**SUFFOLK ACADEMY OF LAW**
*The Educational Arm of the Suffolk County Bar Association*
**560 Wheeler Road, Hauppauge, NY 11788**
**(631) 234-5588**

# ARTICLE 81 GUARDIANSHIP TRAINING

## FACULTY

**Hon. Richard I. Horowitz**
**Vincent J. Messina, Esq.**
**Sheryl L. Randazzo, Esq.**
**Richard A. Weinblatt, Esq.**
**Michele L. Gartner, Esq.**
**George E. Patsis, Esq.**
**Robert R. Meguin, Esq.**

**PROGRAM COORDINATOR**

**Lynn Poster-Zimmerman, Esq.**

**February 27, 2019**
**Suffolk County Bar Association, New York**

# Article 81 Program Agenda

Suffolk County Bar Association
Wednesday, February 27, 2019
9:00 a.m. – 4:00 p.m.

**Training for certification for Guardians, Court Evaluators and Counsel for the Alleged Incapacitated Person.**

**Introduction**

9:00 a.m. – 9:05 a.m. **Lynn Poster-Zimmerman, Esq.**

**The Use of Therapy Dogs in Article 81 Hearings**

9:05 a.m. – 9:30 a.m. **Honorable Richard Horowitz**

**Duties and Responsibilities of Attorney for the Incapacitated Person**

9:30 a.m. – 10:15 a.m. **Vincent Messina, Esq.**

Discussion regarding the duties and responsibilities of the Attorney for the Incapacitated Person

**Role of the Court Evaluator**

10:15 a.m. – 11:00 a.m. **Sheryl Randazzo, Esq.**

1. Legal duties and responsibilities of the court evaluator
2. Rights of the incapacitated person with emphasis on the due process rights to aid the court evaulator in determining his or her recommendation regarding the appointment of counsel and the conduct of the hearings
3. Available resources to aid the incapacitated person

**Break**

11:00 a.m. – 11:15 a.m.

**Role of the Guardian**

11:15 a.m. – 12:00 p.m. **Richard Weinblatt, Esq.**

1. Legal duties and responsibilities of the guardian
2. Rights of the incapacitated person
3. Available resources to aid the incapacitated person

**Questions and Answer Session**

12:00 p.m. – 12:15 p.m.

**Lunch Break**

12:15 p.m. – 12:45 p.m.

**End of Life Decision Making in Guardianship Proceedings**

12:45 p.m. – 1:30 p.m. **George Patsis, Esq.**

**Medical Terminology in Guardianship Proceedings**

1:30 p.m. – 2:15 p.m. **Keri Mahoney, Esq.**

Orientation of medical terminology, particularly that relates to the diagnostic and assessment procedures used to characterize the extent and reversibility any impairment

**Office of Court Administration, Special Counsel for Surrogate and Financial Matters Part 36 Rules**

2:15 p.m. - 3:00 p.m. **Michele Gartner, Esq.**

**Role of the Court Examiner and Annual Guardian Reports**

3:00 p.m. – 3:45 p.m. **Jeffrey Grabowski, Esq., Attorney Court Referee**

Preparation of annual reports, including financial accounting for the property and financial resources of the incapacitated person

**Questions and Answer Session**

3:45 p.m. – 4:00 p.m. Honorable Richard Horowitz and Robert Meguin, Esq.

**Hon. Richard I. Horowitz** was appointed to the Court of Claims by Governor Andrew Cuomo in 2015. He currently sits as an Acting Supreme Court Justice in the dedicated Guardianship Part of Suffolk County. Judge Horowitz's prior judicial positions include District Court Judge, Acting County Court Judge and Supervising Judge of the District Court. He has presided in virtually all of the various civil and criminal parts of the District Court, including the Drug Treatment Court and the Mental Health Court. In 2013 he was tasked with creating and presiding over the Human Trafficking Intervention Court.

Judge Horowitz began his legal career as a public defender at the Legal Aid Society of New York. He served as a Senior Staff Attorney for nineteen years and specialized in working with defendants living with mental illness and chemical addiction.

During a hiatus from the bench in 2014 and 2015, Richard Horowitz served as the Deputy Bureau Chief of the Special Investigations Bureau of the Suffolk County District Attorney's Office. His Bureau was responsible for combatting gang and gun violence, animal cruelty and human trafficking.

**Vincent Messina, Esq.** is a partner in the firm of Sinnreich Kosakoff & Messina, LLP, located in Central Islip, New York, where a significant portion of his practice is devoted to land use and related litigation in the trial courts, Appellate Divisions, and Court of Appeals. He is a former Town Attorney of the Town of Islip, a position he held for approximately thirteen (13) years, and currently represents both developers and zoning boards of appeals. Mr. Messina is a graduate of St. John's University and Hofstra University School of Law. He is currently co-chair of the Real Property Committee and the Chair of the Legislative Committee and a past co-chair of the Municipal Law Committee of the Suffolk County Bar Association, and has lectured on a variety of issues for the Suffolk Academy of Law, New York State Bar Association and the private legal education providers.

**Sheryl Randazzo, Esq.** is a partner with the law firm of Randazzo & Randazzo, LLP, with offices located in Huntington, New York and downtown Manhattan. The firm concentrates its practice in the areas of elder law and estate planning and administration, which includes traditional aspects of wills and trusts, as well as long term care planning, guardianship, Medicaid/Medicare matters and other related areas of law affecting the needs and rights of elderly and disabled individuals.

Ms. Randazzo is a past President of the Suffolk County Bar Association (2010-2011) and has recently completed her twelve years of service as a member of the Association's Board of Directors. Ms. Randazzo earned her law degree from Catholic University of America's Columbus School of Law in Washington D.C., and her Bachelor of Science degree in History, magna cum laude, at Northeastern University in Boston, Massachusetts.

**Jeffrey T. Grabowski, Esq.** holds a Baccalaureate of Arts degree from the University of Illinois and a Juris Doctorate from the City University of New York. He is licensed to practice law in the States of New York and Illinois. Mr. Grabowski served as an attorney for the Mental Hygiene Legal Service from 1996-2005. During his tenure he handled a wide variety of cases including court ordered assisted outpatient treatment, civil and criminal commitment hearings, court ordered medication over objection, and served as both court appointed counsel for alleged incapacitated persons ans as court appointed evaluator in Article 81 guardianship proceedings. In March of 2005 Mr. Grabowski, assumed his current position as Guardianship Referee in the Suffolk County Supreme Court. As Guardianship Referee, Mr. Grabowski monitors compliance with the court's orders in Article 81 guardianship proceedings through the use of compliance conferences, and serves as the Court Attorney for the Model Guardianship Part. For over a decade Mr. Grabowski has dedicated his career to protecting and serving the rights of disabled and incapacitated individuals, and has lectured extensively on these areas of law.

**Michele Gartner, Esq.** is OCA Special Counsel for Surrogate and Fiduciary Matters. She is responsible for the review and certification of training programs for Part 36 fiduciaries, for developing and presenting training programs regarding the part 36 rules for judges and nonjudicial court personnel, and for answering questions from the public and the courts regarding Part 36 interpretation and implementation. She serves as Counsel to the OCA Article 81 Guardianship Advisory Committee, the OCA Surrogate's Court Advisory Committee, and the Administrative Board for the Offices of Public Administrators. She previously served as the Public Administrator of Nassau County. She received her JD from the University of Buffalo School Of Law.

**Keri Mahoney, Esq.** is licensed as both a registered nurse and an attorney in New York. Ms. Mahoney has practiced as an oncology nurse for over 10 years. Ms. Mahoney's law practice is focused on assisting elderly and disabled persons, with a heavy focus on guardianships. In addition, she is an adjunct professor of law at Touro Law Center where she teaches a course involving biomedical ethics and the law.

**Richard A. Weinblatt** is a partner in the law firm of Haley Weinblatt & Calcagni, LLP located in Islandia, New York. He practices primarily in the areas of Elder Law and Trusts and Estates. Richard graduated *magna cum laude* from St. John's University School of Law in 1988. He is a member of the New York State Bar Association, National Academy of Elder Law Attorneys and a former Director of the Suffolk County Bar Association. He is a Past Chair of the New York State Bar Association's Elder Law and Special Needs Section. Richard is a past Associate Dean of the Suffolk County Bar Association's Academy of Law, past President of the Estate Planning Council of Long Island, Suffolk Chapter and is a former Co-Chair of the Suffolk County Bar Association's Elder Law Committee, Surrogate's Court Committee and Tax Committee. Richard is also an adjunct professor at Touro College Jacob D. Fuchsberg Law Center.

**George E. Patsis, Esq**. is the senior member with the general practice law firm of George E. Patsis, PLLC, which is located in Lindenhurst, New York. Mr. Patsis received his Bachelor of Arts degree from Stony Brook University and his law degree from Maurice A. Deane School of Law at Hofstra University. The firm has a focus on Estate Planning, Estate Litigation, and Guardianship matters. Mr. Patsis has been a Court Evaluator, Guardian, Counsel to Alleged Incapacitated Person, and Receiver in numerous matters over the years in both Suffolk and Nassau Counties. In addition, Mr. Patsis has been a member of the Suffolk County Bar Association, New York State Bar Association, and New York State Trial Lawyers Association for many years.

# What Happens When a Guardianship Gets Contentious

## A court-ordered guardianship nearly shattered Kise Davis' life, in a trend that too often leads to isolation and exploitation of older Americans

by Kenneth Miller, AARP The Magazine, October/November 2018 | Jake Stangel/AARP

Larry and Kise Davis were reunited after a lengthy legal battle over Kise Davis' guardianship.

Larry Davis tried his best to help his stepmother, but distance made it difficult. Davis lived with his wife in Sonoma County, Calif.; Kise (pronounced KEE˘-say) Davis lived in Las Cruces, N.M., 1,200 miles away. She was struggling with dementia, and Larry, who held power of attorney over her affairs, spoke with her regularly, kept tabs on her via local contacts and visited as often as he could. He was working toward moving her to an assisted living facility near his home.

That began to seem more urgent in the fall of 2016, when Kise, then 85, began complaining that a longtime acquaintance, Larry Franco — a handyman who helped her with household tasks — was stealing from her. But Kise's illness sometimes made her paranoid; she'd lodged such accusations against friends before. Larry, who was 74, planned to fly out and investigate after the holidays. Then, shortly before Christmas, he came home from a shopping trip to learn that Kise had gone missing.

"This is Kise's neighbor Donnie," said the voice on the answering machine. "I thought you should know that a van just came and took her to some kind of institution."

Terrified that harm had come to Kise, Larry called Franco and demanded to know what was going on. "I got in over my head," Franco told him. He explained that Kise had transferred her power of attorney (POA) to him, then turned suspicious and hostile. Franco's lawyer had advised him that the best way to ensure Kise was properly cared for was to petition a judge to appoint a professional guardian, who would take over legal responsibility for her well-being.

Kise's newly appointed guardian, a company called Advocate Services of Las Cruces, had placed her in a dementia-care facility by order of the court. It took Larry more than a week to reach her there. When they finally spoke, on Christmas Eve, she seemed to believe she'd booked herself a room, though now they wouldn't let her go. "They've put me in an insane asylum," she told him, weeping. "Please come and get me out of here."

**"They've put me in an insane asylum. Please come and get me out of here."**

— Kise Davis

Larry was furious that no one had informed him before letting strangers lock her away, but he assumed he could quickly set things right.

He was wrong.

## A Court-Appointed Guardianship

An estimated 1.3 million adults are under guardianship in this country, perhaps 85 percent of them over 65. The court-ordered supervision, designed to ensure that mentally or physically incapacitated people are cared for and protected, can be partial (often covering only finances and known as a conservatorship) or full. For full guardianship, a judge transfers the individual's civil rights — including the right to sign contracts, make medical decisions, and choose with whom to associate and where to live — to the guardian. The most common arrangement is for the judge to appoint a family member, who may draw on the person's estate to cover approved expenses. If there is no available or appropriate family member, a professional or company may be appointed. The professional can charge the estate to handle the client's affairs and to pay for necessary services, with court approval.

In most instances, experts say, guardians perform conscientiously and their clients benefit. Still, in an unknown number of cases, a guardianship can go disastrously wrong. A 2010 federal report identified hundreds of allegations of abuse, exploitation or neglect by guardians over 20 years. Although family members committed the majority of these misdeeds, the crimes that usually make headlines are those of professional guardians. Last year saw a bumper crop. The owner of a Las Vegas guardianship company was indicted on more than 200 felony charges for allegedly bilking more than 150 people out of their life savings. In New Mexico the two owners of Ayudando Guardians Inc. — along with one owner's husband and son — were arrested for conspiracy, fraud, theft and money laundering in connection with an alleged plot to embezzle $4 million from clients' trust accounts. The CEO of another Albuquerque-based company, Desert State Life Management, pleaded guilty to wire fraud and money laundering; he faces eight to 12 years in prison and must pay $4.8 million in restitution to more than 70 special-needs clients.

Yet even guardianships that fall within the letter of the law can wreak emotional and financial devastation. Although all those involved may think their motives and actions are honorable — as in the case of Kise Davis — the slow, costly workings of the court system can cause untold confusion and pain. Moreover, activists charge that in some cases, unscrupulous professional guardians have turned legally sanctioned exploitation into a cottage industry, abetted by greedy attorneys and pliable judges. "The people who are supposed to solve the ward's and family's problems instead profit enormously from creating a whole bunch of new ones," says physician Sam Sugar, founder of Americans Against Abusive Probate Guardianship.

Testifying in April 2018 before a U.S. Senate committee, Nina Kohn, a law professor at Syracuse University and a principal drafter of the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (a model law designed for adoption by any state), laid out an array of problems with the U.S. guardianship system. One issue, she told the legislators, is that "a subset of guardians act in ways that violate the rights and insult the humanity of those they serve," whether intentionally, negligently or through inadequate training. Advocacy groups

(including AARP) have struggled for decades to repair the gaps in the country's patchwork of guardianship laws. Lately, there have been signs of progress. But as Larry Davis learned when his stepmother landed in a locked unit, there's still a long way to go.

## A Caregiver's Dilemma

Born in Japan, Kise had fallen in love with Larry's father, an Army translator, when he was a new divorcé stationed in her country; Larry traveled from San Diego to meet her shortly after their wedding, in 1956, when he was 14. Tiny, vivacious and artistic, Kise was only 11 years his senior, and he saw her as a kindred spirit: "She's a strong personality," he says. "She's very attached to doing things her way."

Larry credits Kise with repairing the frayed bond between him and his dad. He stayed with the couple often after they moved to the U.S. — first at White Sands Missile Range in New Mexico; then in Newport Beach, Calif., where Kise opened a dress shop, selling her own designs; and, finally, in Las Cruces, where she remained after becoming widowed in 1993.

When Kise first began having memory problems, in 2014, Larry took her to her doctor, who ran tests that showed mild cognitive impairment. Kise drove Larry to a lawyer's office, where she gave Larry power of attorney. Kise had long spoken of moving to Sonoma, near Larry, when she could no longer care for herself; for now, though, she insisted on staying put. At 82, she was still sharp witted, eager to greet customers at the silk-flower stall she ran at the farmers market on weekends. Larry, a retired educator with a doctorate in cultural psychology, knew that pushing too hard could push her away. So he flew home and checked in frequently.

As Kise's condition worsened, Larry had to intervene more often. In 2015 she abruptly transferred power of attorney to a woman friend. Then she began complaining that the friend was stealing her possessions. After the sheriff's department determined that the items — including a pistol, which could not be found — had actually been misplaced, Larry came for another visit and regained her POA. He asked Adult Protective Services (APS) to assess whether Kise could safely continue to live on her own; she passed the evaluation, though the agent suggested she get some help. Larry hired a home-care service to come in weekly. But Kise soon canceled the contract, saying it was a waste of money.

In June 2016, Larry returned to Las Cruces and took Kise to a geriatric physician, who diagnosed her with moderate dementia and recommended that she give up driving. Larry straightened out Kise's checkbook, taxes and overdue bills; he interviewed several elder-care companies, but she rejected them all. Before leaving town, he asked her neighbors to call him if anything seemed amiss. Back in Sonoma, Larry and his wife, Marcia, began looking for a nearby assisted living residence that would fit Kise's needs.

Not long afterward, Kise told Larry that the other Larry in her life, Larry Franco, had begun helping her with daily tasks. At Franco's request, APS reevaluated her; the agency again concluded that she could live on her own. Soon after — without telling her stepson — she transferred her POA to Franco. But by November she was claiming that Franco was stealing

from her. Her stepson promised to visit again after Christmas, when he planned to broach the idea of moving.

Then, on Dec. 16, he learned that Kise had been hauled off and shut away.

### The Legal Fight

In the days after she became a client of Advocate Services, Larry Davis made countless calls to try to free her from custody and move her to California. When he spoke to company owner Sandy Meyer, he says, she told him she thought he wasn't involved in Kise's life, even though she had met him when he was researching home-care services. (In an email to me, Meyer wrote: "Mr. Davis called us that evening before we even had the opportunity to call him. He spoke with another guardian in the office Friday night and spent a half-hour yelling at me on Saturday morning, not even letting me have a chance to respond.") He spoke with Franco's attorney, Jill Johnson Vigil, who said she'd also been unaware that he was an interested party; because he was not related to Kise by blood or adoption, he learned, no one had been legally obligated to notify him. He sought guidance from legal experts and Alzheimer's disease advocates, who told him to prepare for a protracted fight.

