P.C. filed a Verified Summons and Complaint on behalf of Asset Acceptance as assignee of Fleet Bank against Thomas (sic) Garcia in Civil Court of the City of New York, County of Queens. [3]

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

3 The Affidavit of Service alleges that after attempting to serve a copy on March 15, 2006 at 9:29 and on March 16, 2006 at 6:02 a.m., Christopher Pazczala (License No. 1218683) taped a copy of the Summons and Verified Complaint on Tomas Garcia at 2144 45th Avenue, Long Island City, NY 11191, which is recipient's dwelling house within the state and that on March 24, 2006 a copy of the Summons and Verified Complaint was mailed to the above address. An Affidavit of Facts was filed by Richard Schans, the outsourcing supervisor for plaintiff, in which he swore that he had personal knowledge of the debt.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Despite Ms. Garcia's subsequent correspondence with the attorneys at Goldman & Warshaw, P.C., reminding the firm of Mr. Garcia's legal status which required that she be served with any legal papers, Jeffrey M. Parrella, Esq. of Goldman, Warshaw & Parrella, P.C. filed for a default judgment on August 23, 2006.

At no point did anyone on behalf of Asset ever notify the Civil Court of Mr. Garcia's status.

This Court believes that Tomas Garcia, a ward of this court, has been the victim of the most egregious conduct by Fleet Bank, Asset Acceptance, LLC, its attorneys and representatives. For more than eleven years "Fleet" and "Asset" relentlessly pursued Tomas Garcia, an Incapacitated Person. First, by "Fleet" in its faulty lending practices, then by its retaliation in closing out the guardianship account, and then by its failure to even acknowledge the endless communication by this Courts' representatives. This malignity was continued by "Asset", Fleet's assignee, Phillips & Cohen Associates, and their attorneys.

The procedure for the commencement of an action against a person who has been judicially declared an incapacitated person is set forth in the Civil Procedure Law and Rules. However, before an action may be commenced against an incapacitated person a potential plaintiff must first obtain the leave of the Court that appointed the guardian. (Smith v. Keteltas) 27 A.D. 279, 50 NYS 471, 27 Civ. Proc. R. 209 (App. Div. 1st Dept. 1898). In re Shapiro, 253 AD 741, 300 NYS 774. This proposition has a long and sound basis since "the custody of his [an incapacitated person's] estate is no longer in him, but in the court under the administration of the committee [now a guardian] of his property. He can not prosecute or defend a civil action in person or by an attorney after such committee has been appointed." Shatsky v. Sea Gate Asso., 11 Misc. 2d 905, 906, 172 N.Y.S.2d 947, 949. In re of Deimer, 274 A.D. 557, 85 NYS2d, 506. In re Thomas' Will, 286 A.D. 1146, 146 N.Y.S.2d 18. "The Court, is clothed with full authority to determine the validity of claims… This summary remedy is favored by the courts, and is adopted in all cases unless some special facts or circumstances exist…" Grant v. Humbert, 114 AD 462, 464, 465, 100 NYS 44, 47, 19 N.Y. Ann. Cas. 71. There are no special facts or circumstances, such as a claim which would have necessitated a separate action. See Kent v. West, 33 Ad 112, 53 NYS 244 (4th Dept. 1898), Meek v. Martin, 19 Misc 2d 649, 196 N.Y.S.2d 744. Despite failing to obtain leave of court, Asset Acceptance Ltd. commenced an action for the debt.

A lawsuit can not be commenced against an incapacitated person. While an incapacitated person remains liable for his just debts, an action to recover such debts, indeed any action, must be

commenced against the guardian in his or her fiduciary capacity and the caption of the action must be so designated so as to reflect the legal status of the defendant as an incapacitated person. Here, the Plaintiff sued Thomas Garcia individually. Nothing in either the caption, the affidavit of service, or indeed the entire Civil Court file indicates Mr. Garcia's status as a ward of the court.

Additionally, consistent with their lack of adherence to the laws of this state and compounding the problems for this Court, "Asset" failed to follow the requirements for service when suing an incapacitated person. The law requires that a plaintiff must serve both the incapacitated person and his or her guardian. Section 309(b) of the CPLR states: "Personal service upon a person judicially declared to be incompetent to manage his affairs and for whom a committee has been appointed shall be made by personally serving the summons within the state upon the committee and upon the incompetent."

The passage of Article 81 provided that "wherever a statute uses the term conservators or committees, such statute shall be construed to include the term guardian…," Laws of 1992, ch 698 Paragraph 4. Here, "Asset" served only Mr. Garcia in accordance with CPLR Section 308(4). There was never even an attempt to serve the guardian.

Upon this irregular service "Asset" requested that a default judgment be held in violation of CPLR Section 1203 without ever advising the court that the defendant was a judicially declared incapacitated person. That Section states: "No judgment by default may be entered against… a person judicially declared to be incompetent unless his representative appeared in the action or twenty days have expired since appointment of a guardian ad litem for him."

This court is now faced with the unenviable task of reversing the damage caused Mr. Garcia. Clearly, the judgment is invalid. Therefore, the court hereby vacates the restraint on the guardianship account at North Fork Bank under Restraint No. I33165/06. The firm of Goldman, Warshaw & Parrella, P.C. are directed to reimburse Mr. Garcia for any fees charged to his account by the bank. Next the court is left with having to undo the actions of Asset Acceptance, Ltd. and its attorneys from Goldman, Warshaw and Parrella, P.C.

In light of the courts' inability to rely on Asset Acceptance and its attorneys to comply with any lawful court procedure and does not trust that they will comply with an order directing them to vacate the judgment against Mr. Garcia, the Guardian is authorized to retain counsel to vacate the judgment of the Civil Court of the City of New York against Thomas Garcia entered under Index # 33165/06. The legal fees for such action shall be paid by the law firm of Goldman, Warshaw & Parrella, P.C..

Furthermore, Fleet Bank, its successor The Bank of America, Phillip, Cohen & Associates, Asset Acceptance, Ltd., its assignees and subsidiaries are prohibited from attempting to collect this debt. The Guardian has satisfied the Court that the debt, which serves as the basis for the restraining notice and Information Subpoena, is not a valid debt and it would be a waste of judicial resources to grant leave to commence an action against the guardian.

Finally, Asset Acceptance, Ltd., Phillip, Cohen & Associates, Goldman, Warshaw & Parrella, P.C. must answer to this Court for their conduct in this matter.

Suing where a fiduciary has been appointed, without leave, is a question of contempt of Court. "In Chautauque" we not only said with respect to the creditor's failure to obtain leave that the question is merely whether the court will consider him in contempt and punish him accordingly.'" Copeland v. Salomon, 56 N.Y.2d 222, 436 N.E.2d 1284, 451 N.Y.S.2d 682, citing Chautauque County Bank v. Risley, 19 NY 369, 377.

Therefore, Joseph Zande, Esq.; an officer legally entitled to bind the corporation of Asset Acceptance Ltd.; Adam S. Cohen, Esq., and Matthew M. Phillips of Phillips, Cohen & Associates, Jeffrey Michael Parrella, Esq. and Nghia Nguyen, Esq. of Goldman, Warshaw and Parrella, P.C., are directed to appear, with counsel, on September 25, 2007, in Part 20 of Queens Supreme Court, at 9:30 a.m., located at 88-11 Sutphin Blvd., Jamaica, New York to show cause why they should not be held in contempt of court for their actions in this case.

The Clerk is directed to serve a copy of this Order with Notice of Entry upon the following: Thomas Murtha, Esq., 15 East Centre Street, Woodbury, N.J. 08096; Adam S. Cohen, Esq.,

Co-Chairman & CEO, Phillips & Cohen Associates, Ltd., 695 Rancocas Road, Westhampton, N.J. 08060; Matthew M. Phillips,

Co-Chairman, & CEO, Phillips & Cohen Associates, Ltd., 695 Rancocas Road, Westhampton, N.J. 08060; Sharon Terrell, Asset Acceptance LLC, P.O. Box 44426, Baltimore, M.D. 21236-6426; Nghia Nguyen, Esq., Goldman, Warshaw & Parrella, P.C., 34 Maple Avenue, Suite 101, P.O. Box 106, Pinebrook, N.J.; Jeffrey Parrella, Esq., 10 Oakland Avenue, Suite 2-4, Warwick, NY 10990; Stanley Goldman, Esq., Goldman, Warshaw & Parrella, P.C., 34 Maple Avenue, Suite 101, P.O. Box 106, Pinebrook, N.J.; Joseph Zande, Esq., Legal Department, Asset Acceptance, P.O. Box 2041, Warren, MD 48090-2041.

Accordingly, the motion is granted to the extent indicated above.

CHARLES J. THOMAS, J.S.C.

In the Matter of Rhodanna C. B. (Anonymous), appellant; and Pamela B. (Anonymous), et al., respondents.

2004-08263, (Index No. 2114/04)

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

2006 NY Slip Op 7870; 823 N.Y.S.2d 497; 2006 N.Y. App. Div. LEXIS 13055

October 31, 2006, Decided

NOTICE: [**1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING THE RELEASE OF THE FINAL PUBLISHED VERSION.

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

PRIOR HISTORY: APPEAL by Rhodanna C. B., an alleged incapacitated person, in a proceeding pursuant to Mental Hygiene Law article 81 to appoint guardians for her person and property, as limited by her brief, from so much of a judgment of the Supreme Court (Peter P. Rosato, J.), entered July 6, 2004, in Westchester County, as upon granting the petition, failed to provide that the guardians cannot authorize the administration of psychotropic medication or electroconvulsive therapy without the consent of Rhodanna C. B. or a further order of the court.

COUNSEL: Mental Hygiene Legal Service, Mineola, N.Y. (Sidney Hirschfeld, Felicia B. Rosen, and Dennis B. Feld of counsel), for appellant.

JUDGES: DAVID S. RITTER, J.P., DANIEL F. LUCIANO, WILLIAM F. MASTRO, PETER B. SKELOS, JJ. RITTER, J.P., and SKELOS, J., concur. LUCIANO, J., dissents.

OPINION BY: WILLIAM F. MASTRO

OPINION: OPINION & ORDER

MASTRO, J. We hold today that the Supreme Court's appointment of guardians pursuant to Mental Hygiene Law article [**2] 81 with the authority to consent in perpetuity to the administration of psychotropic medication to their ward, over her objection and without any further judicial review or approval, is inconsistent with the due process requirements of *Rivers v Katz* (67 N.Y.2d 485, 495 N.E.2d 337, 504 N.Y.S.2d 74). Accordingly, we reverse the judgment insofar as appealed from.

This proceeding involves a petition by the two children of Rhodanna C. B. to be appointed the guardians of the personal needs of their middle-aged mother, an alleged incapacitated person who previously has undergone psychiatric hospitalization and who currently lives at home. Following a brief hearing at which no medical testimony or expert evidence was adduced, the Supreme Court rendered a judgment which not only granted the petition to appoint the guardians based on Rhodanna's perceived lack of mental capacity, but which also effectively authorized the guardians to consent to the administration of psychotropic drugs or electroconvulsive therapy to

Rhodanna over her objection, without any durational limitation on that authority or judicial review of Rhodanna's capacity or the propriety and necessity of the proposed medical treatment. This [**3] [*2] aspect of the judgment runs afoul of the due process considerations discussed in the *Rivers v Katz* (*supra*) decision.

In *Rivers v Katz* (*supra*), the Court of Appeals considered the circumstances under which a mentally ill patient who has been involuntarily confined to a State facility can be administered psychotropic drugs over his or her objection. The Court began its analysis by making reference to the fundamental principles of patient autonomy underlying such a determination:

"In our system of a free government, where notions of individual autonomy and free choice are cherished, it is the individual who must have the final say in respect to decisions regarding his [or her] medical treatment in order to insure that the greatest possible protection is accorded his [or her] autonomy and freedom from unwanted interference with the furtherance of his [or her] own desires [citations omitted]. This right extends equally to mentally ill persons who are not to be treated as persons of lesser status or dignity because of their illness" (*Rivers v Katz, supra* at 493).

Noting the potentially devastating side effects of psychotropic [**4] drugs, the Court reasoned that before a patient could be forcibly medicated with such drugs pursuant to the State's parens patriae power, "there must be a judicial determination of whether the patient has the capacity to make a reasoned decision with respect to proposed treatment" (*Rivers v Katz, supra* at 497; *see e.g. Matter of William S.*, 31 AD3d 567, 817 N.Y.S.2d 674; *Matter of Michael L.*, 26 AD3d 381, 809 N.Y.S.2d 194; *Matter of Joseph O.*, 245 A.D.2d 856, 666 N.Y.S.2d 322). In the event that the patient's lack of capacity to determine the course of his or her own treatment is demonstrated by clear and convincing evidence, then "*the court* must determine whether the proposed treatment is narrowly tailored to give substantive effect to the patient's liberty interest, taking into consideration all relevant circumstances, including the patient's best interests, the benefits to be gained from the treatment, the adverse side effects associated with the treatment and any less intrusive alternative treatments" (*Rivers v Katz, supra* at 497-498 [emphasis supplied]). Again, the burden is on the party advocating the therapy "to establish by clear and convincing [**5] evidence that the proposed treatment meets these criteria" (*id.* at 498).

In the present case, Rhodanna is not an institutionalized patient, although it has been determined that she suffers from mental illness. Moreover, no attempt has yet been made to medicate her with psychotropic drugs against her will. Nevertheless, pursuant to Mental Hygiene Law § 81.22(a)(8), the Supreme Court has authorized the guardians to consent to such a course of treatment over Rhodanna's objection and without further court approval, if they, in their sole discretion, deem it to be appropriate at some point, no matter how far in the future.