The other side, in fact, was already depicting him as a villain. As it later emerged, Kise had been telling Franco tales about her stepson similar to those she'd been telling her stepson about Franco. The handyman's secondhand impressions of Larry Davis were reflected in the temporary guardianship petition that Franco's lawyer, Johnson Vigil, had filed with the state District Court. Larry was described only as someone who'd previously held Kise's power of attorney, not as a family member; the document claimed he "took no protective action for Ms. Davis," even though he had been advised by Kise's doctor that she "needed to be placed in a facility." (Larry Davis denies he'd been given such advice. Both of Kise's doctors declined to comment for this article, citing patient privacy law.) Due to Kise's cognitive problems, paranoia and possible possession of a firearm, there was "a likelihood of immediate and irreparable harm" unless she was assigned a guardian on an emergency basis, the petition asserted.

## Here's How to Avoid a Bad Guardianship

- Careful planning can ensure that you'll have a say in who will look after you if you ever need help.
- Make peace with your loved ones. Judges often appoint professional guardians when families are feuding, so try to make up before problems escalate. Whatever the cost, it will likely be cheaper than a professional guardian.
- Power up. Create one durable power of attorney for finances and another for medical care. One person can fill both roles, and you can also name your POA designee as your guardian of choice.
- Instruct. Explain to your designee how to do the job (good sources are consumerfinance.gov/managing-someone-elses-money and guardianship.org/standards).
- Trust, but verify. In your POA document, create checks and balances by requiring your appointee to provide a periodic accounting to another trusted friend or relative.

In New Mexico and some other states, petitioners for guardianship can request specific professionals to handle the case. In addition to Advocate Services (the most prominent of the handful of guardianship companies in Las Cruces), Johnson Vigil asked the court to appoint one of the few other local lawyers who handled such cases, CaraLyn Banks, as Kise's attorney and guardian ad litem — responsible for protecting Kise's legal interests. Banks, Larry learned from other lawyers, was known for her skill at fending off family members who contested guardianships in which she was involved.

District Court Judge James T. Martin, who knew the players from previous appearances, granted Johnson Vigil's request. The next step would be a hearing to determine whether the guardianship should become permanent. In order to secure Kise's release, Larry would have to convince the judge — against the arguments of the home team — that she would be better off in his care.

However they begin, bad professional guardianships tend to be devilishly hard to get out of — and sometimes end tragically. Take the case of retired banker Denise Tighe, who fell under guardianship in 2012 after exhibiting symptoms of delirium during a bladder infection. After she was dragged screaming to a nursing home in Weatherford, Texas, her friend Virginia Pritchett found her lying on a mattress on the floor. "She was a wealthy lady who could have afforded 24-hour home help," says Pritchett, who, along with other loved ones, was soon prevented from seeing her. "When her birthday came up, I called and said, 'Can I bring her a gift?' They said no." Pritchett unsuccessfully fought state and local governments on Tighe's behalf, but Tighe died in the institution, after two years of enforced solitude.

Dysfunctional professional guardianships often have common traits. An elderly person with no nearby relatives may begin showing signs of dementia or develop a medical condition that temporarily clouds her mind, and someone (APS, a concerned neighbor, a hospital administrator) petitions the local court to appoint a guardian. Or a relative may petition to become a guardian, but a judge rules that a professional would be more appropriate. Or two relatives file petitions, and the judge resolves the conflict by appointing a professional.

The guardian then moves the person to a nursing home or other supervised facility, even though she may still be capable of living at home or have friends or family members willing to care for her. Those loved ones are falsely portrayed as negligent or malicious and are often restricted or banned from contact with the person under guardianship. The person may be drugged, ostensibly for therapeutic reasons but perhaps also to ensure docility and skew cognitive tests. The guardian enriches himself and his collaborators by selling the person's property (thus making more cash available) and billing her for a dizzying range of services — including defending the guardianship in court if the family contests it. "The lawyers can't make it to the bank fast enough," says Elaine Renoire, president of the National Association to Stop Guardian Abuse.

Still, troublesome guardianships don't always arise from malice. "Guardianship cases are typically messy, because they occur when there's been a breakdown in other systems," observes Syracuse law professor Kohn. Well-meaning family members can make questionable decisions; vulnerable adults can say contradictory things. Those in the guardian's camp may sincerely believe they're doing the right thing.

"I saw this case as an example of what happens when family members do not fulfill their fiduciary duties to an elderly relative who is in need of assistance and the court is asked to step in," Banks told me in an email. "Mr. Davis' conduct before the court proceeding was filed was a concern to everyone involved."

Nonetheless, Kise's case illustrates that the system — to a degree that varies state by state, even district by district — has deep structural flaws. It can reward those on the guardian's side for taking a harsher view of the person's loved ones than may be justified and for resisting efforts at compromise. It lacks mechanisms to ensure accountability or to reduce conflict. As a result, it too often seems to confirm family members' sense that the deck is stacked against them.

**"You'll find out about her assets upon her death."**

— Case manager for Kise Davis

## The Financial Toll

In January 2017, Larry and Marcia flew to Las Cruces and hired an attorney, elder-law specialist Cristy Carbón-Gaul. Then they drove to the facility where Kise was being held, Haciendas at Grace Village. Kise was housed in a locked unit for residents with severe dementia, most of whom could barely communicate. The place was clean and airy, but Larry thought Kise looked haggard and unkempt. "They told me I could go home on Monday," she let him know, "so I packed my bag and waited. But then they said the next day, and the next. They think I'll forget."

Halfway through the visit, Larry got a call from Carbón-Gaul: "The lawyers on the other side are up in arms, saying you're trying to take Kise out." Apparently, a Haciendas staffer had called someone to ask if the Davises could take Kise to lunch, raising suspicions of an escape plan. Larry says he had no such plan, but the misunderstanding cost him and Kise hundreds of dollars in fees paid to their respective attorneys.

A few days later, Larry spoke again with Franco; after comparing notes, they realized that Kise had been making delusional claims about each man to the other. Franco and Johnson Vigil told the judge they wanted Kise to go to California with Larry. But now Banks objected, citing her responsibility to protect Kise's interests.

A hearing was set for Feb. 20 but was canceled due to a missing doctor's report. Banks, however, produced a 17-page paper describing the perilous state of Kise's affairs — including clutter throughout the house, rotting food in the fridge and a dead cat in the freezer — and put the blame squarely on her stepson. Larry had abdicated his duty "to protect Kise from herself and others," Banks wrote. As evidence, she cited his failure to supply Kise with home care and his repeated loss of power of attorney (both of which, Larry notes, resulted from Kise's actions, not his own). She also accused Larry of "agitating" Kise by discussing her case; Larry says he was simply treating her like an adult.

Larry yearned to tell his side of the story in court, but Carbón-Gaul warned that would be useless; Judge Martin, she said, had little patience for such back-and-forth. Frustrated, Larry

added a new attorney to the team: Peter Goodman, a retired business lawyer he'd met at the farmers market; his knowledge of Japanese culture seemed like a potential asset. At the next hearing, in March, Goodman presented an issue that Larry had discussed with Banks and that Banks herself had mentioned in her report: the possibility that if Kise's dementia eventually left her unable to communicate in English, she would do better at a facility — like one Larry had found in Sonoma — where some of the residents spoke Japanese. To Larry's delight, Judge Martin agreed, though he suggested it "would be better" if Kise remained under a professional guardianship after relocating to California. He ordered both parties to cooperate in trying to arrange such a move within 120 days.

But at a hearing in April, Banks raised another roadblock. Memory-care facilities in California, she said, were more expensive than those in New Mexico. In order to ensure that Kise — whose assets totaled about $300,000 — didn't run out of money, it would be necessary to sell her house. The property didn't go on the market until June, and it sat there for months. (In an email, Banks explained that the contents had to be inventoried and sold off, and repairs made to the structure, before the house could be sold.)

Meanwhile, Kise languished. Although she'd been transferred to a new unit, the other residents were still far more debilitated than she was; she spent most of her time reading in her room. (In a court hearing, her case manager testified that Kise was offered a room in the highest-functioning unit when one opened up, yet refused to go. Kise and Larry both deny this.) Friends sometimes visited, but she was forbidden to leave the building. Goodman recalls sitting with her as another resident watched a TV show for schoolkids; the woman asked Kise if she was one of the characters: "Kise looks at me and says, 'You don't get smarter in here.' "

As the 120-day deadline came and went, Advocate Services made it clear who was in control. When Larry suggested reducing Kise's dosage of a sleep aid that could exacerbate dementia, he says, her case manager told him — correctly — that only the guardian could decide on medical issues. When attorney Goodman provided a list of items that Kise wanted to take to California, the case manager emailed: "This behavior is to stop now — no more talking about taking anything." And when Goodman asked the manager about the state of Kise's finances, she scolded him for wasting her time and thereby increasing the fees charged to the estate. "You'll find out about her assets," she wrote, "upon her death."

The case manager, who no longer works for Advocate Services, declined to comment for this article. Company owner Meyer, however, blames Larry and his team for the conflicts. "We performed our duties in the best interest of Kise Davis and her reported wishes to us," she emailed me. "Unfortunately, Mr. Larry Davis felt that we had gone behind his back.... We always make every attempt to work with family members in a collaborative effort to meet the ward's needs.... [This case] became contentious not due to our actions."

## A System Under Scrutiny

Kise's house finally sold in November 2017. At Goodman's suggestion, Larry hired a pair of experienced guardianship litigators to fight the next phase of the battle — trying to make sure that Kise's transfer, which Judge Martin had called for back in March, was carried out. But the next hearing was canceled when the judge had a scheduling conflict, and the case continued to go nowhere.

By then, guardianship in New Mexico was under extreme scrutiny, thanks in part to an investigative series by the *Albuquerque Journal* (which later ran an extensively reported story by Colleen Heild on Kise's plight), as well as the Ayudando and Desert State Life embezzlement outrages. A commission convened by the state Supreme Court was developing proposals for regulatory reform. Legislators introduced a comprehensive bill (strongly backed by AARP New Mexico) to overhaul state guardianship rules, which passed in a stripped-down version in February 2018. The new law did make some improvements: Among other things, it required court hearings, formerly closed, to be open to the public, and a wider range of family members to be notified of a pending guardianship (which might have enabled Larry to intervene earlier). But a provision that would have established a statewide record-keeping system for guardianship, crafted to prevent embezzlement and to rein in excessive charges, was rejected as too expensive.

Since guardianship scandals erupted in the news 31 years ago, similar scenarios have played out across the country. "States pass pretty laws, but there's no meat on the bones," says Bernard Krooks, a past president of the National Academy of Elder Law Attorneys. Monitoring and enforcement mechanisms are often inadequate, as are provisions for training guardians in the rules they're supposed to follow.

That's beginning to change. In 2011 the National Guardianship Network (a coalition of organizations, including AARP, dedicated to improving guardianship law and practice) launched a project known as Working Interdisciplinary Networks of Guardianship Stakeholders, or WINGS — a collaboration of courts, government agencies and civic groups in 25 states that's working to reform guardianship systems. And Congress, last October, passed the Elder Abuse Prevention and Prosecution Act, which includes a section calling for the establishment of programs to assess the workings of state guardianship systems, to develop recommendations for improvement and to establish guardianship-oversight demonstration programs nationwide. But effective oversight requires good information, and most states still fall grievously short regarding this.

"We don't really know how many guardianships there are, let alone how many are going well and how many are problematic," says Diana Noel, a senior legislative representative for AARP. This year the *Albuquerque Journal* found that Advocate Services — the guardian for Kise — had failed to file annual reports for 50 or more cases going back to 1990. "We did get behind, and we're catching up," Sandy Meyer told the paper. Such laxity and lack of follow-up by authorities are not uncommon among guardians nationwide.

## A Family Reunion

On Feb. 26, 2018, 11 months after he ruled that Kise should be moved to California, Judge Martin held another hearing. Larry testified, describing his close relationship with Kise and his efforts to ensure her well-being. Franco and two of Kise's friends spoke as well. They all agreed that living near her family would be in Kise's best interest. Banks disagreed, but the judge said he'd intended for Kise to be moved soon after his original order and was "disappointed" that she hadn't been. He appointed Larry as Kise's guardian and ordered that she be transferred promptly.

The next day, Larry gave Kise the good news: After more than a year of captivity, she was going home with them. "You saved my life," she told him. At first she moved into Larry and Marcia's home in Sonoma. Then, when a space became available, she relocated to an assisted living residence, where the activities include gardening, musical performances and outings. Kise's loved ones can visit anytime, and she can visit them. "This is a nice place," she says. "It's like going to heaven."

At 87, Kise is physically healthy, and Larry hopes she'll remain so. But her freedom came at a considerable cost. He spent more than $50,000 on legal bills and other expenses; the charges to Kise's estate during her ordeal are expected to top $140,000. And that's not counting the existential toll.

"They took 14 of Kise's last months away from her and made it a nightmare," says Larry, who testified before New Mexico's guardianship commission at last year's hearings. "It was like a hostage situation. No one should have to go through what happened to us."

66 A.D.3d 1344
Supreme Court, Appellate Division,
Fourth Department, New York.

In the Matter of the Application of
Rosanna E. HECKL, Olivia J. Corey,
Christopher M. Corey and Thomas J. Corey,
Petitioners–Respondents–Appellants,
For the Appointment of a Personal Needs
and Property Management Guardian
of Aida C., an Alleged Incapacitated
Person, Appellant–Respondent.
Permclip Products Corp., Intervenor–Respondent.

Oct. 2, 2009.

**Synopsis**

**Background:** Children petitioned for appointment of guardians over the person and property of their mother, an alleged incapacitated person (IP). The Supreme Court, Erie County, Penny M. Wolfgang, J., appointed the IP's granddaughter and the IP's personal assistant as coguardians of the IP's person and corporate counsel for corporation of which IP was the president and sole shareholder as guardian of the IP's property. IP and her children appealed.

**Holdings:** The Supreme Court, Appellate Division, held that:

[1] granddaughter was appropriate person to appoint as guardian of IP's person;

[2] conflict of interest disqualified personal assistant from serving as guardian over IP's person;

[3] appointing corporate counsel as guardian over property was warranted; and

[4] court did not violate IP's due process rights by requiring her to testify at hearing.

Affirmed as modified.

West Headnotes (5)

[1] **Mental Health**
⇐ Heirs, next of kin, and relatives in general

Granddaughter was appropriate person to appoint as guardian of grandmother's person, even though grandmother mistakenly believed she did not have grandchildren and was not aware that she was related to granddaughter; evidence indicated grandmother and granddaughter shared a very close and loving relationship, granddaughter had experience in caring for two elderly women and had taken a training course with respect to the duties and responsibilities of a guardian of the person, and granddaughter recognized grandmother's dependence upon her personal assistant and expressed a willingness to work with him. McKinney's Mental Hygiene Law § 81.19(d).

Cases that cite this headnote

[2] **Mental Health**
⇐ Persons Who May Be Appointed

Conflict of interest disqualified personal assistant to alleged incapacitated person (IP) from serving as guardian over her person, even though assistant was IP's trusted and constant companion and maintained her home in immaculate conception; assistant had worked for IP for 34 years and had never received a paycheck, he resided in IP's home, had limited assets, and was dependent upon IP for his food, clothing, and shelter, and he testified that he did pretty much whatever the IP told him to do. McKinney's Mental Hygiene Law § 81.19(d)(8).

Cases that cite this headnote

[3] **Mental Health**
⇐ Persons Who May Be Appointed

Appointing the corporate counsel for corporation of which alleged incapacitated

  

person (IP) was the president and sole shareholder as guardian of the IP's property was warranted; counsel had worked for the corporation for a few years, he arranged to secure in excess of $2 million that had been left in various unsecured places in the IP's home, and IP's children who petitioned for appointment of guardian had removed themselves from consideration as guardians of IP's property. McKinney's Mental Hygiene Law § 81.19.

Cases that cite this headnote

[4] **Mental Health**
Discretion of court

It is within the discretion of the court to appoint a guardian of an alleged incapacitated person's (IP's) property.

Cases that cite this headnote

[5] **Constitutional Law**
Guardianship

**Mental Health**
Evidence

Court did not violate alleged incapacitated person's (IP's) due process rights by requiring her to testify at hearing in proceeding for appointment of a guardian, as the court was charged with determining her best interests. U.S.C.A. Const.Amend. 14; McKinney's Mental Hygiene Law § 81.11(c).

3 Cases that cite this headnote

**Attorneys and Law Firms**

**296 Phillips Lytle LLP, Buffalo (Alan J. Bozer of Counsel), for Appellant–Respondent.

Lippes Mathias Wexler Friedman LLP, Buffalo (Kevin J. Cross of Counsel), for Petitioners–Respondents–Appellants.

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

**Opinion**

MEMORANDUM:

*1345 The alleged incapacitated person, Aida C. (hereafter, IP) appeals and petitioners cross-appeal from an order and judgment appointing the IP's personal assistant and granddaughter as coguardians of the IP's person and the corporate counsel of intervenor-respondent, Permclip Products Corp. (Permclip), as guardian of the IP's property in this proceeding pursuant to Mental Hygiene Law article 81. As we noted in a prior decision concerning this proceeding, the IP is the mother of petitioners, as well as the president and sole shareholder of Permclip (Matter of Aida C., 44 A.D.3d 110, 112, 840 N.Y.S.2d 516). In an amended petition, petitioners removed themselves from consideration as guardians of the IP's property and, during *1346 the pendency of this proceeding, they proposed that the IP's granddaughter, rather than any of the petitioners, be named guardian of the IP's person inasmuch as petitioners and the IP have been estranged since 2005.

Contrary to the contention of the IP on her appeal, Supreme Court properly denied her motion to dismiss the amended petition and determined that she is incapacitated and requires a guardian to provide for her personal needs as well as a guardian to manage her property (*see* Mental Hygiene Law § 81.15[b], [c] ). We reject the further contention of the IP that the court erred in appointing her granddaughter as a coguardian of her person. We conclude with respect to petitioners' cross appeal, however, that the court erred in appointing the IP's personal assistant as a coguardian of the IP's person, and we therefore modify the order and judgment accordingly.

[1] Pursuant to Mental Hygiene Law § 81.19(d), in appointing a guardian the court should consider, inter alia, the social relationship between the IP and the proposed guardian (§ 81.19[d][2] ); the care provided to the IP at the time of the proceeding (§ 81.19[d][3] ); the educational and other relevant experience of the proposed guardian (§ 81.19[d][5] ); the unique requirements of the IP (§ 81.19[d][7] ); and the existence of any conflicts of interest between the IP and the proposed guardian (§ 81.19[d][8] ). With respect to the IP's granddaughter, the record establishes that, although the IP mistakenly believes that she does not have grandchildren, the IP and her granddaughter had shared a very close and loving **297

relationship. Although the IP was not aware that she was related to her granddaughter, she enjoyed an evening with her granddaughter and other family members at a restaurant, and the IP invited her granddaughter to visit her at her home. In addition, the record establishes that the IP's granddaughter has experience in caring for two elderly women and has taken a training course with respect to the duties and responsibilities of a guardian of the person. The IP's granddaughter testified at the hearing on the amended petition that she is willing to work with the IP's personal assistant and recognizes her grandmother's dependence upon him. We thus conclude that there is no basis upon which to disturb the court's appointment of the IP's granddaughter as coguardian of the IP's person (*see Matter of Anonymous*, 41 A.D.3d 346, 839 N.Y.S.2d 78).

[2] As noted, however, we agree with petitioners that the court erred in appointing the IP's personal assistant as coguardian of the IP's person, inasmuch as there is a conflict of interest that prevents him from serving in that capacity (*see* ***1347** Mental Hygiene Law § 81.19[d][8] ). The personal assistant testified that he has worked for the IP for 34 years and has never received a paycheck. He further testified that he resides in the IP's home; the IP provides for his personal needs; and he has limited assets and is dependent upon the IP for his food, clothing and shelter. Furthermore, he testified that he does "pretty much" whatever the IP tells him to do. By way of example, he admitted that he summoned the police at the direction of the IP when her grandchildren came to visit and that, although the police handcuffed the IP's grandson, the personal assistant did not advise the police that the alleged intruders were the IP's grandchildren and that the IP had, the previous evening, invited her grandchildren to visit her. It is undisputed that the personal assistant is the trusted and constant companion of the IP and maintains her home in an "immaculate" condition. Nevertheless, we conclude that he is disqualified to serve as coguardian of the IP's person based upon a conflict of interest, inasmuch as he is dependent upon the IP to meet his basic needs and he does not exercise independent judgment, but rather simply does what the IP instructs him to do.

[3] [4] We reject the further contention of petitioners on their cross appeal that the court erred in appointing Permclip's corporate counsel as guardian of the IP's property. It is well established that it is within the discretion of the court to appoint a guardian (*see Matter of Wynn*, 11 A.D.3d 1014, 1015, 783 N.Y.S.2d 179, *lv. denied* 4 N.Y.3d 703, 790 N.Y.S.2d 649, 824 N.E.2d 50). Here, the record establishes that Permclip's corporate counsel had worked for Permclip for a few years, and that he arranged to secure in excess of $2 million that had been left in various unsecured places in the IP's home. Inasmuch as petitioners in the amended petition deferred to their mother's wishes and no longer sought to be named guardians to manage the IP's property, we perceive no reason to disturb the exercise of the court's discretion in appointing Permclip's corporate counsel as guardian with respect to the IP's property (*cf. Matter of Chase*, 264 A.D.2d 330, 331, 694 N.Y.S.2d 363).

[5] We reject the contention of the IP that the court violated her due process rights by requiring her to testify at the hearing. Although the Mental Hygiene Law is silent on the issue whether the person alleged to be incapacitated (AIP) may be compelled to testify, we note that section 81.11(c) requires the presence of the AIP at the hearing "so as to permit the court to obtain its own impression of the person's capacity." In addition, we note ****298** that we previously rejected the contention of the IP that her Fifth Amendment rights against self-incrimination are implicated in an article 81 proceeding (*see Aida C.*, 44 A.D.3d at 115, 840 N.Y.S.2d 516; *cf.* ***1348** *Matter of A.G.*, 6 Misc.3d 447, 452–453, 785 N.Y.S.2d 313). We likewise conclude that her due process rights are not violated inasmuch as the court is charged with determining her best interests (*see generally Wynn*, 11 A.D.3d at 1015, 783 N.Y.S.2d 179). We have reviewed the remaining contentions of the parties and conclude that they are without merit.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by vacating that part appointing Daniel Walsh coguardian of the person of Aida C. and as modified the order and judgment is affirmed without costs.

**All Citations**

66 A.D.3d 1344, 886 N.Y.S.2d 295, 2009 N.Y. Slip Op. 06897

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37 Misc.3d 418
Supreme Court, Dutchess County, New York.

In the Matter of the Application for the Appointment of A Guardian by Robert B. ALLERS, as Commissioner of Social Services of Dutchess County Department of Social Services, Petitioner, for G.P., A Person Alleged to be Incapacitated, Respondent.

July 26, 2012.

**Synopsis**

**Background:** In guardianship proceeding under Mental Hygiene Law, county department of social services moved in limine for order directing that alleged incapacitated person (AIP) could be required to testify against himself at hearing on capacity. Counsel for AIP responded in opposition.

**[Holding:]** The Supreme Court, James D. Pagones, J., held that AIP would not be required to testify against himself at hearing on his capacity.

Opposition sustained.

West Headnotes (4)

[1] **Statutes**
Plain Language;Plain, Ordinary, or Common Meaning

Words of ordinary import used in a statute are to be given their usual and commonly understood meaning, unless it is plain from the statute that different meaning is intended.

Cases that cite this headnote

[2] **Mental Health**
Standard of proof in general

Determination that a person is incapacitated under Mental Hygiene Law must be based on clear and convincing evidence. McKinney's Mental Hygiene Law § 81.12(a).

Cases that cite this headnote

[3] **Mental Health**
Evidence

Provision of Mental Hygiene Law permitting court to waive rules of evidence applies only in uncontested proceedings where there is consent to the appointment of a guardian. McKinney's Mental Hygiene Law § 81.12(b).

Cases that cite this headnote

[4] **Mental Health**
Evidence

Alleged incapacitated person (AIP) would not be required to testify against himself against his wishes at hearing on his capacity in guardianship proceeding under Mental Hygiene Law; AIP had not consented to appointment of guardian, affirmatively placed his condition in issue, or waived any of his statutory privileges, AIP's personal liberty had been at stake, and Mental Hygiene Law had been silent as to whether AIP could be required to testify. McKinney's Mental Hygiene Law §§ 81.11(4), 81.12(a, b).

1 Cases that cite this headnote

**Attorneys and Law Firms**

****903** William F. Bogle, Jr., Esq., Corbally, Gartland & Rappleyea, LLP, Poughkeepsie, for AIP, G.P.

Janet V. Tullo, Esq., Bureau Chief, Poughkeepsie, for Petitioner, Dutchess County Department of Social Services.

Eugenia B. Heslin, Esq., Mental Hygiene Legal Service, Court Evaluator, Second Judicial Department, Poughkeepsie, Kevin L. Wright, Esq. Temporary Guardian of the Property, Mahopac, for G.P.

**Opinion**

JAMES D. PAGONES, J.

*419 The issue for the court's determination is whether the Alleged Incapacitated Person ("AIP") in this guardianship proceeding under Mental Hygiene Law ("MHL") Article 81 can be required to testify against himself at a hearing conducted pursuant to section 81.11.

*BACKGROUND*

The court recently completed a hearing under MHL § 81.23(a) to determine whether a temporary guardian for the property management needs of the AIP and a guardian for personal care needs were necessary. The court determined that a temporary guardian for the property management needs was warranted and denied the application for a personal care needs guardian in its Decision, Findings of Fact and Order, dated and entered July 19, 2012.

The AIP attended the hearing with his court appointed attorney. The AIP did not testify, present witnesses or submit documentary evidence for consideration (p. 2). The Court sustained the objection of the AIP's attorney when counsel for the petitioner Department of Social Services ("DSS") attempted to call the AIP as a witness for its case in chief (Transcript, 07/13/12 at p. 3).

The parties and temporary guardian for property management have been directed to appear for a hearing on July 26, 2012 at 2:00 p.m. for the purpose of determining whether the temporary guardianship should be made permanent.

In the interim, counsel for DSS submitted correspondence supported by case law and legal analysis indicating that the petitioner intends to call the AIP to testify at the hearing. Counsel for the AIP has, in turn, responded in kind in opposition. As such, the court treats these submissions as an application for *in limine* determination.

*DECISION*

Among its findings and declaration of purpose when enacting MHL Article 81, the New York State Legislature expressed the following sentiment:

> *420 "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 **904 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." (81.01).

Procedural due process safeguards are included in the statute. The AIP is entitled to proper notice, legal representation, the right to demand a jury trial, the right to be present at any hearing, present evidence and otherwise participate. Moreover, the record of any hearing and records obtained by the Court Evaluator pursuant to MHL § 81.09, Mental Hygiene Facility records and records subject to 42 CFR 2.64 and New York Public Health Law § 2785 are potentially subject to an order sealing them from the public. (Article 81 of the Mental Hygiene Law, *Best Practices Manual,* Chap. 2, IV(B), December 2005.)

[1] The statute (MHL § 81.11[4]) mandates that a hearing to determine whether the appointment of a guardian is necessary for the AIP must, unless it is established that the AIP is completely unable to participate in the hearing, be conducted in the presence of the AIP "so as to permit the court to obtain its own impression of the person's capacity." Words of ordinary import used in a statute are to be given their usual and commonly understood meaning, unless it is plain from the statute that different meaning is intended. (*McKinney's N.Y. Statutes,* Book 1, § 232.) The word impression means, "a characteristic, trait or feature resulting from some influence" (*Merriam–Webster's Collegiate Dictionary,* Tenth Ed.); "an effect, feeling, or image retained as a consequence of experience" (*The American Heritage Dictionary of the English Language,* Fourth Ed.). Noticeably silent from the cited statute is that the AIP is required to testify. The Court's impression of *421 the AIP is set forth in its Decision, Findings of Fact and Order (p. 8, ¶ 20).

[2] [3] A determination that a person is incapacitated under Article 81 must be based on clear and convincing evidence. The petitioner bears the burden of proof. (MHL § 81.12[a] ). The court is only permitted to waive the rules of evidence "for a good cause shown." (MHL § 81.12[b] ). The waiver provision applies only in uncontested proceedings where there is consent to the appointment of a guardian. (*Matter or Rosa B.-S.*, 1 A.D.3d 355, 767 N.Y.S.2d 33 [2d Dept.2003].)

Even with the protections afforded the AIP so as to implement the Legislature's stated findings and purpose, MHL Article 81 has been described as a "statute at war with itself." (Fish, "Does the Fifth Amendment Apply in Guardianship Proceedings?", NYLJ, 02/25/11, at 3, col. 1.) The statute "has at its core the contradictory notions of an adversarial model and a paternalistic model." (*Id.*)

[4] The AIP in this proceeding does not consent to the appointment of a guardian. He has not affirmatively placed his condition in issue, nor has he waived any of his statutory privileges.

Counsel for the petitioner has cited *Matter of Heckl,* 66 A.D.3d 1344, at 1347, 886 N.Y.S.2d 295 (4th Dept.2009) and *Matter of Aida C.,* 44 A.D.3d 110, at 115, 840 N.Y.S.2d 516 (4th Dept.2007) as the authority to compel the AIP to testify at the hearing. The Appellate Court in *Matter of Heckl* relied in part upon its ruling in *Matter of Aida C.* that an AIP's Fifth **905 Amendment rights against self-incrimination are not implicated in an Article 81 proceeding (at 1347). The issue before the Court in that decision involved the AIP's refusal to meet and speak with the Court Evaluator, not testify at a hearing on capacity under MHL § 81.11. The *Heckl* decision then states:

"We likewise conclude that [the AIP's] due process rights are not violated inasmuch as the court is charged with determining her best interests (*see generally In re Wynn,* 11 A.D.3d 1014 at 1015, 783 N.Y.S.2d 179)."

The case relied upon the Appellate Court in *Wynn* is *Matter of Lyon,* 52 A.D.2d 847, 382 N.Y.S.2d 833 (2d Dept.1976), aff'd 41 N.Y.2d 1056, 396 N.Y.S.2d 183, 364 N.E.2d 847 (1977). The *Lyon* court based its determination upon Mental Hygiene Law Article 77 which was in effect at the time. While Article 77 may have allowed for a best interests standard at that time, Article 77 was replaced by Article 81, effective April 1, 1993 (*McKinney's Consolidated Laws of New York,* Book 34A, Mental Hygiene Law Article 81, Historical and Statutory Notes, at 4).

*422 There are only two (2) references to best interests in Article 81. The first is § 81.07(g)(1)(iv) which addresses itself to who is entitled to notice of the proceeding. The second is § 81.21(b)(6)(iii) which relates to authorizing the guardian for property management to turn over a photocopy of the incapacitated person's will or similar instrument.

The appointment of a guardian under Article 81 must be based upon clear and convincing evidence (§ 81.12[a] ) as demonstrated by the petitioner. This standard is much higher than best interests. It is consistent with the stated legislative findings and purpose to afford persons who are the subject of an Article 81 proceeding the opportunity to exercise the independence and self-determination of which they are capable (§ 81.01). The rules of evidence cannot be waived when the matter is contested. (*Matter of Rosa B.-S., supra.*)

By providing the AIP with an abundance of safeguards so as to insure that any guardianship shall only result in the least restrictive form of intervention (§ 81.01; § 81.02[a][2]; § 81.03[d]; § 81.21[a]; and § 81.22[a] ), the legislature clearly expressed its intention that he or she have heightened rights previously absent under former Articles 77 and 78 of the Mental Hygiene Law. Those articles dealt with conservators and committees.

A decision more directly on point is *Matter of United Health Services Hospitals, Inc. (A.G.),* 6 Misc.3d 447, 785 N.Y.S.2d 313 (Broome County 2004). In sum, the Court carefully dissected the issue of an AIP's right to refuse to testify based upon Federal and State Constitutional grounds, the statutory right against self-incrimination incorporated in CPLR 4501, and the important decision by our state's Court of Appeals, *Rivers v. Katz,* 67 N.Y.2d 485, 504 N.Y.S.2d 74, 495 N.E.2d 337 (1986), rearg. den'd 68 N.Y.2d 808, 506 N.Y.S.2d 1039, 498 N.E.2d 438 (1986). That decision made it clear that a person retains his or her civil rights in a proceeding where personal liberty is at stake.

One only need review the powers of a guardian for property management (§ 81.21) and personal needs (§

81.22) to understand that a person's liberty interest is most definitely at stake once a finding of incapacity is made. Determining where the person can live, with whom the person can associate, make medical and dental decisions, determine whether the person should travel, decide the person's social environment, authorize access to or the release of confidential records, whether the person can operate a motor vehicle, ****906** make decisions with respect to the management ***423** and expenditure of one's assets, go to the very core of one's independence and ability to enjoy the pleasures of life. As one noted authority succinctly states: "Simply put, the burden is on the petitioner to prove incapacity, not on the AIP to disprove it." (1 Abrams, *Guardianship Practice in New York State,* Ch. 12, § VI, at 583). A petitioner has available other possibilities. Testimony can be obtained from lay witnesses, such as family members, neighbors or friends, as well as experts. (Fish, "Does the Fifth Amendment Apply in Guardianship Proceedings?", *supra* at 6; MHL § 81.11[2].)

The determination in *Heckl,* which relied upon the determination in *Wynn,* which in turn based its decision on the determination in *Lyon,* was based upon a standard that had already been repealed by the enactment of Article 81. Therefore, this court is not bound by *stare decisis* as stated in *Mountain View Coach Lines, Inc. v. Storms,* 102 A.D.2d 663, 476 N.Y.S.2d 918 (2d Dept.1984).