To be sure, as our dissenting colleague notes, the statute empowers the court to authorize a guardian to "consent to or refuse generally accepted routine or major medical . . . treatment" (Mental Hygiene Law § 81.22[a][8]), which by definition includes "the administration of psychotropic medication or electroconvulsive therapy" (Mental Hygiene Law § 81.03[i]). Moreover, as evidenced by its acknowledgment of the *Rivers v Katz* (*supra*) decision in enacting [**6] Mental Hygiene Law § 81.22, the Legislature was aware of, and presumably was convinced that the statute comported with, its holding (*see* Law Rev Commn Comments,

reprinted in 2006 McKinney's Cons Laws of NY, Book 34A, Mental Hygiene Law § 81.22, at 274). However, since such an approach does not provide for an automatic judicial reassessment of the mental capacity of an incapacitated person who objects to treatment *at the time the treatment is proposed*, and does not require that *any* judicial assessment of the necessity and propriety of the proposed treatment *ever* be conducted, the grant of this authority fails to comport with the multiple-step inquiry designed to safeguard the rights of the incapacitated person as set forth in *Rivers v Katz* (*supra*).

As to the first prong of the *Rivers v Katz* (*supra*) analysis, we agree with the Supreme [*3] Court and the dissent that when a court is asked to appoint a guardian of the personal needs of an alleged incapacitated person pursuant to Mental Hygiene Law article 81, it conducts a constitutionally adequate inquiry into the mental capacity of the person [**7] when it follows the procedures set forth in the Article. Indeed, under Mental Hygiene Law § 81.02(b), a finding of incapacity must be based on clear and convincing evidence that the person is unable to provide for his or her own personal needs and cannot adequately understand and appreciate the nature and consequences of such inability. This finding must be preceded by the appointment of a court evaluator pursuant to Mental Hygiene Law § 81.09, who has the duty to interview or consult professionals regarding the person's alleged incapacity (*see* Mental Hygiene Law § 81.09[c][6]), to retain an appropriate medical expert where the court deems it appropriate (*see* Mental Hygiene Law § 81.09[c][7]), to apply to the court for permission to inspect the person's medical, psychological, and psychiatric records (*see* Mental Hygiene Law § 81.09[d]), and to provide the court with a written report and recommendation regarding the petition to appoint a guardian (*see* Mental Hygiene Law § 81.09[c][4]). [**8] Moreover, the alleged incapacitated person has the right to counsel (*see* Mental Hygiene Law § 81.10), and the court must hold a hearing (*see* Mental Hygiene Law § 81.11). Finally, in rendering a determination as to incapacity, the court must make specific findings on the record pursuant to Mental Hygiene Law § 81.15(b). Therefore, the *initial* determination as to capacity in a Mental Hygiene Law article 81 proceeding comports with the due process requirements set forth in *Rivers v Katz* (*supra*) (*see Matter of New York Presbyt. Hosp.*, 181 Misc 2d 142, 147, 693 N.Y.S.2d 405 ["the article 81 procedures . . . provide an individual with the procedural protections required under *Rivers* (*supra*) in the case of a person who objects to a proposed treatment plan"]).

However, neither Mental Hygiene Law article 81 nor the judgment appealed from expressly requires a judicial reassessment of Rhodanna's capacity to make treatment decisions at any point in the future, even many years following the appointment of a guardian. Indeed, the guardians of Rhodanna have been appointed for an indefinite [**9] duration, and are authorized to consent to the administration of psychotropic drugs or electroconvulsive therapy over Rhodanna's objection at any point in the future, regardless of her possible regaining of capacity, without further judicial intervention. Conversely, *Rivers v Katz* (*supra*) mandates that a new determination as to capacity be made each time that a medical provider seeks to administer such a course of treatment to an objecting patient, apparently acknowledging that "the finding that a mentally ill person is unable to make a reasoned decision as to the proposed treatment does not constitute a determination binding in futuro" and "there is recognition of the potential for change in the mental status of a person found to be incapable of deciding a medical treatment issue for himself [or herself]" (*Matter of New York Presbyt. Hosp., supra* at 149-150; *see Matter of Shari K.*, 177 Misc. 2d 25, 27, 675 N.Y.S.2d 790 ("[a]ssuming that [the alleged incapacitated person] is found to be incapacitated pursuant to Mental Hygiene Law § 81.02(b), to grant [the proposed guardian] the power, with unlimited duration, to consent to [**10] the administration of [electroconvulsive therapy] to [the alleged incapacitated person] pursuant to a guardianship appointment, would

deprive her of the due process rights and requisite judicial review mandated by *Rivers v Katz*" (*id.* at 27).

Hence, the foregoing decisions recognize that a person's mental capacity can change over the course of time, and due process requires that the question of capacity be evaluated each time the administration of psychotropic medication or electroconvulsive therapy is proposed over the patient's objection. This is especially true in the case of a person such as Rhodanna, who is relatively young and may have guardians for another 30 years or more, during which time her degree of mental capacity may change quickly and dramatically, perhaps as a result of sound medical decisions made by those very guardians. To hold, as the Supreme Court did, that the single determination of lack of capacity made in this Mental Hygiene Law article 81 guardianship proceeding may forever after deprive Rhodanna of an automatic judicial reassessment of her capacity [*4] in the event that such extraordinary medical therapies are proposed against [**11] her will in the distant future, affords her far less due process protection than an involuntarily-committed patient who has no guardian at all.

In this regard, Mental Hygiene Law §§ 81.30, 81.31, and § 81.36(a)(1), and the reasoning in *Matter of Conticchio* (182 Misc 2d 205, 696 N.Y.S.2d 769) offer little solace to an incapacitated person who objects to such treatment. While Mental Hygiene Law §§ 81.30 and 81.31 provide for the filing of periodic reports with the court regarding the condition of the incapacitated person and the management of her property, there is nothing in those statutes, or in the judgment appealed from, mandating an assessment of the person's current or prospective ability to consent to the narrow categories of extraordinary medical intervention under discussion here *at the time they are proposed*. Moreover, Mental Hygiene Law § 81.36(a)(1) provides that a guardian, the incapacitated person, "or any person entitled to commence a proceeding under this article" (Mental Hygiene Law § 81.36 [**12] [b]) may apply to the court to discharge a guardian or modify his [or her] powers if it is demonstrated that "the incapacitated person has become able to exercise some or all of the powers necessary to provide for personal needs . . . which the guardian is authorized to exercise." The burden of proof upon an application to terminate the guardianship or restore certain powers to the incapacitated person "shall be on the person objecting to such relief" (Mental Hygiene Law § 81.36[d]). In *Matter of Conticchio* (*supra*), the court reasoned that since an incapacitated person or anyone concerned with his or her welfare may make such an application, a ward can always obtain a reassessment of his or her own mental capacity before treatment, thereby satisfying *Rivers v Katz* (*supra*). However, unlike in *Rivers v Katz* (*supra*), in which the entity advocating psychotropic drug treatment or electroconvulsive therapy must apply to the court for permission to act each time the therapy is proposed, Mental Hygiene Law § 81.36 places the onus *on the incapacitated person*, or someone acting on her behalf, to formally [**13] object to the continued exercise of powers by the guardian in this regard. In the absence of such an affirmative objection and an application to remove the guardian or limit his powers, the issue of mental capacity in the face of the proposed treatment is never revisited by the court. Furthermore, even the limited opportunity for ongoing judicial oversight on the issue of capacity provided by this statute would frequently prove illusory, since it is unlikely that the guardian himself will seek to limit or terminate his own powers, and it is unrealistic to expect the incapacitated person to be aware of and exercise this right, especially where she is mentally ill, is not represented by counsel, and may already be laboring under the effects of drug therapy. Given these substantial shortcomings, we are compelled to conclude that the mechanism in Mental Hygiene Law § 81.36 fails to provide a constitutionally satisfactory substitute for the procedures outlined in *Rivers v Katz* (*supra*) for ensuring the timely judicial review of the incapacitated person's ability to make her own decisions regarding treatment with

psychotropic drugs or electroconvulsive [**14] therapy.

The second inquiry required under the *Rivers v Katz* (*supra*) analysis is glaringly absent from Mental Hygiene Law article 81 and from the judgment in this case. As noted earlier, once a lack of capacity is determined, *Rivers v Katz* (*supra*) requires that before an incapacitated patient can be compelled to undergo psychotropic drug treatment against her expressed wishes, *the court* must ascertain whether the proposed treatment is narrowly tailored to recognize the liberty interest of the patient, taking into account the patient's best interests, the potential benefits and adverse side effects associated with it, and any less intrusive alternative treatment regimens (*Rivers v Katz, supra* at 497-498). There is simply no analogue to this judicial inquiry in Mental Hygiene Law article 81 or in the judgment before us. Rather, Mental Hygiene Law § 81.22(a)(8) authorizes the appointing court to empower *the guardian* to consent to the administration of, inter alia, psychotropic drug treatment or electroconvulsive therapy to an incapacitated person over her objection, albeit upon "a consideration of the dignity and uniqueness [**15] of every person, the possibility [*5] and extent of preserving the person's life, the preservation, improvement or restoration of the persons's health or functioning, the relief of the person's suffering, the adverse side effects associated with the treatment, any less intrusive alternative treatments, and such other concerns and values as a reasonable person in the incapacitated person's circumstances would wish to consider" (Mental Hygiene Law § 81.22[a][8]). While these factors are similar to those set forth in *Rivers v Katz* (*supra*), Mental Hygiene Law § 81.22(a)(8) permits the guardian to consent to such therapy without the court *ever* conducting *any* inquiry into the nature, efficacy, or necessity of the treatment.

Likewise, the judgment in this case requires no judicial involvement in the event that psychotropic drug treatment or electroconvulsive therapy is proposed for Rhodanna over her objection at some point in the future. Rather, it cedes the authority to weigh the medical evidence and decide the treatment issue to her guardians. Such an approach is contrary to the express holding in *Rivers* [**16] *v Katz* (*supra*), as well as to the reasoning of numerous other decisions which have recognized the necessity and value of requiring that a *court* conduct a thorough inquiry and weigh the evidence on both sides of the treatment issue before determining whether and to what extent such treatment should be forced upon an incapacitated person (*see e.g. Matter of Gregory F*., 292 A.D.2d 606, 739 N.Y.S.2d 625 [matter remitted for the appointment of an independent psychiatric expert who can provide the court with a second opinion so that it can determine whether the proposed treatment is narrowly tailored to protect the patient's liberty interest]; *Matter of Kings Park Psychiatric Ctr.*, 204 A.D.2d 724, 612 N.Y.S.2d 428 [court should have ordered independent psychiatric evaluation to determine whether prescribed antipsychotic medication is appropriate to administer over the objection of involuntarily committed mentally ill patient]; *Matter of Mary Ann D*., 179 A.D.2d 724, 578 N.Y.S.2d 622 [hearing evidence regarding goal of proposed treatment and potential side effects supported court's determination that closely-monitored program designed to stabilize patient was narrowly tailored [**17] to preserve her liberty interest]; *Matter of McConnell*, 147 A.D.2d 881, 538 N.Y.S.2d 101 [clear and convincing medical and psychiatric evidence adduced at judicial hearing regarding patient's best interests, potential benefits and hazards of intended psychotropic drug treatment, and lack of less intrusive alternatives established that proposed treatment was narrowly tailored to protect patient's liberty interest]; *Matter of Shari K*., 177 Misc. 2d 25, 27, 675 N.Y.S.2d 790, *supra* ["to grant [the guardian] the power, with unlimited duration, to consent to the administration of [electroconvulsive therapy] to [the patient] pursuant to a guardianship appointment, would deprive [the patient] of the due process rights and requisite judicial review mandated by *Rivers v Katz* (*supra*)"]; *Matter of Gordon*, 162 Misc. 2d 697, 619 N.Y.S.2d 235

[proposed guardian's request for authority to compel alleged incapacitated person to receive psychotropic medication against her will in the future was denied; the proper remedy is to seek permission pursuant to *Rivers v Katz* (*supra*)]).

Notwithstanding the plain language in *Rivers v Katz* (*supra*), our dissenting colleague [**18] relies upon the decision in *Matter of Conticchio* (*supra*) in finding that when a guardian has been appointed for an incapacitated person, the guardian rather than the court may apply the requisite factors and make such treatment decisions. However, there are compelling reasons for adhering to the requirement in *Rivers v Katz* (*supra*) that those decisions be made by the court in the context of a judicial proceeding. A guardian is likely to lack that degree of medical and psychiatric knowledge possessed by a court which regularly conducts hearings into such treatment questions. Hence, while a guardian may seek a second opinion when confronted with a recommendation of a course of psychotropic drug therapy by a treating physician, there is no requirement in Article 81 that he do so, nor is it realistic to assume that every guardian will even possess the level of sophistication necessary to appreciate his ward's condition and the true necessity and impact of the proposed treatment. Therefore, a genuine danger exists that the guardian will merely "rubber stamp" the treatment recommendation. Conversely, when a court is the arbiter of the propriety of the proposed treatment, [**19] the issues are fully explored in the context of an adversarial proceeding in which the parties are represented by counsel, medical evidence and other proof may be presented on both sides [*6] of the issue, witnesses may be subjected to the crucible of cross-examination, the court may appoint independent and disinterested experts to aid it in evaluating the incapacitated person's true condition and the overall efficacy of the proposed treatment, and the propriety of the treatment must be demonstrated by clear and convincing evidence (*see Matter of Paris M. v Creedmoor Psychiatric Ctr.*, 30 AD3d 425, 818 N.Y.S.2d 109; *Matter of Mausner v William E.*, 264 A.D.2d 485, 694 N.Y.S.2d 165). Similarly, the court acts as an impartial decision maker, unfettered by the personal interests and concerns which could influence the treatment decision made by a guardian. Indeed, regardless of how well-intentioned a guardian may be, the pressures, difficulties, and expense in dealing with the incapacitated person on a regular basis over the course of time may lead him or her to consent to a treatment plan on behalf of his or her unwilling ward in an unrealistic attempt to cure the person, or in an effort [**20] to control erratic or embarrassing conduct by medicating the person to maintain the ward in a docile state. This is particularly true when, as in this case, the guardianship is unlimited in duration and may last for decades, during which time the guardian's own circumstances and priorities may change considerably. There is a real possibility that in such cases, no matter how altruistic the motives of a guardian may be at the time of his appointment, the liberty interest of the incapacitated person may give way to the convenience of the guardian in the ensuing years. Therefore, a guardian is not an adequate substitute for a court in making such decisions.