For the foregoing reasons, the AIP's objection to being compelled to testify as a witness for the petitioner is sustained.

The foregoing constitutes the decision and order of the Court.

**All Citations**

37 Misc.3d 418, 948 N.Y.S.2d 902, 2012 N.Y. Slip Op. 22204

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KeyCite Yellow Flag - Negative Treatment
Disagreement Recognized by In re Heckl, N.Y.A.D. 4 Dept., October 2, 2009

6 Misc.3d 447
Supreme Court, Broome County, New York.

In the Matter of the Application of UNITED HEALTH SERVICES HOSPITALS, INC., Petitioner, Pursuant to Article 81 of the Mental Hygiene Law for the Appointment of a Guardian of the Person and Property of AG, An Alleged Incapacitated Person, Respondent.

Nov. 4, 2004.

**Synopsis**
**Background:** Proceeding was brought for appointment of guardian over person and property of an alleged incapacitated person (AIP). AIP objected to being called as a witness on Fifth Amendment grounds.

**[Holding:]** The Supreme Court, Broome County, Eugene E. Peckham, J., held that AIP could not be compelled to testify against his wishes.

Ordered accordingly.

West Headnotes (2)

[1] **Constitutional Law**
Fifth Amendment

The Fifth Amendment privilege against self-incrimination is made applicable to the states by the Fourteenth Amendment to the U.S. Constitution. U.S.C.A. Const.Amends. 5, 14.

3 Cases that cite this headnote

[2] **Witnesses**
Proceedings to Which Privilege Applies

Alleged incapacitated person could not be compelled to testify against his wishes in a hearing brought regarding whether a guardian over person and property should be appointed for that person. U.S.C.A. Const.Amend. 5; McKinney's Mental Hygiene Law § 81.01 et seq.

5 Cases that cite this headnote

**Attorneys and Law Firms**

**313 *448 Alyssa M. Barreiro, Esq., Hinman, Howard & Kattell, LLP, Binghamton, Attorney for Petitioner.

Mental Hygiene Legal Service for the Third Dept., April Smith, of Counsel, Binghamton, Attorney for Respondent.

**Opinion**

EUGENE E. PECKHAM, J.

This is a proceeding under Article 81 of the Mental Hygiene Law for the appointment of a guardian of the person and property of AG, an alleged incapacitated person (AIP). AG did not answer the petition, take any steps to place his condition affirmatively in issue; call any witnesses or waive any of his civil rights or privileges. The petitioner is United Health Services Hospitals, Inc. (UHS), and the proposed guardian is the Broome County Commissioner of Social Services. Mental Hygiene Legal Services was appointed by the Court as counsel for the AIP.

At the trial petitioner called a discharge planner at UHS who testified that since March 2003, AG had been admitted to the hospital over 25 times and had signed himself out against medical advice 16 times. Petitioner also called a registered nurse and case manager who confirmed some of the discharge planner's testimony, but was prevented from testifying further due to objections on the grounds of the nurse-patient privilege. CPLR § 4504.

Petitioner next called the AIP as a witness. The AIP's attorney objected on two grounds: 1) The Fifth Amendment right not to testify when a liberty interest is at stake, and 2) that permitting petitioner to call the AIP would shift the burden of proof that is imposed upon Petitioner by MHL § 81.12(a). The question of whether the Fifth Amendment right to remain silent applies to an

Article 81 hearing is a matter of first impression in New York.

[1] The Fifth Amendment privilege against self-incrimination is made applicable to the states by the Fourteenth **314 Amendment to the U.S. Constitution. *In re Gault*, 387 U.S. 1 at 49, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1966). Article 1 § 6 of the New York Constitution contains a similar privilege. This privilege has been incorporated as a rule of evidence in CPLR § 4501, which says "This section does not require a witness to give an answer which will tend to accuse himself of a crime or to expose him to a penalty or forfeiture ..."

In an Article 81 proceeding, a guardian can be given the power to manage and control the decedent's property, including powers *449 to make gifts, provide support for the AIP and his or her dependents, renounce or disclaim property interests and release confidential records. MHL § 81.21. In addition, a guardian of the person can be given power to decide whether the AIP can have a driver's license, to make medical decisions for the AIP and to choose the place of abode of the AIP, including the power to place the AIP in a nursing home or residential care facility. MHL § 81.22. The petition in this case requested all of these powers.

There has been great debate over the last 30 years as to whether the Fifth Amendment privilege applies in proceedings for the commitment of a mentally ill person. The U.S. Supreme Court declined to reach the issue in *McNeil v. Patuxent Institution*, 407 U.S. 245 at 250, 92 S.Ct. 2083, 32 L.Ed.2d 719 (1972). But see *Allen v. Illinois*, 478 U.S. 364, 106 S.Ct. 2988, 92 L.Ed.2d 296 (1986) where the Supreme Court said the right against self incrimination does not apply in proceedings for commitment of "sexually dangerous persons". However, in a concurring opinion in *McNeil*, Justice Douglas argued the privilege should apply.

"Whatever the Patuxent procedures may be called—whether civil or criminal—the result under the Self Incrimination Clause of the Fifth Amendment is the same. As we said in *In re Gault*, 387 U.S. 1, 49–50 [87 S.Ct. 1428, 18 L.Ed.2d 527], there is a threat of self-incrimination whenever there is a 'deprivation of liberty'; and there is such a deprivation whatever the name of the institution, if a person is held against his will." Id. at 257, 92 S.Ct. 2083.

Thereafter, in reliance primarily on Justice Douglas' opinion, a number of state and federal courts ruled on the issue with the cases going both ways. The cases are collected in Perlin, 1 *Mental Disability Law*, § 2C–4.11 at pp. 358–364 (2d Ed.). Most of these cases involved the question of whether an allegedly mentally ill person could refuse to answer questions in a psychiatric interview for the purposes of the commitment hearing. E.g. *Ughetto v. Acrish*, 130 Misc.2d 74, 494 N.Y.S.2d 943 (Sup.Ct. Dutchess Co.1985) *modified on other grounds* 130 A.D.2d 12, 518 N.Y.S.2d 398 (2d Dept.1987) *appeal dismissed* 70 N.Y.2d 871, 523 N.Y.S.2d 497, 518 N.E.2d 8 (1987) (privilege does not apply to pre-hearing psychiatric interview for a retention hearing under Article 9 of the Mental Hygiene Law).

[2] The precise question presented here is: Can the AIP be called by petitioner to testify against himself in an Article 81 guardianship hearing? *Matter of Matthews*, 46 Or.App. 757, 613 P.2d 88 (1980) involved a civil commitment proceeding for a mentally ill person. The Oregon appellate court stated:

> *450 "This is an appeal from an order of commitment finding appellant to be a mentally ill person as defined in ORS 426.005(2). The sole issue on appeal is whether an alleged mentally ill person has a right to remain silent in a civil commitment proceeding. The trial court concluded that the Fifth Amendment privilege did not apply and directed appellant to speak. We affirm."

**315 On the other hand, *Tyars v. Finner*, 518 F.Supp. 502 (C.D.Calif.1981) *aff'd on other grounds* 709 F.2d 1274 (1983) held the opposite. The case was a habeas corpus petition by a patient committed to a state mental hospital after a jury trial. At the trial, the patient was called as an adverse witness by the state prosecutor. Over the objection of his counsel on Fifth Amendment grounds, the trial court nevertheless required him to testify. The Federal District Court held that this was an error saying "Instead of shouldering the entire load, proving its case by its own independent labors, California violated petitioner's right to remain silent" Id. at 510. Although the issue is similar, neither of these two cases involved a guardianship hearing.

The leading treatise on guardianship in New York agrees with *Tyars* and states that the AIP cannot be compelled to testify against his wishes in an Article 81 proceeding.

"... There is no ... authority under Article 81 for the court to compel an unwilling AIP to take the stand to assist the petitioner in establishing incapacity ..." Abrams, *Guardianship Practice in New York State*, pp. 583–5.

The New York Court of Appeals has repeatedly made it clear that a person retains his or her civil rights in a proceeding where personal liberty is at stake. In *Rivers v. Katz*, 67 N.Y.2d 485 at 497, 504 N.Y.S.2d 74, 495 N.E.2d 337 (1986) it held

> "We likewise reject any argument that involuntarily committed patients lose their liberty interest in avoiding the unwanted administration of antipsychotic medication ... We hold, therefore, that in situations where the State's police power is not implicated, and the patient refuses to consent to the administration of antipsychotic drugs, there must be a judicial determination of whether the patient has the capacity to make a reasoned decision with respect to proposed treatment before the drugs may be administered pursuant to the State's *parens patriae* power. The determination should be made at a ***451** hearing following exhaustion of the administrative review procedures provided for in 14 NYCRR 27.8. The hearing should be de novo, and the patient should be afforded representation by counsel (Judiciary Law § 35[1][a]). The State would bear the burden of demonstrating by clear and convincing evidence the patient's incapacity to make a treatment decision."

A few years later in *Matter of Grinker (Rose)*, 77 N.Y.2d 703 at 710, 570 N.Y.S.2d 448, 573 N.E.2d 536 (1991) the Court held under the former conservatorship statute, Article 77 of the Mental Hygiene Law, that a conservator of the property did not have power to place an incapacitated person in a nursing home involuntarily. The court held:

> "Assuming, without deciding, that Mental Hygiene Law § 77.19 authorizes a grant of limited power over a conservatee's person incidentally related to the primary power over property, we conclude that it clearly does not authorize the potent personal transformation of involuntary commitment of a conservatee to a nursing home. The availability of such a significant involuntary displacement of personal liberty should be confined to a Mental Hygiene Law article 78 incompetency proceeding, with its full panoply of procedural due process safeguards." (Citations omitted)

Most recently, our highest court has held that the AIP in an Article 81 proceeding has a constitutional right to counsel. The court said:

> "In any proceeding brought pursuant to Mental Hygiene Law article 81 ... in which the petition seeks powers for a guardian of the person to either place ****316** the indigent allegedly incapacitated person (AIP) in a nursing home or other institutional facility, or to make major medical decisions, an indigent AIP is constitutionally entitled to counsel at public expense." *Matter of St. Luke's–Roosevelt Hospital*, 89 N.Y.2d 889, 653 N.Y.S.2d 257, 675 N.E.2d 1209 (1996).

Another similar privilege that is frequently invoked in Article 81 proceedings is the privilege of confidential communication between doctor and patient. CPLR § 4504. The Second Department has recently held that the doctor-patient privilege applies in Article 81 proceedings unless the AIP waives the privilege or affirmatively asserts his or her mental condition at trial. *Matter* ***452** *of Rosa B.*, 1 A.D.3d 355, 767 N.Y.S.2d 33 (2d Dept.2003). Accord, *Matter of Janczak*, 167 Misc.2d 766, 634 N.Y.S.2d 1020 (Sup.Ct. Ontario Co.1995); *Matter of Higgins*, N.Y.L.J., 10/6/95, p. 27, col. 2 (Sup.Ct. New York Co.); *Matter of Tara X*, N.Y.L.J., 9/18/96, p. 27, col. 1 (Sup.Ct. Suffolk Co.).

MHL § 81.12(b) permits the Court for good cause shown to waive the rules of evidence in an Article 81 proceeding. However, the courts have repeatedly held that the rules of evidence may only be waived in uncontested proceedings.

If the AIP contests the proceeding, the rules of evidence are waived only if the AIP affirmatively places his or her mental condition in issue. *Matter of Rosa B.*, supra; *Matter of Tara X, supra; Matter of Higgins, supra; Matter of Seidner*, N.Y.L.J., 10/8/97, p. 28, col. 4 (Sup.Ct. Nassau Co.).

In addition to being a Constitutional right, the right to remain silent of the Fifth Amendment is also a rule of evidence in civil proceedings in New York. It is a privilege set forth in CPLR § 4501 just as the physician-patient privilege is set forth in CPLR § 4504. In this contested Article 81 proceeding, AG has neither waived his privileges nor affirmatively placed his mental condition in issue. Rather when called to testify by the petitioner, he asserted his constitutional privilege to remain silent and not testify against himself. In a contested proceeding where the rules of evidence, including the CPLR § 4501 privilege, are not waived, he had that right.

*In re Gault, supra,* held that juvenile delinquency proceedings even though nominally denominated civil proceedings could result in placement in an institution with concomitant deprivation of liberty. Thus the Court held that the Fifth Amendment privilege against self incrimination applied in those proceedings. Equally as much in Article 81 proceedings, the AIP can be deprived of liberty. If the evidence warrants, the guardian can be given the power to place the incapacitated person involuntarily in a nursing home or other institution, to make medical decisions for him or her, including the power to withhold or withdraw life sustaining treatment. MHL § 81.22 and § 81.29(e).

If patients do not lose their rights to make their own decision regarding administration of antipsychotic drugs, in similar fashion AIP's should not lose to a guardian their rights to make their own medical decisions. If an AIP has a right to counsel, he or she should also have the right to remain silent on the advice of that counsel. The potential deprivation of liberty in Article 81 ***453** mental hygiene proceedings is potentially the same as or even more severe than the deprivation of liberty in juvenile cases. In both situations the respondent can be placed in an institution against his or her will. Under Article 81, the guardian may even be given the power of life or death, that is to withhold or withdraw life sustaining treatment. MHL § 81.29(e). ****317** The Fifth Amendment should apply equally in both situations.

It is inherently offensive to our Constitution and due process to require a person to testify against himself or herself in a proceeding where that persons's liberty is at stake. The Fifth Amendment triumphantly says it cannot be done in criminal prosecutions. The Supreme Court has held it cannot be done in juvenile proceedings. *In re Gault, supra.* The same has to be true of proceedings where a person's life and liberty is at risk due to allegations of mental illness or incapacity. The right not to testify set forth in CPLR § 4501 and the Constitution has not been waived. The next step that follows logically from the Court of Appeals decisions in *Rivers, Grinker,* and *St. Luke's* is that AG has the right to remain silent and refuse to testify against himself in this Article 81 proceeding. Due process requires nothing less.

The evidence presented that AG has been hospitalized numerous times and has signed himself out of the hospital against medical advice numerous times, standing alone, is not clear and convincing evidence of lack of capacity. The burden of proof is on the petitioner and does not shift to the respondent. It cannot be shifted by calling the AIP as a witness in the petitioner's case in chief. *Tyars v. Finner, supra; Abrams, supra.* Petitioner has not met its burden of proof.

It is therefore the order of the Court that the petition be dismissed. The temporary guardianship of AG granted to Arthur Johnson as Commissioner of Social Services is revoked. This decision is the Order of the Court.

**All Citations**

6 Misc.3d 447, 785 N.Y.S.2d 313, 2004 N.Y. Slip Op. 24454

**End of Document**

27 Misc.3d 1215(A)
Unreported Disposition
(The decision of the Court is referenced
in a table in the New York Supplement.)
Supreme Court, Suffolk County, New York.

In the Matter of the Application of The INCORPORATED VILLAGE OF PATCHOGUE, Petitioner, Pursuant to Article 81 of the Mental Hygiene Law for the Appointment of a Guardian of the Property of Alice Zahnd, An Alleged Incapacitated Person.

No. 42301/08.
|
April 9, 2010.

**Attorneys and Law Firms**

Jeffrey T. Grabowski, Esq., Guardianship Referee, Supreme Court, Suffolk County, Central Islip, NY.

Egan & Golden, LLP, Patchogue, NY, for petitioner.

Vincent J. Messina, Jr., Esq., Central Islip, NY, for Alice Zahnd.

Mental Hygiene Legal Service, Riverhead, NY.

Daniel J. Smith, Esq., Special Guardian, David A. Smith, Esq., PLLC, Garden City, NY.

**Opinion**

MARTHA L. LUFT, J.

*1 The petitioner commenced this proceeding to seek the appointment of a Guardian of the property of Alice Zahnd pursuant to article 81 of the Mental Hygiene Law, with powers relating generally to responding to alleged Village Code violations existing on her property located at 16 Bransford Street, Patchogue, New York. A hearing was held in this matter at which Ms. Zahnd was represented by counsel. Ms. Zahnd chose not to attend the hearing as, apparently, is her prerogative (*see, Matter of Lillian U.*, 66 A.D.3d 1219, 887 N.Y.S.2d 321 [3d Dept 2009] [suggesting an Alleged Incapacitated Person's presence at a hearing could be excused based on that person's unwillingness to attend] ).

The Court finds that it has jurisdiction over Alice Zahnd and that Suffolk County is the proper venue of this proceeding. Ms. Zahnd resided at the Patchogue Nursing Center, 25 Schoenfeld Boulevard, Patchogue, New York when this proceeding was commenced, and continues to reside there. As noted above, she also owns property at 16 Bransford Street in Patchogue.

Alice Zahnd was born on XX/XX/1931, and, thus, is seventy-eight years old. She entered the Patchogue Nursing Center in November of 2006, coming from Brookhaven Memorial Hospital where she had spent the prior couple of weeks.

Ms. Zahnd has not consented to the appointment of a Guardian. For the reasons stated below, the Court finds that a Special Guardian should be appointed for Alice Zahnd with powers pertaining to her property management needs, and the power to explore and investigate whether additional powers are required.