In reaching our conclusion, we are not unmindful of the presumption of constitutionality which attaches to legislation, as well as of the heavy burden shouldered by those who challenge a statute on the ground that it fails to pass constitutional muster (*see LaValle v Hayden*, 98 N.Y.2d 155, 161, 773 N.E.2d 490, 746 N.Y.S.2d 125). Likewise, we acknowledge the principle that legislation must be interpreted in such a manner as to render it constitutional whenever possible (*see National Assn. of Independent Insurers v State of New York*, 89 N.Y.2d 950, 952, 678 N.E.2d 465, 655 N.Y.S.2d 853). [**21] Indeed, it is precisely that principle which compels us to construe Mental Hygiene Law article 81 as including a *Rivers v Katz* (*supra*) hearing requirement in those limited circumstances where a ward objects to the proposed administration of psychotropic drugs or electroconvulsive therapy.

Accordingly, the protection of the liberty interest and autonomy of an incapacitated person, the cornerstone of the decision in *Rivers v Katz* (*supra*) and of Mental Hygiene Law article 81 itself, is achieved only when a guardian's consent to a proposed course of psychotropic drug treatment or electroconvulsive therapy over his ward's objection is subjected to the multiple due process safeguards afforded by an adversarial proceeding before an impartial judicial decision-maker who considers both the current mental capacity of the person and the propriety of the proposed treatment. Since the judgment at issue fails to provide these fundamental protections, it should be reversed insofar as appealed from.

In view of the foregoing, we have no occasion to reach the merits of the appellant's additional substantive contentions.

Accordingly, the judgment is reversed insofar as appealed from, [**22] on the law, and a provision is added thereto directing the petitioners not to authorize the administration of psychotropic medication or electroconvulsive therapy to Rhodanna C. B. without her consent or a further order of the court following a hearing.

RITTER, J.P., and SKELOS, J., concur.

ORDERED that the judgment is reversed insofar as appealed from, on the law, without costs or disbursements, and a provision is added thereto directing the petitioners not to authorize the administration of psychotropic medication or electroconvulsive therapy to Rhodanna C. B. without her consent or a further order of the court following a hearing.

DISSENT BY: DANIEL F. LUCIANO

(Dissent not included)

The Case of Mary

Mary is an 85 year old woman who lives in a mobile home which she owns in a rural upstate county. As a client for the county Office for the Aging (OFA) she is receiving home delivered meals and attends an adult day care program two days a week. Mary's grandson Joe has been living with her for two years. Approximately one year ago Joe's girlfriend, Kate, moved in with Mary and Joe. Since then Mary's living conditions and emotional state have deteriorated. While living alone Mary's home was well cared for and clean, since Joe and Kate's arrival the home is unclean with accumulated dirt, clutter and garbage. Also Mary is now displaying indicators of depression and stress as evidenced by her continuous crying, inability to deal with simple tasks, and feelings of being overwhelmed.

Mary has recently told the Office for the Aging case worker that Kate has been physically and verbally abusing her. She denied any abuse from Joe. Mary openly admits that Kate is continuously calling her names and using vulgarity against her. Mary also reports that Kate is physically abusive. Mary first reported a bruise on her knee after Kate threw the remote at her. The next incident reported was a large bruise on her left arm after Kate allegedly punched her and other incidents when Mary alleged that Kate had pushed her. The OFA case worker saw the bruises on Mary's knee and arm. The OFA received a referral from Mary's propane company regarding verbal abuse by Kate and Joe.

Mary also indicated she was concerned about her finances. She had given a Power of Attorney to Joe when he moved in so he could help her pay bills. At that time she had approximately $83,000 in her savings account and now, according to a recent bank statement, the account has only $21,000 left. Her mobile home is paid for and her monthly expenses are approximately $530 with added costs in the winter months for fuel. She is unsure where all the money went. She stated, "Joe takes care of everything". The OFA has received a referral from Mary's bank reporting possible financial abuse.

The OFA case worker made a referral to PSA. The PSA case worker visited Mary the following day with a Geriatric Nurse Practitioner (GNP). The GNP completed a physical and mental health evaluation. Physically, Mary appeared to have limited movement in her knees and hips resulting in pain when bending and walking. She uses a cane to assist her in walking. She also has limited dexterity in both hands due to arthritis. There was evidence of bruising on both knees and one arm. Mary's vision was also impaired. Cognitively Mary showed signs of confusion, memory loss and impaired judgment.

The PSA case worker interviewed Mary's daughter, Pam (Joe's mother). Joe has told Pam repeatedly that there is no way he and Kate will leave Mary's home. While Joe was speaking on the phone to Pam she could hear Kate in the background yelling and screaming at Mary and Mary crying. Numerous other times when Joe has called Pam she has heard Kate yelling at Mary and one time she heard Mary cry, "You keep hitting me". Pam went on to say there were several incidents where Joe called her in the middle of the night demanding that Mary be removed from her own house. Pam also related an incident where Mary told her that her cane was thrown into the backyard by Kate. Joe retrieved the cane for her. Both Pam and her husband Larry are afraid of their son Joe as he is verbally abusive to both of them and has grabbed Pam in a threatening manner.

Guardianship Resources

NYS Office of Guardian and Fiduciary Services
140 Grand Street – Suite 701
White Plains, New York 10601
Ph (914) 824-5770
Email: gfs@courts.state.ny.us
Internet: www.nycourts.gov/ip/gfs
Article 81 collected Cases
Comments on Article 81 Amendments

Guardianship Practice in New York State
Abrams, Robert, Esq., Editor
New York State Bar Association

Initial and Annual Reports of Guardian
www.courts.state.ny.us/ad3/forms.html#examiner

HIPAA
Frequently Asked Questions on Privacy
Copy of the Regulations
http://www.hhs.gov/ocr/hipaa

"Authorization For Release of Health Information Pursuant to HIPAA"
OCA Form # 960
www.nycourts.gov/forms

Housing Resources:

Affordable Senior Housing directory
http://seniorhousing.state.ny.us

Information on money matters including reverse mortgages
www.aarp.org/money/revmort/

New York State Office for the Aging
Hot Line: (800) 342-9871 or (518) 474-5731
NYS Long Term Care Ombudsman Program
Directory of Senior Housing
http://aging.state.state.ny.us

NYSHICAAP – Counseling on Medicare and other insurance
Toll-free Hotline: (800) 701-0501
http://hiicap.state.ny.us/home/hiassist.htm

MFY Legal Services
299 Broadway, New York, NY, 10007
212-417-3700

Consumer FACT Sheets

http://www.mfy.org/english.shtml

CONSUMER ISSUES: DEALING WITH DEBT
Can creditors take my benefits and assets?
How do I stop debt collectors from bothering me?
I Can't Afford to Pay My Debts. What Should I Do and What is Going to Happen to Me?
Debt Collection Basics: How Do I Negotiate a Settlement in a Debt Case?
I Owe Money and Want to Set Up a Payment Plan with a Debt Collector. What Should I Do?
I Have Received Papers Labeled "Summons" and "Complaint." What Are These? What Should I Do?
I've Been Sued for Debt. What Will Happen When I Go to Court?
I Am Being Sued for Debt: What Should I Put in My Answer?
My Bank Account is Frozen. What Do I Do?

HEALTH CARE: MEDICAL PRIVACY
How Do I Get Access to My Clinical Records?
Medical Privacy: HIPPA and You as the Patient
Medical Privacy: HIPPA and You as the Parent, Child, or Loved One of a Patient

GLOSSARY OF LEGAL TERMS
Relating to
GUARDIANSHIP

prepared by
Rose Mary Bailly, Esq.
Debra Sacks, Esq.

This *glossary* is intended as a general, non-technical, guide to terms that may be used in a guardianship proceeding.

Acknowledgement (of a written instrument) - a formal declaration before a notary public by the person executing the instrument that it is being executed freely; this declaration is certified by the notary on the executed instrument.

Administrator of an estate - a person legally qualified duly appointed by the surrogate's court to manage and settle an estate not disposed of by a will.

Affidavit - a voluntary written statement of facts, confirmed by the person making the statement by taking an oath or making an affirmation before a person authorized to administer the oath or affirmation.

Affirmation - a formal declaration that a statement is true. An affirmation is used instead of an oath when the person affirming objects to taking an oath.

Annual report - the document that the guardian must file with the court every May providing information with respect to the incapacitated person as set forth in section 81.31 of the statute.

Answer - the pleading that may be filed by the respondent in a guardianship proceeding responding to or answering the allegations in the petition.

Appeal - a review by a court of appellate (higher) jurisdiction of the decision of a lower court requested on the grounds that the lower court made errors of law in its decision.

Beneficiary - one who benefits from the act of another; in a will, a person who receives property; in a trust, the person for whose benefit the property is held in trust.

Bond - as it relates to guardianship, evidence that the company issuing the bond insures the performances of the guardian's duties. The bond protects the incapacitated person from the misdeeds of the guardian.

Burden of proof - the responsibility of proving a fact.

Certified copy - a copy of a document or record signed and certified by the officer who has custody of the original document. For example, the court clerk will certify copies of the guardian's order of appointment.

Commission - the written authority issued by the court authorizing or directing the guardian to carry out the duties and responsibility of his or her appointment.

Contingent estate, interest or right - an estate, interest, or right that depends upon the occurrence of an uncertain event; for example, your right to take property is contingent if you are entitled to take the property only if you survive someone else.

Contract - an agreement between two or more parties that creates an obligation to do or not do a particular act.

Conveyance - most commonly, the transfer of title or interest in land from one person to another.

Court Evaluator - a person appointed by the court in a guardianship proceeding to investigate and report to the court on the condition, affairs and situation of the person alleged to be incapacitated.

Decision - a determination by the court arrived at after it has considered the facts and applicable law.

Dismissal - a termination of the proceeding. Dismissal may deny the relief sought by the petition or it may permit the petitioner to renew his or her petition to the court.

Do not resuscitate order - an order not to attempt cardiopulmonary resuscitation in the event a patient suffers cardiac or respiratory arrest that is governed by article 29-B of the public health law.

Donee - a person who receives a gift or a power from a donor.

Donor - a person who gives a gift or confers a power on a donee.

Elective share - the right of a surviving spouse to choose between the portion of the estate of the deceased spouse provided for him or her by will and the portion the law allows a surviving spouse.

Examiner - a person appointed by the presiding judge of each of the appellate divisions in each of the four judicial departments of New York to examine the initial and annual reports submitted by guardians.

Execute - to sign, e.g., to execute a will or a contract.

Executor of an estate - a person appointed by the terms of a will to carry out the directions of the will upon the death of the person who executed the will.

Exhibit - an item that is offered to the court for its inspection.

Expert witness - a witness qualified as an expert in court who will be allowed to give his or her expert opinion to assist the judge or jury in understanding technical subjects.

Health care proxy - a document delegating the authority to make health care decisions, executed in accordance with statutory requirements set forth in article 29-C of the public health law.

Hearing - a proceeding of relative formality in which issues are considered and witnesses are heard by a judge; the hearing generally results in a final decision on those issues. An adversary hearing occurs when both parties are present at the hearing to argue their respective positions. An *ex parte* hearing occurs when only one party is present.

Hearsay - a statement made by someone outside of court attesting to some fact that is then reported to the court for its truth by someone other than the person who made the statement. For example, the court evaluator testifies at the hearing that a nurse at the hospital told him that the alleged incapacitated person is a difficult patient. The nurse is not present in court. The testimony of the court evaluator as to the nurse's description of the patient is generally regarded as hearsay.

Injunction - a remedy granted by the court which directs or forbids the performance of an act by a party. For example, the court may issue an injunction forbidding a bank from honoring certain checks of the allegedly incapacitated person where there has been a showing that the checks were forged.

Inter vivos transfer - a transfer of property during the life of the owner. Such transfer is to be distinguished from a testamentary transfer where the property passes at death. An inter vivos gift, similarly, is a gift made by the donor during his or her life which takes effect while the donor is living. An inter vivos trust is a trust which is created by the person during his or her life and which becomes effective during his or her lifetime. A testimony trust takes effect at the death of the person establishing the trust.

Interim guardian - a guardian appointed by the court to fill a vacancy created by the death, removal, discharge, resignation, or suspension of a guardian and to serve until a successor guardian is appointed.

Initial report - the report on the incapacitated person's status that the guardian is required to file with the court within 90 days after the issuance of the guardian's commission.

Intestate succession - describes the passing of property to heirs when the deceased person leaves no will or when the deceased person's will has been revoked or annulled.

Joint tenancy - a form of ownership of property by two or more people which is characterized by a right of survivorship. The right of survivorship entitles the surviving joint tenant or tenants to continued ownership of the property to the exclusion of any heirs of the deceased tenant. For example, A and B are joint tenants of property in Queens County. A dies survived by B and a sister C. B continues as the sole owner of the Queens property. C does not inherit any interest in that property. A joint tenancy should not be confused with the possession of property pursuant to a lease. See also tenancy by the entirety and tenancy in common.

Judicial Departments - New York is divided geographically into four judicial departments:

- **The first department consists of:**
  New York and Bronx counties.

- **The second department consists of:**
  Richmond, Kings, Westchester, Orange, Putnam, Rockland, Dutchess, Nassau, Suffolk, and Queens counties.

- **The third department consists of:**
  Green, Sullivan, Ulster, Columbia, Albany, Rensselaer, Schoharie, Chemung, Tioga, Broome, Chenango, Schuyler, Tompkins, Cortland, Delaware, Madison, Otsego, Schenectady, Montgomery, Saratoga, Washington, Fulton, Warren, Hamilton, Essex, Clinton, Franklin, and St. Lawrence counties.

- **The fourth department consists of:**
  Chautauqua, Cattaragus, Allegany, Erie, Wyoming, Genesee, Orleans, Niagra, Monroe, Wayne, Ontario, Livingston, Yates, Seneca, Cayuga, Steuben, Onondaga, Oswego, Lewis, Jefferson, Oneida, and Herkimer.

Judgment - the final decision of the court determining the rights and obligations of the parties.