The clear and convincing evidence before the Court establishes that the alleged incapacitated person, Alice Zahnd, suffers from functional limitations. Specifically, she requires assistance with all of her activities of daily living at the Patchogue Nursing Center. She needs assistance with her mobility and has fallen frequently in the Nursing Center. Prior to entering the hospital and then the nursing home, Ms. Zahnd was living in deplorable conditions, without a functioning kitchen and bathroom, and with animal feces scattered about the floor. She is not able to manage her property, and is, at times, under the misapprehension that her parents are looking after her house for her. Although she has been in the Patchogue Nursing Center for almost three and a half years, she states that she is just a visitor there and will return home. Due to the high level of care she requires, her statement is unrealistic, to say the least. She claims that she pays her own property taxes although Village records indicate that taxes have not been paid for the past couple of years. Thus, the clear and convincing proof further establishes that Ms. Zahnd lacks the understanding or appreciation of the nature and consequences of her functional limitations relative to the management and potential liabilities that exist and that may arise in connection with her property at 16 Bransford Street, Patchogue, New York, and that she is likely to suffer harm based thereon.The appointment of a Special Guardian to address issues relative to, and

arising out of, such real property is, therefore, necessary to prevent harm to Ms. Zahnd.

*2 Although, even without drawing any inference based on Ms. Zahnd's election not to appear at the hearing of this matter, there is sufficient clear an convincing evidence in the record to support a finding that Ms. Zahnd is an incapacitated person requiring the assistance of a Special Guardian, the Court's findings are, nevertheless, further supported by an inference drawn against Ms. Zahnd based on her non-appearance (*see, e.g., Brown v. City of New York,* 50 A.D.3d 937, 856 N.Y.S.2d 665 [2d Dept 2008]; *see generally, Matter of Heckl,* 66 A.D.3d 1344, 886 N.Y.S.2d 295 [4th Dept 2009] ).

The Court Evaluator recommended that a Guardian be appointed with personal needs powers, as well as property management powers. However, the petition did not request the former relief, and the Court, therefore, cannot find that there was proper notice to Ms. Zahnd of such a request. Moreover, the evidence adduced did not present a clear picture of how and whether all of Ms. Zahnd's personal needs are currently met without the benefit of a Mental Hygiene Law article 81 Guardian.

The powers requested in the petition focus exclusively on addressing the legal issues surrounding the property at 16 Bransford Street, Patchogue, New York. The petitioner did not take the trouble to investigate and address any other property management needs Ms. Zahnd might have. The Court is thus constrained in detailing the powers appropriate for Ms. Zahnd's Guardian due to the paucity of information presented at the hearing. For example, the Court Evaluator alluded to the fact that a sale of the property might be in Ms. Zahnd's interests to enable her to perhaps reside in a more pleasant nursing facility.

Under all of the above circumstances, the Court finds that the appointment of a Special Guardian to address the legal issues surrounding the property at 16 Bransford Street, Patchogue, New York, to investigate and report back to the Court whether additional powers should be sought, and/or a permanent guardian appointed, and to make whatever application may be appropriate based upon such investigation is warranted.

The Special Guardian shall be Daniel J. Smith, Esq.

The Special Guardian shall have the following powers:

To undertake an investigation to determine the assets of Alice Zahnd, and to marshal accounts or other liquid assets sufficient to allow him to exercise the additional powers granted to him as Special Guardian for Alice Zahnd, and to pay such compensation as the Court may award herein;

To prosecute, defend, settle and maintain any cause of action, arbitration or civil judicial proceeding concerning, or arising out of Alice Zahnd's ownership interest, in the real property located at 16 Bransford Street, Patchogue, New York, including commencing a summary proceeding to recover possession of such real property or an ejectment action, as may be appropriate, provided that any settlement of any judicial action or civil judicial proceeding shall be subject to the approval of the Judge or Justice presiding therein;

*3 To nominate for appointment by the Court counsel to appear for the Special Guardian in any such cause of action, arbitration or civil judicial proceeding;

To nominate for appointment by the Court counsel to represent the rights and interests of Alice Zahnd relative to any criminal proceeding pending or that may be commenced against Alice Zahnd arising out of or in connection with her ownership interest in the real property located at 16 Bransford Street, Patchogue, New York;

To take reasonable and appropriate steps to cure or eliminate any unsafe or illegal conditions existing at the real property located at 16 Bransford Street, Patchogue, New York, including retaining the services of appropriate, qualified contractors, the compensation of which shall be subject to the approval of the Court;

To conduct an appropriate investigation of all relevant circumstances to assess whether it is in the best interests of Alice Zahnd to sell her interest in the real property located at 16 Bransford Street, Patchogue, New York, and as he may deem appropriate, to move for an expansion of his powers as Special Guardian to include the power to commence a proceeding to sell Alice Zahnd's interest in the subject real property pursuant to article 17 or the Real Property Actions and Proceedings Law;

To nominate for appointment by the Court attorneys, accountants, brokers and similar professionals in

connection with the Special Guardian's powers relative to issues concerning the real property located at 16 Bransford Street, Patchogue, New York and Alice Zahnd's interest therein;

To investigate whether Alice Zahnd has additional property management needs requiring the expansion of the Special Guardian's powers or the appointment of a permanent Mental Hygiene Law article 81 Guardian, to report to the Court with respect to the result of such investigation, and to move for an expansion of powers or the appointment of a permanent Property Management Guardian as may be warranted;

To investigate whether Alice Zahnd has personal needs issues, (including an issue as to whether a more suitable or pleasant place of abode should and can be obtained), requiring the expansion of the Special Guardian's powers or the appointment of a Mental Hygiene Law article 81 Guardian, to report to the Court with respect to the result of such investigation, and to move for an expansion of powers or the appointment of a permanent Personal Needs Guardian as may be warranted; and

To serve as his own counsel for the purpose of making further applications to this Court in this proceeding, inasmuch as there is compelling reason to avoid the additional expense and complication that would arise if the Special Guardian is required to nominate counsel for appointment for each subsequent application that may be made to this Court (*see*, 22 NYCRR 36.2[c][8] ).

The Special Guardian shall report to the Court on all matters done pursuant to the order of appointment, and shall serve as such until discharged by order of the Court (*see*, Mental Hygiene Law § 81.16[b] ).

***4** The requirement of a bond is waived.

The appointment of a Special Guardian with the powers specified above constitutes the least restrictive form of intervention consistent with this Court's findings after the hearing.

As provided in Mental Hygiene Law § 81.16[b], the Court may approve "a reasonable compensation" for the Special Guardian. Accordingly, the Special Guardian is granted leave to submit a detailed affidavit of services actually rendered and accompanying time records in support of an application for compensation to be based on the actual services rendered and the time expended. It should be noted that the services of a Guardian are not calculated at the same rate as are legal services (*see, Matter of Helen C.*, 2 A.D.3d 729, 768 N.Y.S.2d 617 [2d Dept 2003]; *Matter of Arnold "O"*, 256 A.D.2d 764, 681 N.Y.S.2d 627 [3d Dept 1998] ).

The proposed Special Guardian shall submit to the Guardianship Clerk of this Court and the Guardianship Referee the designation of the Clerk to receive process and consent to act, and the proposed commission, within twenty days from the date of the signing of the order and judgment.

A compliance conference will be scheduled to allow the Court to monitor whether a proposed order and judgment has been noticed for settlement. The compliance conference may be cancelled if the Court has received a proposed order and judgment with a notice of settlement.

In addition, a control date shall be set to allow the Court to monitor whether the Special Guardian has reported with respect to accomplishing the tasks for which he has been appointed. The Court may seek a status report if the Special Guardian's tasks are not concluded by the control date.

Any of the Court's appointees and anyone else in this matter seeking an award of compensation from the assets of Alice Zahnd should submit a detailed affidavit of services.

Counsel for Alice Zahnd is directed personally to deliver to her a copy of the order and judgment to be issued hereon and explain it to her in a manner which she can reasonably be expected to understand as required by Mental Hygiene Law § 81.16(e).

The petitioner is directed to settle the order and judgment within thirty days on at least ten days notice to all parties served with the order to who cause and petition or notice of proceeding.

Consistent with the foregoing, it is

***ORDERED*** that a copy of this memorandum and order shall be served together the proposed order and judgment to be noticed for settlement herein, and filed with the

Guardianship Clerk of this Court together with the proposed order and judgment, and it is further

***ORDERED*** that the decretal paragraph of this memorandum and order scheduling the control date set to allow the Court to monitor whether the Special Guardian has reported with respect to accomplishing the tasks for which he has been appointed shall be referenced in the recital in order and judgment to be issued herein, and (unless otherwise modified) shall remain in full force and effect upon issuance of the order and judgment, and it is further

*5 ***ORDERED*** that counsel for the petitioner appear for a conference before the Guardianship Referee, Jeffrey T. Grabowski, Esq., [ (631) 853–5160] on May 26, 2010 at 9:30 A.M. at the Supreme Court, 400 Carleton Avenue, Central Islip, New York, to monitor compliance with the requirement of serving a notice for settlement of a proposed order and judgment, unless prior to that date the conference is cancelled. The conference may be cancelled if the Court has received a proposed order and judgment with a notice of settlement.

It is further

***ORDERED*** that the Guardianship Referee notify the Court immediately if the proposed order and judgment is not noticed for settlement as directed, and it is further

***ORDERED*** that this matter is scheduled for control purposes only on August 18, 2010 to allow the Court to monitor whether the Special Guardian has reported with respect to accomplishing the tasks for which he has been appointed

**All Citations**

27 Misc.3d 1215(A), 910 N.Y.S.2d 762 (Table), 2010 WL 1712242, 2010 N.Y. Slip Op. 50755(U)

**End of Document**

I. LEGISLATIVE HISTORY & ROLE OF COUNSEL

a. Under the prior statutes (MHL Articles 77 or 78) guardians ad litem were appointed.
    1. It was not clear whether the GAL was the "eyes and ears of the court" or advocates for the subjects of these proceedings.
        a. The enactment of Article 81 resolved this issue:
            i. The Court Evaluator is the "eyes and ears of the court"
            ii. Counsel is the advocate for the subject of the proceeding

II. WHEN APPOINTMENT OF COUNSEL IS OR IS NOT NECESSARY

a. Mandatory in any of the circumstances set forth in MHL §81.09(c)(1) through (7)
b. Should be appointed in all instances where there is no evidence that the AIP made an informed decision to refuse the assistance of counsel (Gulizar N.O. v Rudy O., 111 AD3d 749 [2d Dept 2013])
c. Need not be appointed when
    i. The only issue is the discovery of property claimed to belong to the IP (no constitutional interest at stake) (In re Richard, 10 Misc 3d 1072(A) [Sup Ct, Tompkins Co. 2005])
    ii. The court determines the a previously executed Power of Attorney and Health Care Proxy were valid, obviating the need for a guardianship (In re Mildred M.J., 43 AD3d 1391, 1393 [4th Dept 2007])

III. DUTIES OF COUNSEL

a. Presenting the position of the alleged incapacitated person (AIP) to the court
    i. This includes, at a minimum, inclusion of the following:
        1. Personal interviews with the client; and
        2. Explaining the nature of the proceeding, rights of the client, possible positions that can be taken, and the consequences of same; and
            a. This can be difficult in instances where the client is unable to participate in the decision making process
                i. It is not ethically permissible for the lawyer to usurp the authority of the client without his or her consent or the authority granted by the court due to the rule of presumed competence
        3. Identifying and obtaining evidence to be presented at the hearing; and
        4. Identifying and providing for the attendance of witnesses at the hearing; and
        5. Motion practice, if necessary or advisable
            a. Motion to dismiss the petition for facial insufficiency.
                i. "'Conclusory allegations without specific factual allegations of incapacity are insufficient and warrant dismissal.' ***Matter of Meisels,*** 10 Misc.3d

659 ***citing Matter of Petty,*** 256 A.D.2d 281. This is primarily because the Fifth Amendment protections against self-incrimination apply to Article 81 proceedings where a person's "life and liberty are at risk due to allegations of mental illness or incapacity," requiring a petitioner to present specific factual allegations regarding the AIP's incapacity. ***Matter of A.G.,*** 6 Misc.3d 447. The specific factual allegations must be supported by clear and convincing evidence of the AIP's incapacity. ***See,*** MHL §§ 81.02 and 81.12(a)."
In re Kufeld, 23 Misc 3d 1131(A) (Sup Ct, Bronx Co., 2009)

ii. Proceeding not utilized for proper purpose
    1. Most courts will not entertain the use of Article 81 in instances of drug or alcohol abuse, except in certain limited instances
    2. Article 81 is not to be used for tax planning purposes or to extend parental control over an incorrigible child (In re Doe, 181 Misc 2d 787 [Sup Ct, Nassau Co. 1999])

b. Motion to quash subpoena(s)
c. Motion in limine (confidential records, assertion of privilege, etc.)
d. Motion to dispense with or suspend the appointment of a court evaluator
    i. Financial purposes
    ii. Strategic purposes
e. Application for Orders of Protection (See, In re Jaar-Marzouka, 51 Misc 3d 1226(A) [Sup Ct Dutchess Co. 2016])
f. Application for the court to conduct a criminal history check pursuant to MHL § 81.19(g)(1)(i)

6. Participation at the hearing

b. Post hearing matters
    i. Submission or review of proposed order and judgment
    ii. Review of fee applications
        1. Absent a provision to the contrary, the withdrawal of a petition pursuant to stipulation of settlement has been deemed to be the functional equivalent of a dismissal, resulting in an assessment of one hundred percent of the cost of the legal fees incurred by the court evaluator as well as by the counsel for the AIP to the petitioner. (See, e.g., In re Laurence H., 51 Misc 3d 834 [County Ct, NY Co., 2016])

2. The court cannot assess against the petitioner the fee of a privately retained attorney for an AIP who successfully defends against an Article 81 petition except in instances which involve frivolous conduct by the petitioner. (See In re Petty, 256 AD2d 281 [1st Dept 1998]; see, also, Petition of Rocco, 161 Misc 2d 760 [Sup Ct, Suffolk Co. 1994] for a discussion of the possible chilling effect of the statutory provision)

iii. Compliance with deadlines set by the court

IV. PROTECTION AGAINST SELF INCRIMINATION

a. Can an AIP be compelled to testify at an Article 81 hearing?

i. Yes, if the proceeding is in the 4th Department:

1. "We reject the contention of the IP that the court violated her due process rights by requiring her to testify at the hearing. Although the Mental Hygiene Law is silent on the issue whether the person alleged to be incapacitated (AIP) may be compelled to testify, we note that section 81.11(c) requires the presence of the AIP at the hearing "so as to permit the court to obtain its own impression of the person's capacity." In addition, we note that we previously rejected the contention of the IP that her Fifth Amendment rights against self-incrimination are implicated in an article 81 proceeding (*see Aida C.,* 44 A.D.3d at 115, 840 N.Y.S.2d 516; *cf. Matter of A.G.,* 6 Misc.3d 447, 452–453, 785 N.Y.S.2d 313). We likewise conclude that her due process rights are not violated inasmuch as the court is charged with determining her best interests (*see generally Wynn,* 11 A.D.3d at 1015, 783 N.Y.S.2d 179).
In re Heckl, 66 AD3d 1344, 1347–48 (4th Dept 2009)

a. The ruling in Heckl has been utilized to compel testimony from an AIP by the Court in other contexts as well. (See, Caryl S.S. v. Valerie L.S., 45 Misc.3d 1223(A) 5 N.Y.S.3d 327 (Sup.Ct. Bronx Co. 2014)(citing Heckl as the basis for the court to question an AIP about the hiring of counsel).

ii. No, if in Broome County or Dutchess County:

1. "One only need review the powers of a guardian for property management (§ 81.21) and personal needs (§ 81.22) to understand that a person's liberty interest is most definitely at stake once a finding of incapacity is made. Determining where the person can live, with whom the person can associate, make medical and dental decisions, determine whether the person should travel, decide the person's social environment, authorize access to or the release of

confidential records, whether the person can operate a motor vehicle, make decisions with respect to the management and expenditure of one's assets, go to the very core of one's independence and ability to enjoy the pleasures of life. As one noted authority succinctly states: 'Simply put, the burden is on the petitioner to prove incapacity, not on the AIP to disprove it.' (1 Abrams, *Guardianship Practice in New York State,* Ch. 12, § VI, at 583). A petitioner has available other possibilities. Testimony can be obtained from lay witnesses, such as family members, neighbors or friends, as well as experts. (Fish, "Does the Fifth Amendment Apply in Guardianship Proceedings?", *supra* at 6; MHL § 81.11[2].)"
In re Allers, 37 Misc 3d 418, 422–23 (Sup Ct, Dutchess Co., 2012); see, also, Matter of United Health Services Hospitals, Inc. (A.G.), 6 Misc.3d 447, 785 N.Y.S.2d 313 (Sup.Ct., Broome County 2004).

b. Conflict between MHL provisions and the theory supporting protection against self-incrimination
    i. Notwithstanding that the burden is on the petitioner, and in the above instances an AIP will not be compelled to testify at the hearing, MHL §8.11(c) requires the presence of the AIP at the hearing "so as to permit the court to obtain its own impression of the person's capacity." Is this not as damaging as testimony in some instances?
        1. In addition, If the AIP refuses to appear at the hearing, the court will draw a negative inference. (In re Inc. Vil. of Patchogue, 27 Misc 3d 1215(A) [Sup Ct Suffolk Co., 2010][citing Heckl, supra]).