Jurisdiction - the power of the court over both the subjects before it, e.g., guardianship, and the parties to the proceeding, e.g., the petitioner and the respondent.

Jury trial - in a jury trial a group of individuals decides issues of fact and the judge decides questions of law. If there is no jury, the judge decides both questions of fact and questions of law.

Mental Hygiene Legal Service - is a legal service organized under article 47 of the mental hygiene law to provide legal assistance to patients or residents of certain facilities within the state. MHLS maintains an office in each judicial department. Under the guardianship law, MHLS may be appointed as court evaluator or as counsel in certain guardianship proceedings.

Motion - an oral or written application or request to the court to determine a controversy. When a person makes a motion, that person usually notifies his or her opponent in the controversy. *Ex parte motion* is an oral or written application to the court to determine a controversy without notifying the opponent. *Ex parte motions* are usually used only in emergency situations.

Notice - as to a guardianship proceeding, taking formal steps to advise interested persons of the guardianship proceeding. For example, under Article 81 the persons entitled to notice of the guardianship proceeding are those who must be served with a copy of the Order to Show Cause, they are not entitled to receive the Petition and supporting papers 81.07 (g).

Notice of Pendency - a document filed in the county clerk's office to warn all persons that litigation is pending which may affect the title to, or possession or use of certain real property in that county. A notice of pendency lasts for three years but can be canceled by an order of the court.

Order - an official command by the court requiring, allowing, or forbidding some act to be done.

Order To Show Cause - a form of notice to the respondent and other persons entitled to notice used in guardianship proceedings.

Petition - the documents in a guardianship proceeding submitted to the court by the petitioner which sets forth the reasons for the appointment of a guardianship.

Petitioner - the party commencing the guardianship proceeding.

Pleading - a document filed in a court stating the legal position of one of the parties to the proceeding.

Power of appointment - a power conferred by deed or will that allows the designated person to select a person or persons to receive and enjoy an estate or income from an estate.

Power of attorney - an instrument executed by one person (the principal) designating another person to act as his or her agent. A power of attorney becomes invalid by law upon the incapacity or death of the principal. Durable power of attorney continues in effect after the incapacity of the principal. It does not survive the death of the principal.

Preference - priority scheduling treatment granted to a guardianship case

Presumptive distributee - a person who would be entitled to take a share in the property of the alleged incapacitated person if the alleged incapacitated person were deceased.

Record - generally includes a written or recorded transcript of a hearing as well as all the pleadings and exhibits that have been submitted to the court as part of a guardianship proceeding; e.g., all the documents and transcripts that are part of the record of a guardianship proceeding are on file in the courthouse.

Respondent - as it relates to guardianship proceeding, the person for whom a guardian is sought.

Rules of Evidence - rules that govern the admissibility of evidence at trials and hearings.

Service of process - usually the delivery of formal notification to respondent and other persons entitled to be informed of a proceeding. In guardianship the Alleged Incapacitated Person (AIP), Court Evaluator and Attorney for the AIP are to be served with the Order to Show Cause, Petition and supporting papers, 81.07(e). A process server is a person who charges a fee for delivering the notice.

Standby guardianship - is a guardian appointed at the time of the appointment of the guardian to act in the event that the guardian resigns, dies, is removed, discharged or suspended or becomes incapacitated. The standby guardian is empowered to assume office immediately upon the resignation, death, removal, discharge, suspension, or adjudication of incapacity of the guardian subject only to the confirmation of the court appointment within sixty days following the assumption of the office.

Subpoena - a command to appear and give testimony or show certain documents or records at a specified time and location.

Supreme Court - is a single court with statewide jurisdiction. The court has a branch in each county.

Surrogate's Court - is a court of limited jurisdiction located in each county. It has jurisdiction over actions and proceedings relating to affairs of decedents, probate of wills, administrations of estates, and guardianship of minors. It also has jurisdiction over guardianships for persons who are mentally retarded or developmentally disabled and, in some limited instances involving property management, article 81 guardianships.

Temporary guardian - a guardian appointed for a limited period of time with limited powers over specific personal care or property management decisions. A temporary guardian is appointed at the commencement of a guardianship proceeding or while the proceeding is pending, when there is a showing of danger in the reasonably foreseeable future to the health and well being of the allegedly incapacitated person, or a danger of waste, misappropriation, or loss of property of the person.

Temporary restraining order - a form of emergency relief granted by the court for a brief duration that prohibits a person from doing or continuing to do an act until the court can conduct a hearing on the issues raised by the controversy.

Tenancy by the entirety - a form of ownership of property by husband and wife which is characterized by a right of survivorship. The right of survivorship entitles the surviving spouse to continued ownership of the property to the exclusion of any heirs of the deceased spouse. For example, H and W are tenants by the entirety of property in Kings County. W dies leaving a daughter C by a former marriage and H surviving. H continues as the sole owner of the Brooklyn property. C does not inherit any interest in that property. A tenancy by the entirety is not to be confused with the possession of property pursuant to a lease.

Tenancy in common - a form of ownership of property by two or more persons. Unlike a joint tenancy or tenancy by the entirety, there is no right of survivorship. For example, A and B owned property in Queens County as tenants in common. A dies, leaving as survivors, B and A's daughter D. D inherits A's interest in the Queens property.

Testate succession - describes the passing of property to heirs when the deceased leaves a will.

Totten trust - an account in a bank set up by one person (A) in trust for another (B). Under the terms of a Totten trust, B is not entitled to any portion of the funds in the Totten Trust until A dies. A may change the beneficiary from B to anyone else or may terminate the trust during his or her life.

Trust - an arrangement under which property is administered by one person (the trustee) for the benefit of another person (the beneficiary); the person who establishes the trust is known as the settlor. A revocable trust is a trust arrangement in which the settlor reserves the right to revoke the terms of the trust; one example of a revocable trust is one that provides for the income of the trust to be paid to the settlor for life and at the death of the settlor the trust would end and the property in the trust would be distributed to persons designated by the settlor. The settlor reserves the right to revoke the trust. An irrevocable trust is a trust arrangement which may not be revoked after its creation. An irrevocable trust is a method often used to make a gift in order to allow the settlor to gain certain tax benefits by removing the property from the estate of the settlor.

Trustee - the person who administers the trust.

Venue - the county where the guardianship proceeding is commenced. For example, in a guardianship proceeding brought in the Supreme Court of New York in Queens County, Venue of the proceeding is Queens County.

Verified pleading - a pleading that has been sworn to by the party submitting it to court.

Will - an oral declaration or a written instrument made by a person that is revocable during his or her lifetime and intended to take effect upon his or her death under the terms of which the person disposes of property and provides for the administration of his or her estate.

Wrongful death action - an action brought on behalf of a deceased person to recover damages against a person whose wrongful conduct caused the deceased person's death and who would have been liable to the deceased person for that conduct if he or she had lived.

PSA

Protective Services for Adults
NYS OCFS Adult Services

ARTICLE 81 GUARDIANSHIP For PSA Clients

For Commissioners, Case Workers and County Attorneys

Participant Manual, Part 2

(Post Appointment Process)

2008

New York State Office of Children & Family Services

Brookdale Center for Healthy Aging & Longevity
Hunter College / The City University of New York

HUNTER IS CUNY

Post Appointment Process

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STATE OF NEW YORK
UNIFIED COURT SYSTEM
OFFICE OF COURT ADMINISTRATION
GUARDIAN AND FIDUCIARY SERVICES
140 GRAND STREET - SUITE 701
WHITE PLAINS, NEW YORK 10601
(914) 824-5770
Fax (212) 457-2608
www.nycourts.gov/ip/gfs

JONATHAN LIPPMAN
Chief Administrative Judge

ANN T. PFAU
First Deputy Chief Administrative Judge

CHARLES F. DEVLIN
Director

MARITA L. MCMAHON
Deputy Director

Dear Friend,

You have been appointed guardian for an incapacitated person. You **MAY NOT ACT** until the following steps have been completed:

1. You must receive the **WRITTEN ORDER OR JUDGMENT** of the Court appointing you guardian;

2. IF the order or judgment has given you the power to prosecute or defend civil judicial proceedings, you must **FILE** in the County Clerk's Office a **DESIGNATION** (use the attached Form #1): **if this power is not given, skip to step 3**;

3. IF the order or judgment has required a bond, you must FILE in the County Clerk's Office a BOND in the required amount (bonds may be obtained from insurance brokers/agents in SURETY BONDS): if a bond is not required, skip to step 4;

4. You must present at the County Clerk=s Office for his/her signature a **COMMISSION** (use the attached Form #2); it is suggested that you get several duplicate originals signed (the cost is $5 for each commission);

5. IF the incapacitated person owns real estate, you must **FILE** in the County Clerk=s Office a **STATEMENT IDENTIFYING REAL PROPERTY** (use attached Form #3).

Once you have completed these steps, you **MAY ACT** as guardian and exercise the powers contained in the commission, which are identical to those granted in the order or judgment.

The hard job of being a guardian now begins. To help you get started, **GUARDIAN TRAINING PROGRAMS** are available. These programs will explain your duties as guardian and inform you how best to fulfill those duties. The Court has directed that you attend one of these programs, and it is recommended that you do so within the

May 2007 NYS Office of Children & Family Services
Brookdale Center for Healthy Aging & Longevity of Hunter College / CUNY

next 90 days. The clerk of the local guardianship court will provide you, on request, with a schedule of programs.

Towards the end of the order or judgment appointing you guardian, the Court assigned you a **COURT EXAMINER**. The court examiner will review your **INITIAL REPORT** (use attached Form #4), which is due 90 days after the date of your commission, and your **ANNUAL REPORT** (use attached Form #5), which is due in May of each year. The court examiner is not only obligated to assist the Court in supervising your work as guardian by the review of filed reports, but also to serve as an available resource to answer any questions you might have about your powers or duties.

The Court recognizes that to be a guardian is a difficult and time-consuming task. It appreciates your willingness to serve and would like to offer you as much support as possible. The clerk of the local guardianship court and the court examiner are your primary resources for help, as well as your own attorney. If you need further assistance, please contact us at the New York State Office of Guardianship Services by mail, FAX, email or phone.

Very truly yours,

Charles F. Devlin
Director

FORM # 1

Supreme Court of the State of New York

_____ County

----------X

In the Matter of **DESIGNATION**

_____ **INDEX NUMBER_____**

Name of Incapacitated Person

----------X

_____, _____

Name of Guardian* **Address**

having been appointed guardian of G personal needs G property management (check either or both) for _____, _____

Name of Incapacitated Person **Address of Incapacitated Person**

designates the Clerk of the County of_____, as a person on whom

County

service of process in any civil judicial proceeding 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.

DATED: , 200

Signature of Guardian

State of New York, County of _____ } ss:)

On this __day of_____, 200__ , before me came_____

Name of Guardian

to me known to be the individual described in, and who executed, the foregoing instrument, and acknowledged that he/she executed same

_____

Notary

***If you are a co-guardian, list the names and addresses of all other co-guardians:**

- FILING INSTRUCTIONS -

File in the County Clerk's Office (Legal Division) in the county where the proceeding was held.

SUPREME COURT OF THE STATE OF NEW YORK

_____ COUNTY
County

----------X

In the Matter of

Commission to Guardian

INDEX NO. _____

_____.
Name of Incapacitated Person

---------- X

Each and every box [ ] must be marked [Y], if the offered choice is being selected, or [N], if the offered choice is not being selected.

THE PEOPLE OF THE STATE OF NEW YORK,
TO ALL TO WHOM THESE PRESENTS COME,
GREETINGS:

A judgment of this Court, dated _____, 200___, appoints:

[ ] Guardian of the Property:_____
Name, address, phone number

[ ] Guardian of the Person: _____
Name, address, phone number

[ ] Co-Guardian of the Property: _____
Name, address, phone number.

[ ] Co-Guardian of the Person:_____
Name, address, phone number.

for: _____
Name of Incapacitated Person, address, phone number

POWERS

The powers of the guardian/co-guardian(s) of **PROPERTY** are:

[ ] 1. Marshal the income and assets of the Incapacitated Person and establish bank, brokerage and other similar accounts in the name of the Guardian for the Incapacitated Person and endorse, collect, negotiate and deposit all negotiable instruments drawn to the order of the Incapacitated Person, including, but not limited to government entitlement checks; invest funds with the same authority as a trustee, pursuant to New York EPTL section 11-2.2; inventory personal property, and store or dispose, as appropriate, and inventory any safe deposit box and **report to the Court for further order as to the disposition of the contents of the safe deposit box**;

[ ] 2. Pay such bills as may be reasonably necessary for the Incapacitated Person's maintenance and care;

[ ] 3. Make gifts, subject to **prior** court approval, pursuant to Mental Hygiene Law section 81.21.(b), except that no **prior** court approval shall be required for any gift or gifts to an individual, if the total of all gifts to that individual in the same calendar year does not exceed $250, **AND** the total of **all** gifts to **all** individuals in the same calendar year does not exceed the lesser of 2% of all liquid assets in the guardianship estate or $4,000.;

[ ] 4. Provide support for the following persons dependent upon the Incapacitated Person:

Name	Address	Relationship	Amount
Name	Address	Relationship	Amount

[ ] 5. Enter into contracts (including contracts for the sale of real property, provided that **prior to the closing of title** the Court approves the terms of sale, upon submission of a copy of the fully executed contract and a written appraisal of the value of the property, and provided further that the property is listed for sale with a New York State licensed real estate broker and a member of the Multiple Listing Service [MLS] and the property is marketed on the MLS); **other contracts for the sale or purchase of assets (e.g., cars, safety equipment, etc.), including construction contracts, shall require prior court approval, if the contract price is in excess of $5,000 or 5% of the guardianship estate, whichever is less, provided that no prior court approval shall be required when the contract price is less than $500; ALL PURCHASES OF REAL ESTATE shall require PRIOR court approval upon proof of a PROPOSED contract of purchase and a written appraisal of the value of the property;**

[ ] 6. Establish

[ ] an irrevocable prepaid funeral trust in accordance with Medicaid regulations from resources only and not from income;

[ ] a personal allowance account in accordance with Medicaid regulations from resources only and not from income;

[ ] from resources only and not from income, a separate interest bearing, savings account in the guardian's name, as guardian, in the amount of $ _____ and denominated in the "Comments" on the bank records **"as and for administrative costs of the guardianship proceeding"**, and such separate account shall not be deemed an available Medicaid asset, unless and until all administrative costs are paid;

[ ] 7. Engage in Medicaid and estate planning, subject to **prior** court approval of all proposed transfers, pursuant to Mental Hygiene Law section 81.21 (b);

[ ] 8. Apply for government and private benefits;

[ ] 9. Prosecute and defend civil proceedings, including administrative proceedings, and settle and compromise all matters related to such proceedings;

[ ] 10. Sign and file income tax returns and all other tax documents for any and all tax obligations and appear before federal, state and local taxing authorities on all claims, litigation, settlements and other matters related thereto;

[ ] 11. Authorize access to or release of confidential records;

[ ] 12. Retain an attorney or an accountant, or other professional (e.g. a geriatric care manager, financial adviser), subject to court approval of fees, upon an affidavit of services submitted with the initial, annual or final reports (Mental Hygiene Law sections 81.30, 81.31 and 81.33) **(fees may be paid prior to court approval, subject to reimbursement pursuant to orders issued on the initial, annual or final reports);**

[ ] 13. Pay the funeral expenses out of any funds remaining in the guardianship estate at death, to the extent that a prepaid funeral trust, if any, is insufficient to pay for same;

[ ] 14. Pay such bills after death if incurred prior thereto and if authority to pay same would have otherwise existed;

[ ] 15. Lease a primary residence for up to 3 years.

[ ] 16. **Other:** _____

The guardianship of property shall be

[ ] for an indefinite duration.

[ ] until _____ .
Date

The powers of the guardian/co-guardian(s) of **PERSON** are:

[ ] 1. Determine who shall provide personal care or assistance to the Incapacitated Person;

[ ] 2. Make decisions regarding social environment and other social aspects of his/her life;

[ ] 3. Determine whether he/she should travel;

[ ] 4. Determine whether he/she 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. Choose the place of abode,

[ ] provided that the Incapacitated Person shall not be placed in a skilled nursing facility or residential care facility, as defined by Public Health Law section 2801, without his/her consent or further order of the court.

[ ] including placement or continued placement in a skilled nursing facility or residential care facility, as defined by Public Health Law section 2801, provided that no consent shall be given to the voluntary formal or informal admission of the Incapacitated Person to a mental hygiene facility under article 9 or 15 of the Mental Hygiene Law or to an alcoholism facility under article 21 of the Mental Hygiene Law.

[ ] 9. Consent to or refuse generally accepted routine or major medical or dental treatment, provided that treatment decisions are made consistent with the findings of Mental Hygiene Law section 81.15 and in accordance with the standards in Mental Hygiene Law section 81.22 (a)(8),

[ ] ***and provided further that no consent shall be given to the administration of psychotropic medication or electroconvulsive therapy over the objection of the Incapacitated Person and, in the event of such objection, consent may only be given, after hearing, upon further order of this court or a court of competent jurisdiction. At no time may the guardian consent to treatment with psychotropic medication or electroconvulsive therapy by physical force.***

[ ] ***with the additional power to consent to the administration of psychotropic medication or electroconvulsive therapy over the objection of the Incapacitated Person, as follows: (If marked "Y", add language from the order/judgment authorizing this power.)***

[ ] ***and provided further that no consent shall be given to the withholding or withdrawal of life sustaining treatment, except that consent may be given to an "Order Not to Resuscitate", as a surrogate, pursuant to Public Health Law § 2965 (2)(a)(i).***

[ ] ***with the additional power to consent to the withholding or withdrawal of life sustaining treatment, as follows: (If marked "Y", add language from the order/judgment authorizing this power.)***

[ ] 10. **Other:**

The guardianship of person shall be
[ ] for an indefinite duration.
[ ] until

_____ **Date**

The Guardian of the Property has filed a designation.

[ ] A bond was required in the amount of $_____and has been filed.
Amount

DATED: , 200
_____, NY
County

CLERK

FORM #3

STATEMENT IDENTIFYING REAL PROPERTY

Pursuant to Mental Hygiene Law § 81.20 (a)(6)(vi)

Record and Index under:

Incapacitated Person: _____
Name

_____
Address

Guardian of Property: _____
Name

_____
Address

[ ] (check box if there is/are Co-Guardian(s) of Property and list below)

_____ _____
Name **Address**

_____ _____
Name **Address**

Adjudication of Incapacity: _____
Date of Decision/Verdict **Date of Judgment**

_____
Court **County** **Index Number**

Surety: _____
Name **Bond Number**

REAL PROPERTY

Address: _____

Tax Map Designation/Municipality: _____
Block **Lot** **Name of Municipality**
(check if: [ ] city [ ] town [ ] village)

Dated: **Signed**_____

_____
Name of Guardian OR Co-Guardian of Property

State of New York, County of _____ **} ss:**

On this___day of _____, 200__ , before me came _____ to me
Name or Guardian OR Co-Guardian
known to be the individual described in, and who executed, the foregoing instrument, and acknowledged that he/she executed same

_____
Notary

SUPREME COURT OF THE STATE OF NEW YORK
_____COUNTY
County

----------X

In the Matter of

_____.
Name of Incapacitated Person

("IP" designates Incapacitated Person in this report)

----------X

INITIAL REPORT

INDEX NO. _____
Number/Year

Please mark appropriate boxes with [X], and type or print all requested information.
For more space, please use reverse side of page of question being answered..

DATE OF ORDER APPOINTING GUARDIAN: _____

APPOINTING JUDGE: _____

FILING STATUS

A. G Sole Guardian of Person **D. G Co-Guardians of Person**

B. G Sole Guardian of Property **E. G Co-Guardians of Property**

C. G Sole Guardian of Person and Property **F. G Co-Guardians of Person and Property**

YOU MAY ONLY FILE A JOINT REPORT IF YOUR FILING STATUS IS D, E or F.

PERSONS FILING THIS REPORT

What is the status of your educational requirements under MHL § 81.30?

	Waived	Completed
Name / Address / Phone / Relationship*	G	G
Name / Address / Phone / Relationship	G	G
Name / Address / Phone / Relationship	G	G
Name / Address / Phone / Relationship	G	G

*Part 36 appointees from OCA Fiduciary List: enter Fiduciary Identification Number. All others: enter a relationship, such as, parent, spouse, child, friend.

IP's PERSONAL DATA

1. IP's AGE:

2. IP resides in:

a. G Community at:

Address **Phone residence** **Years in**

_____

G This address is the IP's own home, which is G rented G owned.

G The IP lives here alone.

G The IP lives here with others:

_____ **Name** **Relationship**

_____ **Name** **Relationship**

_____

G This address is the home of another.

Name **Relationship**

b. G Facility:

_____**Facility Name** **Address**

_____

Phone **FAX** **Date Admitted** **Name of Social Worker**

3. Language of IP: G English G Spanish G Other

4. Citizenship: G US G Other

PERSONAL NEEDS
(Complete if your filing status is A, C, D or F)

5. Primary Care Physician:

Name	Address	Phone
Frequency of examinations	**Date of last examination**	**Primary Diagnosis**

6. Psychiatrist/Psychologist or Other Mental Health Provider:

Name	Address	Phone
Frequency of examinations	**Date of last examination**	**Primary Diagnosis**

7. Dentist:

Name	Address	Phone
Frequency of examinations	**Date of last examination**	

Complete the following ONLY if the IP resides IN THE COMMUNITY.

8. Pharmacy:

Name	Address	Phone

9. List professionals and service agencies (e.g., geriatric care managers, social workers, home healthcare agencies, social service agencies, "meals on wheels") assisting IP.

Name	Address	Phone	Profession/Service
Name	Address	Phone	Profession/Service
Name	Address	Phone	Profession/Service
Name	Address	Phone	Profession/Service

10. List Day Care Programs or other regularly attended programs for nutrition, rehabilitation, socialization, etc.

Name	Address	Phone	Frequency of Attendance
Name	Address	Phone	Frequency of Attendance
Name	Address	Phone	Frequency of Attendance
Name	Address	Phone	Frequency of Attendance

PROPERTY/FINANCIAL MANAGEMENT
(Complete if your filing status is B, C, E or F
and
report all liquid assets, personal property, real property and income
you are AUTHORIZED to take into your possession, management and control, AS GUARDIAN)

11. Liquid Assets:

a. [ ] Cash Accounts:

Have you changed the title of accounts to your name, *as guardian*?

Institution	Acct. Type/Acct. No.	Amount	
			[ ] Yes [ ] No
			[ ] Yes [ ] No
			[ ] Yes [ ] No
			[ ] Yes [ ] No

TOTAL

(Accounts in any one institution should not exceed $100,000 in order to avoid the loss of FDIC coverage.)

b. [ ] Mutual Funds, Securities and Brokerage Accounts:

Have you changed the title of accounts to your name, *as guardian*?

Institution	Acct. Type/Acct. No.	Amount	
			[ ] Yes [ ] No
			[ ] Yes [ ] No
			[ ] Yes [ ] No
			[ ] Yes [ ] No

TOTAL

c. [ ] Stocks:

Have you changed the title on certificates to your name, *as guardian*?

Corporation	No. of shares	Value	
			[ ] Yes [ ] No
			[ ] Yes [ ] No
			[ ] Yes [ ] No
			[ ] Yes [ ] No

TOTAL

d. [ ] Bonds:

Have you changed the title on bonds to your name, *as guardian*?

Issuing govt./agcy./corp.	Value	
		[ ] Yes [ ] No
		[ ] Yes [ ] No
		[ ] Yes [ ] No
		[ ] Yes [ ] No

TOTAL

e. Other: list any other liquid asset, giving type, location and value. :

Have you changed title to these assets to your name, *as guardian*, or is a change not applicable (N/A)?

Type	Location	Value			
			[ ] Yes	[ ] No	[ ] N/A
			[ ] Yes	[ ] No	[ ] N/A
			[ ] Yes	[ ] No	[ ] N/A
			[ ] Yes	[ ] No	[ ] N/A

TOTAL

f. TOTAL VALUE OF LIQUID ASSETS: BOX A

12. Personal Property (e.g., cars, boats, furniture, jewelry, artwork) :

Description	Location	Value

TOTAL VALUE OF PERSONAL PROPERTY: BOX B

13. Real Property (e.g., vacant land, residential [including cooperative apartments and condominiums] commercial or income producing property):

<u>In the letter you received at your appointment, you were instructed about filing the "Statement Identifying Real Property" (Form #3 attached to letter). Attach a copy of form(s) filed for property listed below.</u>

_____ [ ] sole [ ] joint [ ] part %
Location Property Type Value

_____ [ ] sole [ ] joint [ ] part %
Location Property Type Value

_____ [ ] sole [ ] joint [ ] part %
Location Property Type Value

_____ [ ] sole [ ] joint [ ] part %
Location Property Type Value

_____ [ ] sole [ ] joint [ ] part %
Location Property Type Value

_____ [ ] sole [ ] joint [ ] part %
Location Property Type Value

Only give value of <u>IP's</u> ownership share or mortgage interest.

"Part" includes IP's part ownership or mortgage interest. and "%"

%includes IP's part ownership or mortgage interest. Mortgage % is proportion of mortgage debt to total value.

TOTAL VALUE OF REAL PROPERTY: BOX C

<u>Estate Value</u>

14. TOTAL VALUE OF LIQUID ASSETS, PERSONAL AND REAL PROPERTY: (ADD BOXES A, B and C)

15. Regular Monthly Income

a. [ ] Social Security Retirement .....$_____per month.

b. [ ] Supplemental Security Income (SSI).....$_____per month.

c. [ ] Social Security Disability (SSD).....$_____per month.

d. [ ] Veterans' Benefits (VA).....$_____per month.

e. [ ] Pension/Retirement Benefits.....$_____per month.

f. [ ] Annuity Income.....$_____per month.

g. [ ] Rental Income.....$_____per month.

h. [ ] Mortgage Interest Income.....$_____per month.

i. [ ] Other from list on reverse side.....$_____per month.