**§ 81.10 Counsel**

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

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

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

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

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

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

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

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a. Mandatory in any of the circumstances set forth in MHL §81.09(c)(1) through (7)
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            a. Motion to dismiss the petition for facial insufficiency.
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        1. Absent a provision to the contrary, the withdrawal of a petition pursuant to stipulation of settlement has been deemed to be the functional equivalent of a dismissal, resulting in an assessment of one hundred percent of the cost of the legal fees incurred by the court evaluator as well as by the counsel for the AIP to the petitioner. (See, e.g., In re Laurence H., 51 Misc 3d 834 [County Ct, NY Co., 2016])

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iii. Compliance with deadlines set by the court

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i. Yes, if the proceeding is in the 4th Department:

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a. The ruling in Heckl has been utilized to compel testimony from an AIP by the Court in other contexts as well. (See, Caryl S.S. v. Valerie L.S., 45 Misc.3d 1223(A) 5 N.Y.S.3d 327 (Sup.Ct. Bronx Co. 2014)(citing Heckl as the basis for the court to question an AIP about the hiring of counsel).

ii. No, if in Broome County or Dutchess County:

1. "One only need review the powers of a guardian for property management (§ 81.21) and personal needs (§ 81.22) to understand that a person's liberty interest is most definitely at stake once a finding of incapacity is made. Determining where the person can live, with whom the person can associate, make medical and dental decisions, determine whether the person should travel, decide the person's social environment, authorize access to or the release of

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**§ 81.10 Counsel**

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

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

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

1. the person alleged to be incapacitated requests counsel;
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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;
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# UNDERSTANDING THE ROLE OF COURT EVALUATOR

Materials Prepared and Presented by:
Sheryl L. Randazzo, Esq.
Randazzo & Randazzo, LLP

**Where Did the Role of Court Evaluator Come From?**

Prior to Guardianship Law as created by the enactment of Article 81 of New York's Mental Hygiene Law,[1] guardianship issues were addressed pursuant to Conservator/Committee Law which has since been revoked.[2] Under those former statutes, the position of guardian ad litem was used to enable the Court to appoint an independent person to advocate for the person claimed to be in need of a guardian, as well as to look out for that person's best interest. However, the role of providing advocacy and the role of protecting a person's best interest were often found to contradict one another and conflicts resulted.

Upon the enactment of Article 81, the role of Court Evaluator was created to clarify the prior role(s) of guardian ad litem, and to prevent the frequent conflicts that occurred. In particular, the Court Evaluator is intended to protect the best interests of a person for whom a guardianship is sought, and the statute further provides for the appointment of counsel to protect that same person's right to an advocate.

**What is the Role of the Court Evaluator?**

Generally stated, it is the role of the Court Evaluator to investigate all of the circumstances that surround a person alleged to be incapacitated or in need of a guardian. According to the Law Revision Commission's Comment included with §81.09 at its inception –

> 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.

A list of the actual functions and responsibilities of the Court Evaluator are provided for by Article 81 at Section 81.09.[3]

**Who May Serve as Court Evaluator?**

Since Article 81's inception through to and including its current revisions, it is very clear that the role of Court Evaluator is not limited to attorneys. Accountants, nurses, social workers and not-

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[1] Article 81 of the Mental Hygiene Law of the State of New York (hereinafter referred to as "Article 81") was enacted in 1992 and effective April 1, 1993.
[2] Articles 77 and 78 of the Mental Hygiene Law of the State of New York were revoked upon Article 81's effective date.
[3] A copy of §81.09, as amended effective June 1, 2011, is attached hereto as Appendix 1.

for- profit corporations, among others, "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[,]" may be appointed, so long as any such person or entity is on the list of those eligible to serve as maintained by the Office of Court Administration.[4]

**When Does the Role of Court Evaluator Begin?**

At the time the court signs an Order to Show Cause commencing a guardianship proceeding, the court typically identifies the person or entity being appointed to serve as Court Evaluator.[5] Upon receiving notice of the appointment, which is usually required by the Order to Show Cause within seven days of its signing, the person so appointed should confirm that he or she has sufficient time and opportunity to complete the requirements of a Court Evaluator, will be able to attend the hearing date as scheduled, and has no conflict of interest with regard to the matter. Article 81 proceedings are expedited proceedings and, as such, are intended to be heard within 28 days of the signing of the Order to Show Cause so a Court Evaluator is expected to act quickly upon notice of being appointed. If that is not possible for the person named as Court Evaluator, he or she should notify the court immediately to enable an alternative appointment to be made.

Once a person decides to accept the appointment as Court Evaluator, certain documents must be filed with the court's Fiduciary Clerk to comply with OCA requirements. If these documents have not been provided to the Court Evaluator as of the date notice of the appointment is received, he or she should personally contact the Fiduciary Clerk immediately to request them.

**Steps to be Taken by the Court Evaluator**

Although the steps to be taken by any Court Evaluator in an actual Article 81 matter will differ depending on the circumstances involved, the following are the most frequent tasks which need to be completed by a Court Evaluator:[6]

1. Confirming personal and subject matter jurisdiction and venue of the proceeding.

2. Meeting, interviewing and observing the alleged incapacitated person.[7]

3. Determining whether the AIP would like counsel and whether counsel should be appointed by the Court.

4. Making personal observations about the AIP's condition, affairs and situation.

5. Determining whether the AIP is able to travel to the courthouse for the hearing.

6. Interviewing the petitioner and other interested parties about the AIP's condition, affairs and situation.

7. Evaluating the sufficiency and reliability of resources available to provide for the AIP's personal needs or property management.

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[4] §81.09(b)(1).

[5] For purposes of these materials, all further references to a person acting as Court Evaluator are also intended to cover any entity acting as Court Evaluator.

[6] This list is a modification of the complete list of the duties of a Court Evaluator as contained at §81.09(5).

[7] Hereinafter, the alleged incapacitated person, or person alleged to be in need of a guardian, shall be referred to as "AIP."

8. Confirming and/or determining the existence of financial resources and their approximate value.

9. Consulting with appropriate professionals with specialized knowledge of the AIP's condition(s) where necessary.

10. If a guardian is believed to be necessary, determining the most appropriate and least restrictive form of intervention required to meet the AIP's needs.

11. Preparing a report and recommendations to be submitted to the court.

12. Attending all court proceedings and conferences.

In addition, Article 81 provides for additional circumstances that must be investigated by a Court Evaluator where the petitioner is seeking to have transfers made on behalf of the AIP.[8]

**Particular Issues Related to the Role of Court Evaluator**

A Guardianship Proceeding is Not A Referendum on Lifestyle

In performing the role of Court Evaluator, the person acting in this capacity must assist the court in reaching a determination as to whether an AIP requires the appointment of a guardian. This determination is based upon an ultimate conclusion being reached by the court after appropriately considering the AIP's current or anticipated personal or property management needs, his or her available resources outside of the potential guardianship,[9] and the likelihood that harm would result to the individual without the appointment of a guardian.[10] This is very different than deciding if there is an alternative way the AIP might be able to do things and manage his or her own life, but which he or she has chosen not to do.

Often situations where a child believes they know better than their parent, or situations where a child does not respect a parent's preferences or independence, can be resolved outside of a

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[8] §81.21(b).

[9] §81.02(a) In its entirety, this subdivision of the statute reads as follows:

(a) The court may appoint a guardian for the 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 [Section 81.02(b)]. In deciding whether the appointment is necessary, the court shall consider the report of the court evaluator, as required in [Section 81.09(c)(5)], and *the sufficiency and reliability of available resources*, as defined in [Section 81.03(e)], *to provide for the 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 [Section 81.03(d)].

(*Emphasis added.*)

[10] §81.02(b) (McKinney 1992), states –

(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.

(*Emphasis added.*)

guardianship if knowledgeable or otherwise appropriate counsel is initially consulted. However, cases still can arise where a guardianship is sought solely for the purpose of attempting to implement someone else's preferred life style for the AIP over the AIP's own choices. Where petitioner's counsel was not able to discern this intention,[11] the Court Evaluator will serve as the AIP's next line of defense in protecting the AIP's dignity, independence and reasonable preferences. In this regard, it is vital to remember that, given certain circumstances, a Court Evaluator may recommend and a court may decide that a guardianship action be dismissed.

Functional Limitation vs. Medical Diagnosis

Article 81's focus on functional levels is one of the most significant changes from its predecessor statutes.[12] Thus, for longtime practitioners in this area who were familiar with providing medical evidence in support of their guardianship-type requests for relief, functional considerations remain an area of insufficient clarity.[13]

"Functional level" is defined by Section 81.03(b) as "... the ability to provide for personal needs and/or the ability with respect to property management." "Functional limitations" are defined by Section 81.03(c) as the "... behavior and conditions of a person which impair the ability to provide for personal needs and/or property management." Thus, neither consideration of an AIP's functional abilities or inabilities requires or even suggests that the formal medical diagnosis or condition of an AIP be considered in making an ultimate determination of capacity.

To the contrary, Article 81's requirements suggest that examples of an AIP's abilities and limitations with respect to personal needs, property management and the activities of his or her daily life are more significant to a court in reaching its determination as to the appropriateness of the appointment of a guardian.[14] Accordingly, this is one of the areas where a Court Evaluator's extensive and meaningful investigation into an AIP's circumstances is particularly important.

May the Court Evaluator Meet with the AIP without Counsel Being Present?

Prior to contacting or meeting with an AIP who is represented by counsel, the Court Evaluator should contact counsel about doing so.[15] This is particularly true where the Court Evaluator is an

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[11] Petitioner's counsel's role is to represent his or her client's position in connection with a guardianship proceeding. In this capacity, seldom will petitioner's counsel have the opportunity to personally observe the AIP or assess the potential need for a guardian prior to commencing a guardianship proceeding. However, by understanding Article 81's requirements and appropriately relaying them to the client, many potential guardianship petitioners properly decide against pursuing such a course of action. This is particularly true where the risks of seeking an unsuccessful guardianship proceeding are fully explained and communicated to the potential petitioner by his or her counsel.

[12] New York Mental Hygiene Law Articles 77 (conservatorships) and 78 (committees), respectively.

[13] There has previously been a great deal of discussion and divergent treatment among the courts hearing guardianship proceedings and guardianship practitioners as to whether medical records *may*, or even in some courts *must*, be submitted as evidence of incapacity in an Article 81 proceeding. Clearly, medical records were not required under Article 81. However, effective December 13, 2004, §81.07(a)(3) has been revised to expressly state that a guardianship court "shall not require that supporting papers contain medical information." For further consideration of this topic, *see*, M. Miller, *Guardianship Proceedings and Physician-Patient Privilege*, in GUARDIANSHIP PRACTICE IN NEW YORK STATE, 529 (R. Abrams 1997), and supplements thereto.

[14] "Personal needs" are defined, in part, as "... food, clothing, shelter, health care and safety." §81.03(f) (McKinney 1992). "Property management" is defined 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." §81.03(g) (McKinney 1992).

[15] GUARDIANSHIP PRACTICE IN NEW YORK STATE, 442 (R. Abrams 1997).

attorney.[16] However, it is important to be aware that Article 81 does not require AIP's counsel to be present for the AIP's meeting with the Court Evaluator.

To better understand the treatment of this matter by the courts, it is important to remember that,

> [while a guardianship] proceeding may be an adversarial proceeding, the Court Evaluator is not an adversarial party nor does he/she serve as an attorney. The Court Evaluator works as an arm of the Court and the assessment [to be] made is of an independent nature.[17]

Thus, a guardianship court's primary interest will be to enable the Court Evaluator's independent investigation and assessment, upon which they are to report and make recommendations to the court.

Notwithstanding, from the perspective of the AIP and their counsel, particularly where the necessity of the appointment of a guardian is being contested, cases occur where counsel might insist on being present for the AIP's meeting with the Court Evaluator due to the serious issues at stake in a guardianship proceeding and the potential loss of liberty to the AIP. Counsel's persistence, together with the circumstances presented in a specific case, will serve as the guide to the Court Evaluator as to how to proceed in regard to this issue.

For instance, if counsel is present but does not interfere with AIP's participation, the opportunity for the Court Evaluator to observe and interview the AIP may not be compromised. However, where AIP's counsel actively interferes with the Court Evaluator's investigation, or if the Court Evaluator believes that the mere presence of counsel has impacted on how the meeting with the AIP proceeded, the Court Evaluator may need to seek court intervention to prevent AIP's counsel from interfering. In such event, a second or even third meeting between the AIP and the Court Evaluator may be necessary. Again, this issue demonstrates the fact-sensitive nature of Article 81 proceedings and the importance of treating matters on a case by case basis.

Appearance at Hearing and Admissibility of Court Evaluator's Testimony

Article 81 requires the Court Evaluator to attend all court proceedings and conferences.[18] However, technically the Court Evaluator is not a "party" in the action.[19] Instead, the Court Evaluator is an investigator and a witness for the court. In such capacity, the Court Evaluator will be expected to testify at the hearing, typically in the narrative, and significant weight is generally given to the Court Evaluator's testimony. The Court Evaluator's Report is also offered into evidence and generally accepted as such.

From the perspective of an AIP and/or AIP's counsel, particularly as a result of the practical consequences of the Court Evaluator's role as a witness, it is extremely important for an AIP to be prepared for the Court Evaluator's visit(s) and any subsequent conversations with the Court Evaluator, and, generally with the assistance of counsel, to be prepared to meaningfully cross-examine the Court Evaluator at the hearing.[20] From the perspective of the court, and particularly where the AIP is not

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[16] New York's Code of Professional Responsibility DR 7-104 requires that an attorney should not contact a person directly if the attorney has knowledge that the person is represented by counsel.

[17] *In Matter of D.G.*, 4 Misc3d 1025A, 2004 NY Misc. LEXIS 1605, 2004 NY Slip Op 51043U [Sup Ct, Kings County 2004].

[18] §81.09(c)(9).

[19] *In re Lulu XX*, 88 N.Y.2d 842, 644 N.Y.S.2d 683 (1996).

[20] The primary issue with regard to a Court Evaluator's testimony is whether it is sufficiently reliable.

represented by counsel, it is also very important that a full and comprehensive record be developed to ensure that the AIP's rights have been fully promoted and protected in the proceeding.

In addition to the Court Evaluator's role as witness at the hearing, many courts permit a Court Evaluator to more fully participate in the hearing, including the right to cross-examine other witnesses in the proceeding. While this varies between different jurisdictions, both a Court Evaluator and all potential witnesses at an Article 81 hearing should be prepared for this possibility.

Payment of the Court Evaluator's Fee

Section 81.09(f) expressly provides for the various sources from which a Court Evaluator's fee may be paid. Specifically, where the guardianship hearing results in a guardian being appointed for the AIP, the Court Evaluator's fee is payable from the AIP's estate.[21] Alternatively, when a guardianship hearing results in a denial or a dismissal of the action, the Court Evaluator's fee may be payable from the AIP's estate, from the petitioner, or a combination of both such parties based upon the court's apportionment.[22] The statute even provides for payment of the Court Evaluator's fee in the event the AIP dies before the court's determination in the proceeding.[23]

As Court Evaluator, it is important to be mindful of the time spent in performing your duties. In cases where a dismissal appears imminent, it is often helpful to make certain that the petitioner is aware of his or her potential liabilities in the proceeding.

## CONCLUSION

Prior to serving as or interacting with a Court Evaluator in an Article 81 proceeding, it would be well-worth your energy to make the relatively small commitment of your time to read and become familiar with Article 81 in its entirety, but particularly the provisions as to a court's required findings and the role of Court Evaluator in helping the court to make such findings. By doing so, you will not only be better able to serve your clients, but the potential benefits of saving time, energy and money will no doubt be in the best interest of the guardianship system as well.

[21] §81.09(f).
[22] Id.
[23] Id.

## Appendix 1

**81.09 Appointment of court evaluator**

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

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

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

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

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

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

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

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

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

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

(ii) does the person wish legal counsel of his or her own choice to be appointed or is the appointment of counsel in accordance with section 81.10 of this article otherwise appropriate;

(iii) can the person alleged to be incapacitated come to the courthouse for the hearing;

(iv) if the person alleged to be incapacitated cannot come to the courthouse, is the person completely unable to participate in the hearing;

(v) if the person alleged to be incapacitated cannot come to the courthouse, would any meaningful participation result from the person's presence at the hearing;

(vi) are available resources sufficient and reliable to provide for personal needs or property management without the appointment of a guardian;

(vii) how is the person alleged to be incapacitated functioning with respect to the activities of daily living and what is the prognosis and reversibility of any physical and mental disabilities, alcoholism or substance dependence? The response to this question shall be based on the evaluator's own assessment of the person alleged to be incapacitated to the extent possible, and where necessary, on the examination of assessments by third parties, including records of medical,

psychological and/or psychiatric examinations obtained pursuant to subdivision (d) of this section. As part of this review, the court evaluator shall consider the diagnostic and assessment procedures used to determine the prognosis and reversibility of any disability and the necessity, efficacy, and dose of each prescribed medication;

(viii) what is the person's understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living;

(ix) what is the approximate value and nature of the financial resources of the person alleged to be incapacitated;

(x) what are the person's preferences, wishes and values with regard to managing the activities of daily living;

(xi) has the person alleged to be incapacitated made any appointment or delegation pursuant to section 5-1501, 5-1505, or 5-1506 of the general obligations law, section two thousand nine hundred sixty-five or two thousand nine hundred eighty-one of the public health law, or a living will;

(xii) what would be the least restrictive form of intervention consistent with the person's functional level and the powers proposed for the guardian;

(xiii) what assistance is necessary for those who are financially dependent upon the person alleged to be incapacitated;

(xiv) is the choice of proposed guardian appropriate, including a guardian nominated by the allegedly incapacitated person pursuant to section 81.17 or subdivision (c) of section 81.19 of this article; and what steps has the proposed guardian taken or does the proposed guardian intend to take to identify and meet the current and emerging needs of the person alleged to be incapacitated unless that information has been provided to the court by the local department of social services when the proposed guardian is a community guardian program operating pursuant to the provisions of title three of article nine-B of the social services law;

(xv) what potential conflicts of interest, if any, exist between or among family members and/or other interested parties regarding the proposed guardian or the proposed relief;

(xvi) what potential conflicts of interest, if any, exist involving the person alleged to be incapacitated, the petitioner, and the proposed guardian; and

(xvii) are there any additional persons who should be given notice and an opportunity to be heard.

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

6. interviewing or consulting with professionals having specialized knowledge in the area of the person's alleged incapacity including but not limited to developmental disabilities, alcohol and substance abuse, and geriatrics.

7. retaining an independent medical expert where the court finds it is appropriate, the cost of which is to be charged to the estate of the allegedly incapacitated person unless the person is indigent.

8. conducting any other investigations or making recommendations with respect to other subjects as the court deems appropriate.

9. attending all court proceedings and conferences.

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

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

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

(As amended through to and including June 1, 2011.)

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# Article 81 Training
# December 5, 2018

## ROLE OF THE GUARDIAN

I. Duties and Responsibilities

A. Qualifying as the Guardian

1. Apply for a bond if one is required.

2. Prepare a Commission. This is the document that is issued by the County Clerk which sets forth the powers that have been granted to the Guardian.

3. Submit the Commission, Oath and Designation, Consent to Act and the bond, if required, to the clerk of the Court.

II. General Duties of the Guardian

A. The following general duties apply to both guardians of the person and guardians of the property:

1. Exercise only those powers authorized in the Court Order;

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. Visit the incapacitated person not less than four times per year, or more frequently if required by the Court Order;

5. File an initial report within 90 days after receiving the Commission;

6. File an annual report on a calendar year basis. Reports must be filed by May 31st of each year;

7. File a final report at the termination of the guardianship.

III. Duties of the Guardian of the Person

A. The Guardian's Role When the Incapacitated Person Is in a Nursing Home or Other Facility

1. If the incapacitated person is in a nursing home or other facility at the time the Guardian is appointed, the Guardian should familiarize himself or herself with the facility and the staff of the facility.

2. Determine if the needs of the incapacitated person are being met by the care in the facility.

3. Consider the wishes, desires and preferences of the incapacitated person and, where appropriate, make application to the Court for a change in residential placement.

4. If the incapacitated person is residing in the community at the time of appointment but the Guardian determines it is in the incapacitated person's best interest to reside in a facility, before placement is made, make sure that it is authorized by the Court Order.

5. The Guardian is not permitted to consent to the voluntary or involuntary admission of the incapacitated person to a mental health facility.

B. The Guardian's Role When the Incapacitated Person Is Residing in the Community

1. The Guardian's role is more challenging when the incapacitated person is residing in the community.

2. The Guardian must assure that the incapacitated person's need for food, shelter, clothing, housing, medical care and personal care are being properly met.

3. If there is no one available to do the food shopping, arrangements must be made for the ordering and delivery of food to the home.

   a. There are some supermarkets that provide delivery to the home.

   b. Meals on Wheels may also be an option to supplement the food delivery.

4. If the incapacitated person requires assistance or supervision and is not able to reside alone, consideration should be given to employing a home healthcare agency or directly employing an individual home care aide.

   a. Be careful when directly hiring home healthcare aides.

   b. The home healthcare aides are employees, not independent contractors.

   c. This means that the Guardian, as employer, is responsible for payroll taxes, Workmen's Compensation insurance and disability insurance. There are severe penalties and fines imposed for failure to comply with the employer's obligations.

   d. The safer choice may be to employ a home healthcare agency.

5. The Guardian should ensure that the incapacitated persons medical needs are being addressed. This includes ensuring that the incapacitated person is receiving appropriate medical attention.

   a. Arrangements need to be made for in-house visits by medical professionals or appropriate transportation to doctors, dentists or other healthcare providers.

6. The Guardian should look into all available resources to assist the incapacitated person, including government benefits such as Medicare and Medicaid.

7. If the personal needs Guardian is also the property management Guardian, before hiring and paying for home care workers and household expenses the guardian should review the Order and Judgment to make sure that these expenditures are authorized. If not authorized, an application to the court will be necessary.

8. If the personal needs Guardian is not serving as the property management Guardian, coordination with the property management Guardian is required in order to put the proper people in place and to pay for services and household expenses.

IV. Duties of the Property Management Guardian

A. Additional Duties of the Property Management Guardian

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 therefrom 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.

B. Marshaling Assets and Managing the Incapacitated Persons Financial Affairs

1. Locate assets

a. The Guardian should review the Court's file. The Court Evaluator's report may be a good start to learning what assets the incapacitated person has.

b. The Guardian should also speak with the incapacitated person's family and friends.

c. The latest income tax return that was filed by the incapacitated person may also be a good source of information.

d. Arrange to have the incapacitated persons mail forwarded to the Guardian.

e. Check the New York State unclaimed funds website.

2. Open a guardianship account

a. The Guardian should open a guardianship account to be used to deposit the incapacitated person's income and pay the incapacitated person's bills.

b. The account should be titled in the guardian's name, as guardian for the incapacitated person. The incapacitated person's social security number should be used for the account.

c. Never commingle the guardian's personal funds with those of the incapacitated person.

d. The guardianship account should be opened at a bank that provides

copies of the canceled checks. These will be important when the Guardian files his or her annual and final reports.

3. Collection of assets

a. Close the incapacitated person's existing bank accounts and deposit the funds into the guardianship account.

b. If the incapacitated person owns a safe-deposit box, the box should be inventoried in the presence of a bank officer and the ownership of the account should be changed to the Guardian as guardian for the incapacitated person.

c. Stocks, bonds, brokerage accounts and annuities should be retitled to the name of the Guardian as guardian for the incapacitated person. The incapacitated person's social security number should remain on the accounts.

d. Retirement accounts such as IRAs and 401(k)s should remain in the name of the incapacitated person. The financial institutions should be notified of the guardianship so that only the Guardian will be authorized to deal with the account. Liquidating these accounts may result in the unnecessary imposition of income taxes.

e. Totten trust accounts should be changed to the name of the Guardian as guardian for the incapacitated person, in trust for, the name of the designated beneficiary.

f. Joint bank accounts create a special problem. If it is a true joint

account, the Guardian should be able to collect 50% of the account. If it is a convenience account, the Guardian should be able to collect the full amount in the account. Application to the court may be necessary to resolve the ownership interest of these joint accounts.

4. Collection of income.

a. The Guardian should arrange to become the representative payee for Social Security benefits.

b. The Guardian should also arrange for the collection of any other income, such as pension benefits.

C. Protecting the Incapacitated Person's Assets

1. Real property owned by the incapacitated person.

a. Review insurance coverage to make sure that the property is adequately insured for fire, theft and liability.

b. Obtain information about mortgages and other liens against the property. Arrange for the payment of these obligations.

c. Contact the utility companies and make arrangements for monthly payments.

2. Personal property and collectibles.

a. Inventory the incapacitated persons personal property, including jewelry, furniture and furnishings, artwork and other collectibles.

b. It is a good idea to photograph all items and keep the photographs with the inventory.

c. Consider the appraisal of valuable items.

d. Review insurance coverage.

3. Motor vehicles

a. If a motor vehicle is to be retained, review insurance coverage, inspection requirements and maintenance requirements.

b. If motor vehicle is not to be retained, make sure that the Court Order permits the sale of the vehicle.

4. Medical insurance

a. Review existing insurance.

b. Apply for insurance coverage if the existing coverage is not adequate. This could include private insurance and Medicare supplement policies.

c. If necessary and appropriate, apply for Medicaid benefits.

D. Investments

1. Guardian should be aware of the prudent investors act which governs the standards for investments.

2. Before making investments, review the Order and Judgment to make sure that they are authorized.

3. The purchase or sale of real property requires a court proceeding.

E. Making Gifts

1. The Guardian is not permitted to make gifts of an incapacitated person's property without Court approval.

2. Before approval is given, the Court will hold a hearing and make findings of fact as required by the statute.

F. Support of Persons Dependent upon the Incapacitated Person.

1. The Guardian should not use the incapacitated person's funds to support other persons unless authorized by the Court Order.

V. Rights of the Incapacitated Person

A. Powers Not Granted in the Order and Judgment Are Retained by the Incapacitated Person.

1. As noted above, a guardian has only those powers that are granted in the Order and Judgment.

2. If the Guardian believes that a power that has not been granted in the Order and Judgment is necessary, the Guardian should make application to the Court for an expansion of powers.

3. The incapacitated person retains all powers that have not been granted to the Guardian.

a. For example, just because a person has been declared to be incapacitated, does not mean that such person may not execute a Last Will and Testament.

4. The incapacitated person has a right to have his or her wishes, preferences and desires considered before the Guardian makes any decisions on such person's behalf.

VI. Available Resources to Aid the Incapacitated Person

A. Medicare and Medicaid

1. The Guardian should familiarize him or herself with Medicare and Medicaid benefits that may be available to the incapacitated person.

a. If the Guardian is not familiar with these benefits, the Guardian should seek the advice of qualified professionals.

B. Food Stamps (SNAP), Heating Assistance, Section 8 Housing and Other Government Benefits.

1. There are a number of government programs available to assist the elderly and disabled.

C. Assisted Living Facilities

1. An assisted living facility may be appropriate for a person who is no longer able to reside alone in their home but does not require the level of care of a nursing home.

D. Senior Citizen Centers

1. A number of towns offer senior citizen centers which provide a source of socialization.

E. Adult Day Care Programs

1. There are a number of adult take care programs available. Some are based on a social model and some are based on a medical model.

2. Medicaid benefits may be available to pay for these daycare programs.

VII. Termination of the Guardianship

A. Death of the Incapacitated Person

1. The guardianship terminates upon the death of the incapacitated person.

2. Despite termination of the guardianship, the Guardian still has certain duties and reporting obligations.

3. The Guardian should familiarize himself or herself with the requirements set forth in Mental Hygiene Law § 81.44.

4. The Guardian is not discharged until his or her final account is approved by the Court, and an Order Discharging the Guardian is granted.

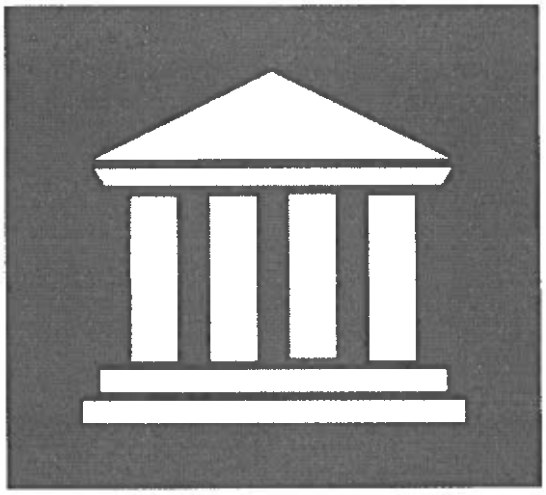
B. Termination During the Lifetime of the Incapacitated Person

1. The guardianship may also terminate upon the resignation or removal of the Guardian.

2. A property management Guardian may also be discharged if the assets of the incapacitated person are depleted.

# PART 36

## THE RULES OF THE CHIEF JUDGE



**CERTIFIED TRAINING**

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# PART 36. APPOINTMENTS BY THE COURT

## § 36.0 PREAMBLE

Public trust in the judicial process demands that appointments by judges be fair, impartial and beyond reproach. Accordingly, these rules are intended to ensure that appointees are selected on the basis of merit, without favoritism, nepotism, politics or other factors unrelated to the qualifications of the appointee or the requirements of the case.

The rules cannot be written in a way that foresees every situation in which they should be applied. Therefore, the appointment of trained and competent persons, and the avoidance of factors unrelated to the merit of the appointments or the value of the work performed, are the fundamental objectives that should guide all appointments made, and orders issued, pursuant to this Part.

## § 36.1 APPLICATION

(a) **Except as set forth in subdivision (b) of this section, this Part shall apply to the following appointments made by any judge or justice of the Unified Court System:**

(1) guardians;

(2) guardians *ad litem*, including guardians *ad litem* appointed to investigate and report to the court on particular issues, and their counsel and assistants;

(3) attorneys for the child who are not paid from public funds, in those judicial departments where their appointments are authorized;

(4) court evaluators;

(5) attorneys for alleged incapacitated persons;

(6) court examiners;

(7) supplemental needs trustees;

(8) receivers;

(9) referees (other than special masters and those otherwise performing judicial functions in a quasi-judicial capacity);

(10) the following persons performing services for guardians or receivers:

(i) counsel;

(ii) accountants;

(iii) auctioneers;

(iv) appraisers;

(v) property managers; and

(vi) real estate brokers; and

(11) a public administrator within the City of New York and for the Counties of Westchester, Onondaga, Erie, Monroe, Suffolk and Nassau and counsel to the public administrator, except that only sections 36.2(c) and 36.4(f) of this Part shall apply, and that section 36.2(c) of this Part shall not apply to incumbents in these positions until one year after the effective date of this paragraph.

(b) **Except for sections 36.2(c)(6) and 36.2(c)(7) of this Part, this Part shall not apply to:**

(1) appointments of attorneys for the child pursuant to section 243 of the Family Court Act, guardians *ad litem* pursuant to section 403-a of the Surrogate's Court Procedure Act, or the Mental Hygiene Legal Service;

(2) the appointment of, or the appointment of any persons or entities performing services for, any of the following:

(i) a guardian who is a relative of: (a) the subject of the guardianship proceeding; or (b) the beneficiary of a proceeding to create a supplemental needs trust; a person or entity nominated as guardian by the subject of the proceeding or proposed as guardian by a party to the proceeding; a supplemental needs trustee nominated by the beneficiary of a supplemental needs trust or proposed by a proponent of the trust; or a person or entity having a legally recognized duty or interest with respect to the subject of the proceeding;

(ii) a guardian *ad litem* nominated by an infant of 14 years of age or over;

(iii) a nonprofit institution performing property management or personal needs services, or acting as court evaluator;

(iv) a bank or trust company as a depository for funds or as a supplemental needs trustee;

(v) except as set forth in section 36.1(a)(11), a public official vested with the powers of an administrator;

(vi) a person or institution whose appointment is required by law; or

(vii) a physician whose appointment as a guardian *ad litem* is necessary where emergency medical or surgical procedures are required; or

(3) an appointment other than above without compensation, except that the appointee must file a notice of appointment pursuant to section 36.4(b) of this Part.

## § 36.2 APPOINTMENTS

(a) **Appointments by the judge.** All appointments of the persons set forth in section 36.1 of this Part, including those persons set forth in section 36.1(a)(10) of this Part who perform services for guardians or receivers, shall be made by the judge authorized by law to make the appointment. In making appointments of persons to perform services for guardians or receivers, the appointing judge may consider the recommendation of the guardian or receiver.

(b) **Use of lists.**

(1) All appointments pursuant to this Part shall be made by the appointing judge from the appropriate list of applicants established by the Chief Administrator of the Courts pursuant to section 36.3 of this Part.

(2) An appointing judge may appoint a person not on the appropriate list of applicants upon a finding of good cause, which shall be set forth in writing and shall be filed with the fiduciary clerk at the time of the making of the appointment. The appointing judge shall send a copy of such writing to the Chief Administrator. A judge may not appoint a person that has been removed from a list pursuant to section 36.3(e) of this Part.

(3) Appointments made from outside the lists shall remain subject to all of the requirements and limitations set forth in this Part, except that the appointing judge may waive any education and training requirements where completion of these requirements would be impractical.

(c) **Disqualifications from appointment.**

(1) No person shall be appointed who is a judge or housing judge of the Unified Court System of the State of New York, or who is a relative of, or related by marriage to, a judge or housing judge of the Unified Court System within the fourth degree of relationship.