TOTAL REGULAR MONTHLY INCOME:

16. Other Income (report approximate amounts on an annual basis):

a. [ ] Interest.....$

b. [ ] Dividends.....$

c. [ ] Trust Income.....$

d. [ ] Other from list on reverse side.....$

TOTAL OTHER INCOME:

17. [ ] IP is the beneficiary of the following trusts:

Type	Name of Trustee	Trustee's Address/Phone
Type	Name of Trustee	Trustee's Address/Phone
Type	Name of Trustee	Trustee's Address/Phone
Type	Name of Trustee	Trustee's Address/Phone

18. Debt (List all debt over $500):

a. [ ] Mortgage(s) (Total balance due on all mortgages).....$

b. [ ] Rent arrears (Total of past du rent).....$

c. [ ] Utilities (Total of past due gas, electric, oil, telephone bills).....$

d. [ ] Real Property Taxes (Total of past due real property tax).....$

e. [ ] Hospital/Medical (Total of past due hospital, doctor, lab bills)...$

f. [ ] Income Taxes (Total of federal/state/local income taxes.....$

g. [ ] Other from list on reverse side.....$

TOTAL DEBT:

19. Application has been made for the following government entitlements:

a. [ ] Social Security Retirement

b. [ ] Supplemental Security Income (SSI)

c. [ ] Social Security Disability (SSD

d. [ ] Medicaid

e. [ ] HEAP (aid for heating costs)

f. [ ] STAR (relief from property taxes)

g. [ ] Other (please explain)

20. Are any civil judicial proceedings pending or threatened against the IP (e.g., mortgage foreclosure, eviction, debt collection, divorce, immigration proceeding; please explain):

21. [ ] Medical/Hospital insurance has been provided for the IP, as follows (please explain):

22. [ ] Homeowner/Renter's insurance has been provided for the IP, as follows (please explain):

23. [ ] Auto insurance has been provided for the IP, as follows (please explain):

24. [ ] Other insurance has been provided for the IP, as follows (please explain):

25. [ ] Safe Deposit Boxes are authorized to be opened and have been located, as follows:

_____ **[ ] Opened**
(inventory attached)
Institution **Address/Phone**

_____ **[ ] Opened**
(inventory attached)
Institution **Address/Phone**

_____ **[ ] Opened**
(inventory attached)
Institution **Address/Phone**

_____ **[ ] Opened**
(inventory attached)
Institution **Address/Phone**

26. [ ] Mail is authorized to be collected and opened and arrangements are, as follows (please explain):

27. [ ] Income tax authority has been granted and arrangements to exercise that authority are, as follows
(e.g., tax returns filed previously have been located, accountant previously retained to prepare returns has been contacted, IRS FORM 4506 (Request for Copies of Tax Returns) has been filed, IRS FORM 56 (Notice of Fiduciary Relationship) has been filed, IRS FORM SS-4 (Request for Employer Identification Number, if employing persons to assist IP) has been filed, similar state and local forms have been filed; please explain):

The following must be completed by ALL GUARDIANS

DOCUMENTS

28. The following documents have been found (e.g., power of attorney, health care proxy, will); if any document is inconsistent with the powers granted in the guardianship (e.g., power of attorney grants same property management powers as the guardianship of property or health care proxy grants same medical decision making as guardianship of personal needs), application will be made to the court for further instructions; please mark box if fiduciary (e.g., attorney-in-fact, health care agent, executor/trix) has been given NOTICE of guardianship appointment:

Document Type	Date	Located	NOTICE	
			[ ]	[ ] Application to court required
			[ ]	[ ] Application to court required
			[ ]	[ ] Application to court required
			[ ]	[ ] Application to court required
			[ ]	[ ] Application to court required
			[ ]	[ ] Application to court required

VISITS

29. The frequency of the Guardian/Co-Guardians' visits to the IP and the date of the last visit (Guardians are required to visit at least 4 times per year):

Frequency (e.g., daily, weekly, monthly, 4 Xs per year)	Date of last visit

CHANGES AND ADDITIONAL POWERS

30. Please report any changes to the IP's personal care and maintenance or management of his/her financial and property affairs currently needed and planned.

31. Do these changes require additional powers or a modification of the powers granted?

DATED:

STATE OF NEW YORK)
) ss:
COUNTY OF _____)
_____ County

I/We, being duly sworn, say, that I am/we are the Guardian/Co-Guardians for

_____
Name of IP

and have executed this Initial Report, which to the best of my/our knowledge and belief contains true and accurate information regarding the personal needs and/or property of the Incapacitated Person and all of the activities I/we have undertaken on behalf of the Incapacitated Person. I/we verify that all matters reported herein are known to me/us of my/our own knowledge, except those which are stated upon information and belief.

Sign:_____

_____
Print Name of Guardian/Co-Guardian of
[ ] Person [ ] Property [ ] Person & Property

Sign:

Print Name of Co-Guardian
[ ] Person [ ] Property [ ] Person & Property

Sign:

Print Name of Co-Guardian
[ ] Person [ ] Property [ ] Person & Property

FILERS & JOINT FILERS

All filers may only mark one (1) box under their name.
To qualify as joint-filers, the same box must be marked under each joint-filer's name.

GUARDIAN'S ANNUAL ACCOUNTING

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

In the Matter of the Inventory and Account of

_____

Guardian for

_____

An Incapacitated Person

Annual Account for Calendar Year 20____

Index Number _____

Date: _____

I, _____, residing at _____

_____, as Guardian of the Person and/or Property for the above named person, do hereby make, render, and file the following annual account and inventory.

On the _____ day of _____ , _____, I was duly appointed Guardian of the Person and/or Property of the above named person by Order of the Supreme Court of _____ County and have continued to act as such fiduciary since that date, giving a bond in the original sum of $_____ , [now in the sum of $_____ , pursuant to subsequent orders,] which is still in full force and effect with _____ _____ , as Surety. There has been no change in the Surety thereon, and the Surety is in as good financial standing as when the bond was given (or: There has been no change in the Surety thereon, other than as explained in Schedule F).

The following is a true and full account of all receipts and disbursements for the calendar year 20_____.

SUMMARY

Schedule A -	Principal on hand at date of appointment or last accounting:	$_____
Schedule B -	Changes to principal:	$_____
Schedule C -	Income Received :	$_____
	Sub Total:	$_____
Schedule D -	Paid Disbursements:	$_____
Schedule E-1 -	Balance of cash and securities to be charged to next year's account:	$_____
Schedule E-2 -	Real Estate:	$_____
Schedule E-3 -	All other personal property:	$_____
	Total Estate:	$_____

SCHEDULE A: Principal on Hand SOURCE: (name and address of financial institution)
AMOUNT: (cash or market value of securities)

_____ _____ _____

_____ _____ _____

TOTAL OF SCHEDULE A: $_____

SCHEDULE B: Increases or Decreases in Principal

List additional property received, gain or loss on sale or liquidation of stocks or bonds, any net receipts from sale of realty, (attach copy of closing statement), etc.

_____

_____

TOTAL OF SCHEDULE B: $_____

SCHEDULE C: Received Income and Cash Increases

If any property listed in the last accounting has been converted to cash, list here the amount received from the sale and attach an explanation.

SOURCE	AMOUNT
_____	_____
_____	_____

List income or monies received or earned on behalf of the IP.

SOURCE	AMOUNT
_____	_____
_____	_____

TOTAL OF SCHEDULE C: $_____

SCHEDULE D: Paid Disbursements

PAID TO	AMOUNT
_____	_____
_____	_____

TOTAL OF SCHEDULE D: $_____

SCHEDULE E-1: Balance on Hand and other Personal and Real Property

BANK ACCOUNTS, BROKERAGE ACCOUNTS, SECURITIES, PERSONAL PROPERTY (list name of joint owners, if any, and their relationship to IP)	INVENTORY VALUE (list values as of end of accounting period, for securities list both inventory and market values)	MARKET VALUE
_____	_____	_____
_____	_____	_____
TOTAL OF SCHEDULE E-1:	$_____	$_____

SCHEDULE E-2: Real Estate

(List all real estate owned by the IP, either in whole or in part. State location, assessed value, current market value, amount of mortgage (if any), and the weekly or monthly rental. If property is owned jointly, give names of joint owners and their relationship to the IP.

_____

_____

SCHEDULE E-3: All Other Personal Property

DESCRIPTION	INVENTORY / MARKET VALUE

SCHEDULE F: Name and Address of Surety

(Attach a copy of the latest bond. Also, state and explain any changes in the bond, of the Surety thereon, or in the financial standing of the Surety.)

NAME AND ADDRESS	AMOUNT OF BOND	BOND NUMBER

AS TO THE INCAPACITATED PERSON:

1. State the age, date of birth, Social Security Number and marital status of the Incapacitated Person:

_____

_____

2. List the name and present address of the living spouse, children and siblings, of the Incapacitated Person:

_____

_____

3. State the present residence address and telephone number of the Guardian:

_____

_____

4. State the present address and telephone number of the Incapacitated Person. If the IP is in a facility state the facility's name, address and telephone number and the name of the chief executive officer of the facility or the person otherwise responsible for the care of the IP:

_____

_____

5. State whether there have been any changes in the physical or mental condition of the IP, and any substantial change in medication:

_____

_____

6. State the date and place the IP was last seen by a physician and the purpose of the visit:

_____

_____

7. Attach a statement by a physician, psychologist, nurse clinician or social worker, or other person who has evaluated or examined the IP within the three months prior to the filing of this report, regarding an evaluation of the IP's condition and the current functional level of the IP.

8. If the Guardian has been charged with providing for the personal needs of the IP:
(A) Attach a statement whether the current residential setting is suitable to the current needs of the IP.
(B) Attach a resume of any professional medical treatment given to the IP during the preceding year.
(C) Attach a plan for medical, dental and mental health treatment and related services for the coming year.
(D) Attach a resume of any other information concerning the social condition of the IP, including the social and personal services currently utilized by the IP, the social skills of the IP, and the social needs of the IP.

9. State whether the Guardian has used or employed the services of the IP, or whether moneys have been earned by or received on behalf of such IP. Provide details in Schedule C:
_____
_____

10. Attach a resume of any other pertinent facts relative to the care and maintenance of the IP, including the frequency of your visits; whether the IP has made a Will or executed a Power of Attorney; and any other information necessary for the proper administration of this matter.

STATE OF NEW YORK
ss.:
COUNTY OF _____

_____ (Guardian), being duly sworn says:

I am the Guardian of the Person and / or Property for the above named Incapacitated Person. The foregoing account and inventory contains, to the best of my knowledge and belief, a full and true statement of all my receipts and disbursements on account of said Incapacitated Person; and of all money and other personal property of said person which have come to my hands or have been received by any other persons by my order or authority since my appointment or since filing my last annual account and inventory, and of the value of all such property, together with a full and true statement and account of the manner in which I have disposed of the same and of all property remaining in my hands at the time of filing this account and inventory; also a full and true description of the amount and nature of each investment made by me since my appointment or since the filing of my last account and inventory.
I do not know of any error or omission in the account and inventory to the prejudice of said person.

_____
Guardian

Sworn to before me this

_____day of _____, 20_____

_____Notary Public

Post Death Procedures for Guardians

Chapter 175 of the Laws of 2008

Effective January 7, 2009

Summary of Specific Provisions

Section One: Amends subdivision (a) of Section 81.34 of the Mental Hygiene Law to mandate that:

1. the guardian notify the personal representative of the estate along with other listed parties in section 81.16 showing that , to the extent the guardian is responsible for the property, all taxes have been paid or that no taxes are due and that the guardian has fully reported all property actions and noticed the required parties of same

2. the guardian is authorized

   - to pay the funeral expenses of the IP and,

   - in the event a personal representative has not been appointed, to pay the estimated estate and income tax charges

Section Two: Adds a new Section 81.44 to the Mental Hygiene Law to specify the post death procedure to be done by the guardian to transition the guardianship to an estate. Included in these provisions is:

1. Within twenty days of the death of the IP the guardian must prepare a Statement of Death (last residence of the IP, date and place of death, names and addresses of all persons entitled to Notice, including the estate representative)

   - serve copy of Statement of Death upon the court examiner, appointed estate representative or representative named in the will and the Public Administrator in the county where the guardian was appointed

   - file the original Statement of Death together with proof of service with the court that appointed the guardian

2. Within **one hundred and fifty days** of the death of the IP

   - A Statement of Assets and Notice of Claim must be served upon the personal representative of the decedent's estate or, if no personal representative, upon the Public Administrator

Statement of Assets - a description of the nature and approximate value of the guardianship property at the time of the incapacitated persons death and

Notice of Claim - the approximate amount of any claims or liens against the guardianship property

- Shall deliver all guardianship property to the appointed personal representative of the IP's estate or the Public Administrator

- The guardian may retain, pending the settlement of the guardian's Final Report, guardianship property equal in value to the claim for administrative costs, liens and debts

- A final report must be filed with the court.

Chapter 176 of the Laws of 2008
Revoking a Will or Codicil of an IP

Effective July 7, 2008

Summary of Specific Provision

Amends subdivision (d) of Section 81.29 of the Mental Hygiene Law to provide that the court in an Article 81 proceeding **shall not** invalidate or revoke a will or codicil of an incapacitated person during the lifetime of such person.

Process for Final Report
MHL Article 81.33

Final Report process must be initiated within 150 days after the death of the IP

Verified Petition for Ex Parte Order Permitting Final Account
Petition seeking permission to file the Final Account and the reason (i.e. the death of the IP)

Order for Leave to File Final Account
This is issued by the Court ordering you to file the Accounting

Final Inventory and Account
The final Account must be filed with the county clerk and the court within 60 days

Order Settling Final Inventory and Account
Once the Final Accounting is approved by the court the Guardian's attorney submits an Order Settling Final Inventory and Account. This document determines the compensation due the guardian and instructions concerning the distribution of the remaining assets of the decedent.

Ex Parte Order Releasing Guardian
The guardian's attorney submits this Order to discharge the guardian

Public Administrator
The Office of Public Administrator administers a decedent's estate where no person entitled to take or to share in the estate will accept the responsibility to act, or where the decedent leaves no will or a personal representative entitled by law to act.

The Public Administrator (PA) investigates the affairs of the decedent. The PA's office may authorize a funeral as well as an amount of money permitted for the funeral out of the estate of the decedent. Also the Pa's office may search for relatives, pay debts of the estate and perform other duties. If a relative is located, the PA determines whether that individual is prepared to accept responsibility for the estate of the decedent.

Contact the PA in the Borough or county in which the decedent resided.

PSA

Protective Services for Adults
NYS OCFS Adult Services

ARTICLE 81 GUARDIANSHIP

For PSA Clients

For Commissioners, Case workers and County Attorneys

Legal Statute

2008

New York State Office of Children & Family Services

Brookdale Center for Healthy Aging & Longevity
Hunter College / The City University of New York

HUNTER IS CUNY

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MENTAL HYGIENE LAW
TITLE E. GENERAL PROVISIONS
ARTICLE 81. PROCEEDINGS FOR APPOINTMENT OF A GUARDIAN FOR PERSONAL NEEDS OR PROPERTY MANAGEMENT

NY CLS Men Hyg § 81.01 (2007)

§ 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.

§ 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 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.

§ 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.

(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.

§ 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, [fig 1] 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.

§ 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 [fig 1] , 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 [fig 1] , 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.

§ 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 [fig 1] in which the person alleged to be incapacitated is a patient or resident.

§ 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 [fig 1] the date on which the order to show cause is heard no more than twenty-eight days from the date of the [fig 2] signing of the [fig 3] order to show cause. The court may for good cause shown set a date less than twenty-eight days from the date of the [fig 4] 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; [fig 1]

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 [fig 1] (e) of this section and in the form and manner prescribed [fig 2] 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 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. [fig 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;

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 [fig 1] (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, [fig 1] 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 [fig 1] , the chief executive officer in charge of the facility [fig 2] ; 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.

§ 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;

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.

§ 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 [fig 1] ;

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;

(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, [fig 1] 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.

6. interviewing or consulting with professionals having specialized knowledge in the area of the person's alleged incapacity including but not limited to mental retardation, 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 [fig 1] 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 [fig 1] 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.

§ 81.10. Counsel

(a) Any person for whom relief under this article is sought shall have the right to [fig 1] 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 [fig 1] 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) [fig 1] 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 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.

§ 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 [fig 1] 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.

§ 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.

§ 81.13. 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 [fig 1] (b) of section 81.07 of this article. A decision shall be rendered within [fig 2] seven days [fig 3] 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.

§ 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.

§ 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; [fig 1]

6. the duration of the appointment [fig 1] ; 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; [fig 1]

8. the duration of the appointment [fig 1] ; and

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

§ 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.

(d) The court shall direct that a judgment be entered determining the rights of the parties.

(e) [Until Dec 13, 2004] A copy of the order and judgment shall be personally served upon and read to the person who is the subject of the proceedings by the court evaluator or by counsel for the person.

(e) [Eff Dec 13, 2004] 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 [fig 1] 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.

§ 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.

§ 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 state, territory, or 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.

§ 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

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.

§ 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.

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.

§ 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; [fig 1]

10. renounce or disclaim any interest by testate or intestate succession or by inter vivos transfer consistent with paragraph (c) of section 2-1.11 of the estates, powers and trusts law [fig 1] ;

11. authorize access to or release of confidential records; [fig 1]

12. apply for government and private benefits [fig 1] ;

13. marshall assets;

14. pay the funeral expenses of the incapacitated person;

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 [fig 1] 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 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 (d) 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.

(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.

§ 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. consent to or refuse generally accepted routine or major medical or dental treatment subject to the provisions of subdivision (e) of section 81.29 of this article dealing with life sustaining treatment; the guardian shall make treatment decisions consistent with the findings under section 81.15 of this article and in accordance with the patient's wishes, including the patient's religious and moral beliefs, or if the patient's wishes are not known and cannot be ascertained with reasonable diligence, in accordance with the person's best interests, including a consideration of the dignity and uniqueness of every person, the possibility and extent of preserving the person's life, the preservation, improvement or restoration of the person's health or functioning, the relief of the person's suffering, the adverse side effects associated with the treatment, any less intrusive alternative treatments, and such other concerns and values as a reasonable person in the incapacitated person's circumstances would wish to consider;

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 [fig 1] a chemical dependence facility under article [fig 2] twenty-two of this chapter;

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.

§ 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] [n1] 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 of the court, be continued for ten days after the appointment of [fig 1] 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 [fig 1] (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.

§ 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.

§ 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 [fig 1] 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 depositary 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, 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.

§ 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.

§ 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.

§ 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 [fig 1] such guardian [fig 2] 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.

§ 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, [fig 1] 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.

(e) Nothing in this article shall be construed either to prohibit a court from granting, or to authorize a court to grant, to any person the power to give consent for the withholding or withdrawal of life sustaining treatment, including artificial nutrition and hydration. When used in this article, life sustaining treatment means medical treatment which is sustaining life functions and without which, according to reasonable medical judgment, that patient will die within a relatively short time period.

§ 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.

(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.

§ 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.

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, [fig 1] the guardian shall send a duplicate of such report to the chief executive officer of that facility [fig 2] . 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 [fig 1] 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.

§ 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 [fig 1] . 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 [fig 1] 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 [fig 1] . 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 [fig 1] 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 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.

§ 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 [fig 1] , 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.

§ 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 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.

(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.

§ 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.

§ 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 [fig 1] 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 [fig 1] 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 peron, 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.

§ 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.

§ 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.

§ 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.

§ 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.

§ 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.

§ 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.

§ 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.

Presumption of Capacity

- Ability to:
  - Articulate values and goals
  - Make decisions and plans consistent with values and goals
  - Put plans into effect

Medical vs. Legal Capacity

Autonomy

- Self-determination
- Informed consent
- Opportunity

Parens Patriae

- Common Law principle
- State's interest in preserving and protecting life

Least Restrictive Alternative

- Interventions that least impede freedom
- Support strengths
- Compensate for deficits

Decision Making Capacity

- Refers to the ability to:
  - Understand and process information
  - Make reality-based decisions regarding one's lifestyle that are in character with one's beliefs and values over time
  - Communicate those decisions

Decision Making Capacity

- Refers to the ability to:
  - Carry out activities of daily living
  - Direct others to carry out personal wishes in order to meet essential needs for food, clothing, shelter and medical care

Functional Assessment Criteria

- Mobility
- Nutrition
- Hygiene
- Housekeeping
- Dressing
- Toileting
- Mental status
- Behavior status

Legal Standard

- Unmet needs (personal or property)

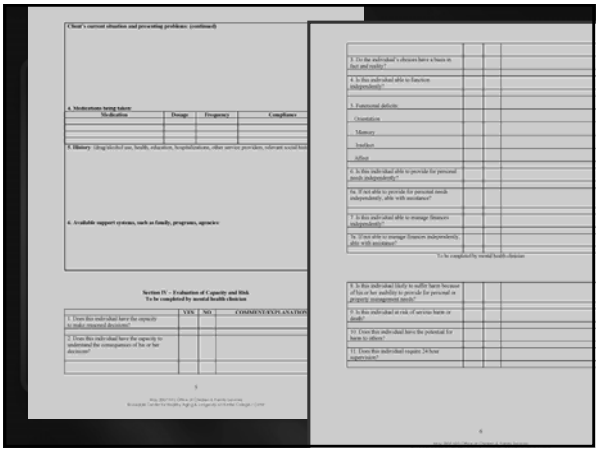
AND

- Agree/Prove incapacity

Incapacity

- Clear and convincing evidence that a person is likely to suffer harm because:
  - Unable to provide for person/property needs

    AND
  - Cannot adequately understand and appreciate their situation



Section IV – Evaluation of Capacity and Risk
To be completed by mental health clinician

	YES	NO	COMMENT/EXPLANATION
1. Does this individual have the capacity to make reasoned decisions?			
2. Does this individual have the capacity to understand the consequences of his or her decisions?			
3. Do the individual's choices have a basis in fact and reality?			
4. Is this individual able to function independently?			
5. Functional deficits:			
Orientation			
Memory			
Intellect			
Affect			
6. Is this individual able to provide for personal needs independently?			
6a. If not able to provide for personal needs independently, able with assistance?			
7. Is this individual able to manage finances independently?			
7a. If not able to manage finances independently, able with assistance?			
8. Is this individual likely to suffer harm because of his or her inability to provide for personal or property management needs?			
9. Is this individual at risk of serious harm or death?			
10. Does this individual have the potential for harm to others?			
11. Does this individual require 24 hour supervision?			

4. Is this individual able to function independently?			
5. Functional deficits:			
Orientation			
Memory			
Intellect			
Affect			

6. Is this individual able to provide for personal needs independently?			
6a. If not able to provide for personal needs independently, able with assistance?			

7. Is this individual able to manage finances independently?			
7a. If not able to manage finances independently, able with assistance?			

8. Is this individual likely to suffer harm because of his or her inability to provide for personal or property management needs?			
9. Is this individual at risk of serious harm or death?			
10. Does this individual have the potential for harm to others?			
11. Does this individual require 24 hour supervision?			

The Players

- Petitioner
- Court Evaluator
- Legal Counsel

The Process

- Order to Show Cause
- Petition
- Affidavit
- Affirmation

At a ____ Part _____ of the Supreme Court of the State of New York, held in and for the County of _____, at the Courthouse, located at New York City and State of New York on the ____ day of _____, 200_.

PRESENT:
HON: _____,
JUSTICE

X----------X

In the Matter of the Application of _____ ex rel. Commissioner of Social Services of the City of New York, Petitioner,

For the Appointment of a Guardian of the Person and Property Of _____, Respondent

ORDER TO SHOW CAUSE
Index No: _____

X----------X

IMPORTANT

AN APPLICATION HAS BEEN FILED IN COURT BY THE COMMISSIONER OF SOCIAL SERVICES OF _____ WHO BELIEVES, YOU MAY BE UNABLE TO TAKE CARE OF YOUR PERSONAL NEEDS OR FINANCIAL AFFAIRS.
THE COMMISSIONER IS ASKING THAT SOMEONE BE APPOINTED TO MAKE DECISIONS FOR YOU. WITH THIS PAPER IS A COPY OF THE APPLICATION TO THE COURT SHOWING WHY THE COMMISSIONER 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, 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

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X----------X

IMPORTANT

AN APPLICATION HAS BEEN FILED IN COURT BY THE COMMISSIONER OF SOCIAL SERVICES OF _____ WHO BELIEVES, YOU MAY BE UNABLE TO TAKE CARE OF YOUR PERSONAL NEEDS OR FINANCIAL AFFAIRS.
THE COMMISSIONER IS ASKING THAT SOMEONE BE APPOINTED TO MAKE DECISIONS FOR YOU. WITH THIS PAPER IS A COPY OF THE APPLICATION TO THE COURT SHOWING WHY THE COMMISSIONER 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, ADDRESS AND TELEPHONE NUMBER OF THE CLERK OF THE COURT ARE:

THE COURT HAS APPOINTED A COURT EVALUATOR TO EXPLAIN THIS PROCEEDING

4. Granting such other, further or different relief as may be just and proper; and it is further

ORDERED that _____, telephone number (___) _____, upon filling his/her consent and affidavit of responsibility be and hereby is appointed Court Evaluator for the above-named alleged incapacitated person to appear for and protect his/her interests in this proceeding, upon duly qualifying and consenting according to law, complying with Part 36 of the rules of the Chief Judge and filing the certificate required by §36.1(d) and the notice of appointment required by §36.3 of the Rules of the Chief Judge; and it is further

ORDERED that _____ at _____, telephone number (___) _____, upon filling his/her notice of appearance be and hereby is appointed attorney for the above-named

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alleged incapacitated person to appear for and represent the alleged incapacitated person in this proceeding, and it is further

ORDERED that _____ at _____, telephone number (___) _____, upon issuance of the commission of temporary guardianship be and hereby is appointed temporary guardian for the above-named alleged incapacitated person with the following powers and duties

STATEMENT OF ALLEGED INCAPACITATED PERSON'S RIGHTS

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.

The hearing must be conducted in the presence of the person alleged to be incapacitated, either at the

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

In the Matter of the Application of
[Enter Name of Petitioner]

Index

as PETITIONER pursuant to Article 81 of the Mental Hygiene Law for the Appointment of a Guardian of

PETITION

[Enter Name of Alleged Incapacitated Person],
an ALLEGED INCAPACITATED PERSON.

TO THE SUPREME COURT OF THE STATE OF NEW YORK: COUNTY OF _____

The petition of _____ respectfully states and alleges:

1. That _____ is an alleged incapacitated person who is ____ years of age and resides at _____, in the _____ judicial district of the State of New York. Such person's telephone number is (_____) _____.

2. The alleged incapacitated person resides with the following person(s) [Enter Name(s)] _____ at [Enter Address(es)] _____. Such person(s) telephone number(s) is/are _____.

3. [Set forth and 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, set forth specific 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

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Brookdale Center for Healthy Aging & Longevity of Hunter College / CUNY

3. [Set forth and 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, set forth specific 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

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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

needs.]

5. [If powers are sought with respect to PROPERTY MANAGEMENT for the alleged incapacitated person, set forth 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.]

property management.]

6. [Set forth the particular powers being sought and their relationship to the functional level and needs of the person alleged to be incapacitated.]

7. [Set forth the duration of the powers being sought.]

8. [Set forth 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.]

incapacitated are as follows: [Set forth reasons].

13. [Set forth any relief sought pursuant to section 81.23 of this article (Provisional remedies such as temporary guardian, injunction and temporary restraining order).]

14. [Set forth the available resources, if any, that have been

14. [Set forth the available resources, if any, that have been considered by the petitioner and the petitioner's opinion as to their sufficiency and reliability.]

Court Evaluator	**Counsel**
Best Interest	Wishes
Investigator	Advocate
Assist Court	Assist AIP
Professional (OCA Certified)	Attorney
Mental Hygiene Legal Service	MHLS
Fee	Fee

Service 81.07(b) (c)
OSC, Petition, Supporting Papers

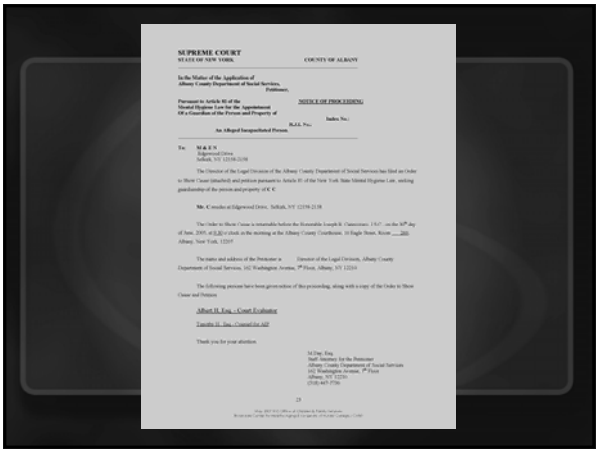
- Alleged incapacitated person
- Counsel for AIP
- Court Evaluator

Notice 81.07(f)(g)
OSC, Notice

- Spouse, parents, siblings and children of AIP
- Persons with whom AIP resides
- Agents under POA or HCP
- Any person or organization genuinely interested in AIP
- Local DSS if appropriate

Notice 81.07(f)(g)
OSC, Notice

- CEO of facility in which AIP resides
- Mental Hygiene Legal Services if AIP resides in a mental hygiene facility
- Other persons as directed by the Court



SUPREME COURT
STATE OF NEW YORK **COUNTY OF ALBANY**

In the Matter of the Application of
Albany County Department of Social Services,
Petitioner,

Pursuant to Article 81 of the
Mental Hygiene Law for the Appointment
Of a Guardian of the Person and Property of

NOTICE OF PROCEEDING

Index No.:

H.J.I. No.:

An Alleged Incapacitated Person.

To: M & E N
Edgewood Drive
Suffolk, NY 12158-2158

The Director of the Legal Division of the Albany County Department of Social Services has filed an Order to Show Cause (attached) and petition pursuant to Article 81 of the New York State Mental Hygiene Law, seeking guardianship of the person and property of **C C**

Mr. C resides at Edgewood Drive, Suffolk, NY 12158-2158

The Order to Show Cause is returnable before the Honorable Joseph R. Carnevale, J.S.C. on the 30th day of June, 2005, at 9:30 o'clock in the morning at the Albany County Courthouse, 16 Eagle Street, Room ___, Albany, New York, 12207.

The name and address of the Petitioner is Director of the Legal Division, Albany County Department of Social Services, 162 Washington Avenue, 9th Floor, Albany, NY 12210

The following persons have been given notice of this proceeding, along with a copy of the Order to Show Cause and Petition:

Albert H. Esq. - Court Evaluator

Timothy H. Esq. - Counsel for AIP

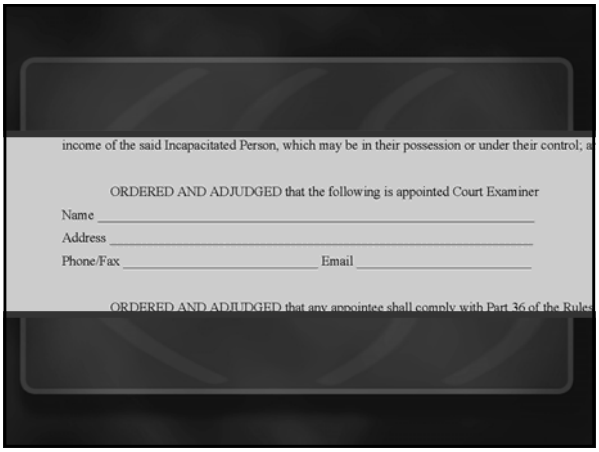
Thank you for your attention.

M. Esq.
Staff Attorney for the Petitioner
Albany County Department of Social Services
162 Washington Avenue, 9th Floor
Albany, NY 12210
(518) 447-5750

Post-Appointment Procedures

- Written Order or Judgment
- Designation
- Bond
- Statement Identifying Real Property
- *Commission*

May Act As Guardian



income of the said Incapacitated Person, which may be in their possession or under their control; a

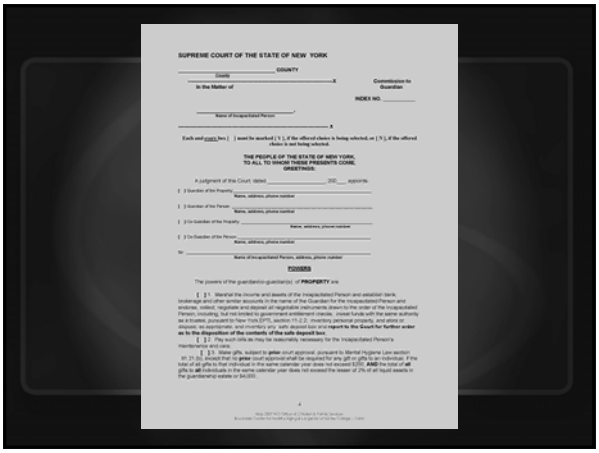
ORDERED AND ADJUDGED that the following is appointed Court Examiner

Name _____

Address _____

Phone/Fax _____ Email _____

ORDERED AND ADJUDGED that any appointee shall comply with Part 36 of the Rules



SUPREME COURT OF THE STATE OF NEW YORK

_____ **COUNTY**

_____ **County** _____X

In the Matter of

_____,

Name of Incapacitated Person

_____ X

Commission to Guardian

INDEX NO. _____

Each and every box [ ] **must be marked [Y], if the offered choice is being selected, or [N], if the offered choice is not being selected.**

THE PEOPLE OF THE STATE OF NEW YORK,
TO ALL TO WHOM THESE PRESENTS COME,
GREETINGS:

A judgment of this Court, dated _____, 200___, appoints:

[ ] Guardian of the Property _____
Name, address, phone number

[ ] Guardian of the Person _____
Name, address, phone number

[ ] Co-Guardian of the Property _____
Name, address, phone number

[ ] Co-Guardian of the Person _____
Name, address, phone number

for _____
Name of Incapacitated Person, address, phone number

POWERS

The powers of the guardian(s)-guardian(s) of **PROPERTY** are:

[ ] 1. Marshal the income and assets of the Incapacitated Person and establish bank accounts, brokerage accounts, and safe deposit boxes in the name of the Incapacitated Person and endorse, collect, negotiate and deposit all negotiable instruments drawn to the order of the Incapacitated Person, including, but not limited to government entitlement checks; invest funds with the same authority as a trustee, pursuant to New York EPTL section 11-2.2; inventory personal property, and store or dispose, as appropriate, and inventory any safe deposit box and **report to the Court for further order as to the disposition of the contents of the safe deposit box**.

[ ] 2. Pay such bills as may be reasonably necessary for the Incapacitated Person's maintenance and care.

[ ] 3. Make gifts, subject to **prior** court approval, pursuant to Mental Hygiene Law section 81.21 (b), except that no **prior** court approval shall be required for any gift or gifts to an individual, if the total of all gifts to that individual in the same calendar year does not exceed $250, **AND** the total of **all** gifts to **all** individuals in the same calendar year does not exceed the lesser of 2% of all liquid assets in the guardianship estate or $4,000.

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The guardianship of property shall be
[ ] for an indefinite duration.
[ ] until _____ .
Date

The powers of the guardian/co-guardian(s) of **PERSON** are:
[ ] 1. Determine who shall provide personal care or assistance to the Incapacitated Person;
[ ] 2. Make decisions regarding social environment and other social aspects of his/her life;
[ ] 3. Determine whether he/she should travel;
[ ] 4. Determine whether he/she should possess a license to drive;
[ ] 5. Authorize access to or release of confidential records;
[ ] 6. Make decisions regarding education;

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Brookdale Center for Healthy Aging & Longevity of Hunter College / CUNY

[ ] 7. Apply for government and private benefits;
[ ] 8. Choose the place of abode,
[ ] provided that the Incapacitated Person shall not be placed in a skilled nursing facility or residential care facility, as defined by Public Health Law section 2801, without his/her consent or further order of the court.
[ ] including placement or continued placement in a skilled nursing facility or residential care facility, as defined by Public Health Law section 2801, provided that no consent shall be given to the voluntary formal or informal admission of the Incapacitated Person to a mental hygiene facility under article 9 or 15 of the Mental Hygiene Law or to an alcoholism facility under article 21 of the Mental Hygiene Law.
[ ] 9. Consent to or refuse generally accepted routine or major medical or dental treatment, provided that treatment decisions are made consistent with the findings of Mental Hygiene Law section

Reports by Guardian

- Initial 90 day Report 81.30
- Annual Report 81.31

Death of the IP

Guardian Notification Requirements

81.34(a), 81.16

Guardian must notify:

- Personal representative of the estate and the court
- That the guardian has paid all taxes and fully discharged his/her duties to the IP

Post Death Powers of Guardian 81.34, 81.36

- Payment of funeral expenses of IP
- Pay estimated estate and income tax (only if an estate personal representative has not been appointed)
- Pay bills only if guardian had bill paying power when the IP was alive (81.21)

Post Death Powers of Guardian 81.34, 81.36

- Pay other charges of emergent nature
- Defend/maintain litigation until estate representative is appointed

  (81.21)

Within 20 Days of the Death of the IP Guardian Must 81.44

- Prepare Statement of Death

1. Serve copy of Statement of Death upon court examiner, estate representative and Public Administrator
2. File original Statement of Death with proof of service with the court

Within 150 days of the death of the IP Guardian Must
81.44

- Serve "Statement of Assets and Notice of Claim" upon estate representative or the Public Administrator
- Deliver guardianship property to estate representative or the Public Administrator

Within 150 days of the death of the IP Guardian Must
81.44

- Guardian may retain (pending settlement of the Final Report) guardianship property equal in value to the claim for administrative costs, liens and debts
- File the final Report with the court

Questions I Have

Name: _____ Daytime Phone: (_____)_____

E-mail address: _____

Site Location: _____

Question(s): _____

_____

_____

_____

_____

_____

_____

_____

_____

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_____

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_____

_____

_____

- Fax this form to: (518) 426-4098 or (518) 426-0696

BROOKDALE CENTER
for Healthy Aging & Longevity
Hunter College / The City University of New York

Instructions for CLE Registration and Evaluation
Article 81 Teleconference
December 1 and December 12, 2008

As you know, *all* attendees to this teleconference must sign the standard attendance roster and complete the standard evaluation form. In addition to the standard attendance roster and evaluation form, attorneys seeking CLE credits must *also* complete the attached Registry for Continuing Legal Education Credits and the Training Evaluation and Continuing Legal Education (CLE) Request form.

Please note that there are two (2) Registry for Continuing Legal Education Credits forms, one for the December 1 session and one for the December 12 session. Please be certain that the attorneys sign in when they arrive and sign out when they leave each session. It is imperative that the attorneys sign in/out on both days in order to be eligible for CLE credits.

The Training Evaluation and Continuing Legal Education (CLE) Request form for CLE credits is to be handed out to the attorneys at the end of the December 12 session only.

Please send both completed Registries for Continuing Legal Education Credits and the Training Evaluation and Continuing Legal Education (CLE) Request forms to the following address:

Brookdale Center for Healthy Aging & Longevity
Attn: Steven Jones
425 E 25th St., 13th Floor North
NY, NY 10010

CLE certification credits will be issued via mail to attorneys completing both sessions.

As usual, please submit the standard attendance roster and evaluations to Marti Murphy.

425 East 25th Street, New York, NY 10010-2590
Tel: 212.481.3780 Fax: 212.481.3791

REGISTRY FOR CONTINUING LEGAL EDUCATION CREDITS

FOR ATTORNEYS ONLY

Program Title: Article 81 Teleconference: Training for Guardians, Court Evaluators, Counsel for the AIP and Petitioner's Attorney

Date of Program: December 1, 2008 **Start Time:** 12:30pm **End Time:** 3:30pm

Print Name	Sign In	Time In	Sign Out	Time Out

Note: You must attend both the December 1 and December 12 session in order to be eligible for CLE credits. A CLE request form will be distributed at the end of the December 12 session to all attorneys who successfully complete both sessions of this training.

REGISTRY FOR CONTINUING LEGAL EDUCATION CREDITS

FOR ATTORNEYS ONLY

Program Title: Article 81 Teleconference: Training for Guardians, Court Evaluators, Counsel for the AIP and Petitioner's Attorney

Date of Program: December 12, 2008 **Start Time:** 9:30am **End Time:** 12:30pm

Print Name	Sign In	Time In	Sign Out	Time Out

Note: You must attend both the December 1 and December 12 session in order to be eligible for CLE credits. A CLE request form will be distributed at the end of the December 12 session to all attorneys who successfully complete both sessions of this training.

SADIN INSTITUTE ON LAW & PUBLIC POLICY
BROOKALE CENTER FOR HEALTHY AGING & LONGEVITY OF HUNTER COLLEGE
425 East 25th Street, New York, NY 10010-2590

TRAINING EVALUATION
&
CONTINUING LEGAL EDUCATION (CLE) REQUEST FORM

Your response to the following questions will aid the Law Institute in its efforts to better serve you. Please take a few minutes to respond to the following questions. If you wish to receive Continuing Legal Education (CLE) credit for attending this training, completion of this form is required.

Thank you in advance for your assistance.

Article 81 Teleconference: Training for Guardians, Court Evaluators, Counsel for the AIP and Petitioner's Attorney

Two-Session Program taking place on December 1 and 12, 2008

[*Please circle the appropriate answers]

1) In general, the quality of the training was:
   Excellent Very Good Good Fair Poor

2) The course training materials were:
   Excellent Very Good Good Fair Poor

3) The Instructor's presentation of the subject was:
   Excellent Very Good Good Fair Poor

4) How many Law Institute trainings/workshops have you attended?
   First time 2-4 4-6 6-8 8+

5) How long have you been working in the field covered in this training?
   Beginner 1-3 years 4-6 years 7 years or more

6) Would you take another training course given by the Law Institute?
   Yes No (Why? _____

7) How would you rate the training location and facilities?
   Excellent Very Good Good Fair Poor

8) What is your background?
   Law Social Work Other: _____

9) If your background is in law, what type:
   Private (elder law) Law Firm (elder law) Private (Other _____.)
   Paralegal (Other _____.)

Please turn over

Training Evaluation (continued)

10) What other benefit program training classes would be of interest to you?

_____

_____

11) How did you hear about this particular training?
mailing co-worker our website other_____

12) Additional Comments / Suggestions: _____

_____

_____

13) If you would like to be placed on our mailing list to receive training announcements, please complete the following:

Name (*PLEASE PRINT*!): _____

Title: _____

Organization: _____

Address: _____ Rm/Apt/Suite# _____

City: _____ State: _____ Zipcode: _____

Telephone: (_____) _____ Fax: (_____) _____

Email: _____

Continuing Legal Education (CLE) Credit Request:

(Only attorneys may apply)

This will verify that I have attended the **"Article 81: Training for Guardians, Court Evaluators, Counsel for the AIP And Petitioner's Attorney"** workshop sponsored by the Sadin Institute on Law & Public Policy and request CLE credit for attending this training on Dec. 1 and 12, 2008.

Name (PLEASE PRINT!) _____

Title _____

Organization/Firm: _____

Address: _____ Floor/Rm/Suite/Apt: _____

City: _____ State _____ Zipcode: _____

Tel # (_____) _____ Fax # (_____) _____

Signature:_____ Date:_____/_____/_____

Attendance records will be kept on file in our offices. A letter verifying your attendance will be issued upon written request to The Sadin Institute on Law & Public Policy, Brookdale Center for Healthy Aging & Longevity, 425 East 25th Street, NY, NY 10010. For the workshop named above, you will receive the following transitional/non-transitional CLE credit(s): **2.0 credits in skills; 5.0 in practice**