(2) No person serving as a judicial hearing officer pursuant to Part 122 of the Rules of the Chief Administrator shall be appointed in actions or proceedings in a court in a county where he or she serves on a judicial hearing officer panel for such court.

(3) No person shall be appointed who is a full-time or part-time employee of the Unified Court System. No person who is the spouse, sibling, parent or child of an employee who holds a position at salary grade JG24 or above, or its equivalent, shall be appointed by a court within the judicial district where the employee is employed or, with respect to an employee with statewide responsibilities, by any court in the State.

(4) (i) No person who is a chair or executive director, or their equivalent, of a State or county political party (including any person or persons who, in counties of any size or population, possess or perform any of the titles, powers or duties set forth in Public Officers Law section 73[1][k]), or the spouse, sibling, parent or child of that official, shall be appointed while that official serves in that position and for a period of two years after that official no longer holds that position. This prohibition shall apply to the members, associates, counsel and employees of any law firms or entities while the official is associated with that firm or entity.

(ii) No person who has served as a campaign chair, coordinator, manager, treasurer or finance chair for a candidate for judicial office, or the spouse, sibling, parent or child of that person, or anyone associated with the law firm of that person, shall be appointed by the judge for whom that service was performed for a period of two years following the judicial election. If the candidate is a sitting judge, the disqualifications shall apply as well from the time the person assumes any of the above roles during the campaign for judicial office.

(5) No former judge or housing judge of the Unified Court System, or the spouse, sibling, parent or child of such judge, shall be appointed, within two years from the date the judge left judicial office, by a court within the jurisdiction where the judge served. Jurisdiction is defined as follows:

(i) the jurisdiction of a judge of the Court of Appeals shall be statewide;

(ii) the jurisdiction of a justice of an Appellate Division shall be the judicial department within which the justice served;

(iii) the jurisdiction of a justice of the Supreme Court and a judge of the Court of Claims shall be the principal judicial district within which the justice or judge served; and

(iv) with respect to all other judges, the jurisdiction shall be the principal county within which the judge served.

(6) No attorney who has been disbarred or suspended from the practice of law shall be appointed during the period of disbarment or suspension.

(7) No person convicted of a felony, or for five years following the date of sentencing after conviction of a misdemeanor (unless otherwise waived by the Chief Administrator upon application), shall be appointed unless that person receives a certificate of relief from disabilities.

(8) No receiver or guardian shall be appointed as his or her own counsel, and no person associated with a law firm of that receiver or guardian shall be appointed as counsel to that receiver or guardian, unless there is a compelling reason to do so.

(9) No attorney for an alleged incapacitated person shall be appointed as guardian to that person, or as counsel to the guardian of that person.

(10) No person serving as a court evaluator shall be appointed as guardian for the incapacitated person except under extenuating circumstances that are set forth in writing and filed with the fiduciary clerk at the time of the appointment.

(d) **Limitations on appointments based upon compensation.**

(1) No person shall be eligible to receive more than one appointment within a calendar year for which the compensation anticipated to be awarded to the appointee in any calendar year exceeds the sum of $15,000.

(2) If a person has been awarded more than an aggregate of $100,000 in compensation by all courts during any calendar year, the person shall not be eligible for compensated appointments by any court during the next calendar year.

(3) For purposes of this Part, the term compensation shall mean awards by a court of fees, commissions, allowances or other compensation, excluding costs and disbursements.

(4) These limitations shall not apply where the appointment is necessary to maintain continuity of representation of or service to the same person or entity in further or subsequent proceedings.

## § 36.3 PROCEDURE FOR APPOINTMENT

(a) **Application for appointment.** The Chief Administrator shall provide for the application by persons seeking appointments pursuant to this Part on such forms as shall be promulgated by the Chief Administrator. The forms shall contain such information as is necessary to establish that the applicant meets the qualifications for the appointments covered by this Part and to apprise the appointing judge of the applicant's background.

(b) **Qualifications for appointment.** The Chief Administrator shall establish requirements of education and training for placement on the list of available applicants. These requirements shall consist, as appropriate, of substantive issues pertaining to each category of appointment -- including applicable law, procedures, and ethics -- as well as explications of the rules and procedures implementing the process established by this Part. Education and training courses and programs shall meet the requirements of these rules only if certified by the Chief Administrator. Attorney participants in these education and training courses and programs may be eligible for continuing legal education credit in accordance with the requirements of the Continuing Legal Education Board.

(c) **Establishment of lists.** The Chief Administrator shall establish separate lists of qualified applicants for each category of appointment, and shall make available such information as will enable the appointing judge to be apprised of the background of each applicant. The Chief Administrator may establish more than one list for the same appointment category where appropriate to apprise the appointing judge of applicants who have substantial experience in that category. Pursuant to section 81.32(b) of the Mental Hygiene Law, the Presiding Justice of the appropriate Appellate Division shall designate the qualified applicants on the lists of court examiners established by the Chief Administrator.

(d) **Reregistration.** The Chief Administrator shall establish a procedure requiring that each person on a list reregister every two years in order to remain on the list.

(e) **Removal from lists.** The Chief Administrator may remove any person from any list for unsatisfactory performance or any conduct incompatible with appointment from that list, or if disqualified from appointment pursuant to this Part. A person may not be removed except upon receipt of a written statement of reasons for the removal and an opportunity to provide an explanation and to submit facts in opposition to the removal.

(f) Notwithstanding section 36.3(e), pending a final determination on the issue of removal, the Chief Administrator may temporarily suspend any person from any list upon a showing of good cause that the person's conduct places clients or wards at significant risk of financial or other harm, or presents an immediate threat to the public.

## § 36.4 PROCEDURE AFTER APPOINTMENT

(a) Upon appointment of a fiduciary pursuant to this Part, the Court shall forward a copy of the appointment order to the designated fiduciary clerk within two (2) business days.

(b) **Notice of appointment and certification of compliance.**

(1) Every person appointed pursuant to this Part shall file with the fiduciary clerk of the court from which the appointment is made, within 30 days of the making of the appointment: (i) a notice of appointment; and (ii) a certification of compliance with this Part, on such form as promulgated by the Chief Administrator. Copies of this form shall be made available at the office of the fiduciary clerk and shall be transmitted by that clerk to the appointee immediately after the making of the appointment by the appointing judge. An appointee who accepts an appointment without compensation need not complete the certification of compliance portion of the form.

(2) The notice of appointment shall contain the date of the appointment and the nature of the appointment.

(3) The certification of compliance shall include: (i) a statement that the appointment is in compliance with section 36.2(c) and (d) of this Part; and (ii) a list of all appointments received, or for which compensation has been awarded, during the current calendar year and the year immediately preceding the current calendar year, which shall contain: (a) the name of the judge who made each appointment; (b) the compensation awarded; and (c) where compensation remains to be awarded (i) the compensation anticipated to be awarded; and (ii) separate identification of those appointments for which compensation of $15,000 or more is anticipated to be awarded during any calendar year. The list shall include the appointment for which the filing is made.

(4) A person who is required to complete the certification of compliance, but who is unable to certify that the appointment is in compliance with this Part, shall immediately so inform the appointing judge.

(c) **Approval of compensation.**

(1) Upon the approval of compensation of more than $500, the court shall file with the fiduciary clerk (i) on such form as is promulgated by the Chief Administrator, a statement of approval of compensation, which shall contain a confirmation to be signed by the fiduciary clerk that the appointee has filed the notice of appointment and certification of compliance; and (ii) a copy of the proposed order approving compensation.

(2) The court shall not sign an order awarding compensation exceeding $500 until such time as the fiduciary clerk has confirmed that the appointee has properly filed the notice of appointment and certification of compliance. No compensation shall be awarded to an appointee who has not properly filed the notice of appointment and certification of compliance.

(3) Each approval of compensation of $5,000 or more to appointees pursuant to this section shall be accompanied by a statement, in writing, of the reasons therefor by the judge. The judge shall file a copy of the order approving compensation and the statement with the fiduciary clerk at the time of the signing of the order.

(4) Compensation to appointees shall not exceed the fair value of services rendered. Appointees who serve as counsel to a guardian or receiver shall not be compensated as counsel for services that should have been performed by the guardian or receiver.

(5) Unless otherwise directed by the court, a fiduciary appointee may utilize supporting attorneys and staff in their firm without additional Court approval. Support attorneys and staff may perform tasks only under the fiduciary appointee's direct supervision; all appearances and reports must be made by the fiduciary appointee; and all compensation earned by support attorneys or personnel shall be charged to the appointee for purposes of compensation limits pursuant to this Part.

(d) **Reporting of compensation received by law firms.** A law firm whose members, associates and employees have had a total of $50,000 or more in compensation approved in a single calendar year for appointments made pursuant to this Part shall report such amounts on a form promulgated by the Chief Administrator.

(e) **Reporting of compensation received by a referee to sell real property.**

(1) A referee to sell real property shall make a letter application to the court to authorize payment over $750 for a "good cause" adjournment or if there is a rebid or resale.

(2) Upon approval of compensation exceeding $750 to a referee to sell real property, the Court shall file a copy of its compensation order with the appropriate fiduciary clerk, who shall generate the required Unified Court System forms and monitor compliance and filing with the Part 36 processing unit. Payment of such compensation may not be made until the plaintiffs in the matter have received a copy of the court's compensation order.

(3) Exception. The procedure set forth in this section shall not apply to the appointment of a referee to sell real property and a referee to compute whose compensation for such appointments is not anticipated to exceed $750.

(f) **Approval and reporting of compensation received by counsel to the public administrator.**

(1) A judge shall not approve compensation to counsel to the public administrator in excess of the fee schedule promulgated by the administrative board of the public administrator under SCPA 1128 unless accompanied by the judge's statement, in writing, of the reasons therefor, and by the appointee's affidavit of legal services under SCPA 1108 setting forth in detail the services rendered, the time spent, and the method or basis by which the requested compensation was determined.

(2) Any approval of compensation in excess of the fee schedule promulgated by the administrative board of the public administrator shall be reported to the Office of Court Administration on a form promulgated by the Chief Administrator and shall be accompanied by a copy of the order approving compensation, the judge's written statement, and the counsel's affidavit of legal services, which records shall be published as determined by the Chief Administrator.

(3) Each approval of compensation of $5,000 or more to counsel shall be reported to the Office of Court Administration on a form promulgated by the Chief Administrator and shall be published as determined by the Chief Administrator.

## § 36.5 PUBLICATION OF APPOINTMENTS

(a) All forms filed pursuant to section 36.4 of this Part shall be public records.

(b) The Chief Administrator shall arrange for the periodic publication of the names of all persons appointed by each appointing judge, and the compensation approved for each appointee.

# PART 36 OF THE RULES OF THE CHIEF JUDGE: AN EXPLANATORY NOTE

Part 36 of the Rules of the Chief Judge creates a system that broadens the eligibility for appointment to a wide range of applicants well-trained in their category of appointment, establishes procedures that promote accountability and openness in the selection process, and insulates that process from appearances of favoritism, nepotism or politics.

## 1. APPLICABILITY

Part 36 governs ten categories of primary appointments and six categories of secondary appointments (§ 36.1 [a]), as set forth below.

### (A) GUARDIANS

Part 36 applies to guardians appointed for: 1) incapacitated persons pursuant to Mental Hygiene Law Article 81; 2) minors pursuant to Surrogate's Court Procedure Act article 17 or Civil Practice Laws and Rules article 12; and 3) the intellectually or developmentally disabled pursuant to Surrogate's Court Procedure Act article17-A (§ 36.1 [a][1]). If a person is appointed guardian upon a ward's nomination or a party's proposal, appointment is exempt from Part 36 (§ 36.1 [b][2][i]).

A guardianship where the appointee is a nonprofit institution, department of social services, or other public agency with legally recognized duties or interests is exempt from Part 36 (§ 36.1 [b][2][i], [iii]). Guardianships in proceedings for the termination of parental rights (see Social Services Law § 384-b, Surrogate's Court Procedure Act § 403-a, Family Ct. Act article 6) are also exempt, since only persons or entities authorized by law may be appointed guardian in such proceedings (§ 36.1 [b][2][i], [vi]).

### (B) GUARDIANS AD LITEM

Part 36 applies to guardians ad litem appointed under the general provisions of Surrogate's Court Procedure Act § 403 and Civil Practice Laws and Rules 1202, including guardians ad litem appointed to investigate and report to the court on particular issues (§ 36.1 [a][2]). Where a court appoints counsel or assistants to guardians ad litem, these appointees also are governed by the rules. If appointed a guardian ad litem upon the nomination of an infant of 14 years of age or over, the appointee is exempt (§ 36.1[b][2][ii]). Similarly exempt is a physician whose appointment as a guardian ad litem is necessary where emergency medical or surgical procedures are required (§ 36.1 [b][2][vii]).

### (C) ATTORNEYS FOR THE CHILD (FORMERLY LAW GUARDIANS)

Privately paid attorneys for the child who are appointed in domestic relations matters in those Departments of the Appellate Division where authorized are subject to the provisions of Part 36 (§ 36.1 [a][3]). Attorneys for the child appointed and paid from public funds are exempt (§ 36.1 [b][1]). (As a general rule, Part 36 applies only to appointees compensated at the expense of private parties, and not those compensated from public funds such as appointments pursuant to Family Court Act § 243, Surrogate's Court Procedure Act § 403-a, 407, Judiciary Law § 35, and County Law article 18-B.)

### (D) COURT EVALUATORS, ATTORNEYS FOR ALLEGED INCAPACITATED PERSONS, COURT EXAMINERS

In proceedings for the appointment of guardians for incapacitated persons pursuant to Article 81 of the Mental Hygiene Law, the court may appoint an attorney for the alleged incapacitated person (Mental Hygiene Law § 81.10) or appoint a court evaluator as an independent witness to investigate and report to the court (Mental Hygiene Law § 81.09). These appointments are governed by Part 36 (§ 36.1 [a][4], [5]), except that a nonprofit institution appointed court evaluator is exempt (§ 36.1 [b][2][iii]). The Mental Hygiene Legal Service, which may serve as attorney for an alleged incapacitated person or court evaluator, is also exempt (§ 36.1 [b][1]).

If a guardian is appointed pursuant to Article 81 of the Mental Hygiene Law, the court may also assign a court examiner to audit and report on accountings required to be filed in such guardianship proceedings (Mental Hygiene Law §' 81.30, 81.31). Court examiners are designated by the Presiding Justice of each Department of the Appellate Division (Mental Hygiene Law § 81.32), and, upon designation, must comply with all the provisions of Part 36 (§§ 36.1 [a][6]; 36.3 [c]).

### (E) SUPPLEMENTAL NEEDS TRUSTEES

Supplemental needs trustees (see Omnibus Budget Reconciliation Act of 1993 (42 USC 1396p[d][4], EPTL § 7-1.12, SSL § 366 [2][b][2][iii], 18 NYCRR § 360-4.5) may be appointed in a number of contexts in Supreme Court or Surrogate's Court, e.g., in infants' compromise orders, or in proceedings under article 17-A of the Surrogate's Court Procedure Act or Article 81 of the Mental Hygiene Law. When selected by the court and appointed by judgment or order, a supplemental needs trustee is subject to the provisions of Part 36 (§ 36.1 [a][7]), unless the appointee is a bank or trust company (§ 36.1 [b][2][iv]), or is appointed upon nomination by the beneficiary, or by the proponent, of the trust (§ 36.1 [b][2][i][b]).

### (F) RECEIVERS

Part 36 applies to receivers almost without exception (§ 36.1 [a][8]). In rare cases where the choice of receiver would be dictated by law, such an appointee would be exempt (§ 36.1 [b][2][vi]).

### (G) REFEREES

Referees are treated differently under Part 36 depending on the purpose for which they are appointed. Under Articles 31 and 43 of the Civil Practice Laws and Rules, referees, sometimes called "special masters", are often used in a quasi-judicial capacity to supervise discovery or conduct trials in civil actions or proceedings. No matter what their title, if referees are used to perform a judicial function, they are exempt from Part 36 (§ 36.1 [a][9]). Referees appointed for all other purposes are governed by the rules. These appointments are usually for the purpose of performing an act outside of court, e.g., conducting the sale of real property in a mortgage foreclosure action or supervising a labor union election.

Referees to compute the value of, and sell, real property in the ordinary mortgage foreclosure action, and who receive compensation of $750 or less, are subject to all of the provisions of Part 36 preliminary to appointment, including the disqualification provisions of section 36.2 (c), the limitations based on compensation of section 36.2 (d), and list enrollment under section 36.3. Upon appointment, however, these referees are not required to file the notice of appointment or certification of compliance that all other Part 36 appointees must file (§ 36.4 [e]). They and the court are also excepted from filing a statement of approval of compensation pursuant to Judiciary Law § 35-a (1) (a) and 22 NYCRR § 26.1 (a) (see section 5.B. infra), because the $750 total compensation results from two separate appointments which are below the statutory threshold of $500 for each appointment (up to $250 for computation; $500 for sale).

### (H) SECONDARY APPOINTMENTS OF GUARDIANS AND RECEIVERS: COUNSEL, ACCOUNTANTS, APPRAISERS, AUCTIONEERS, PROPERTY MANAGERS, REAL ESTATE BROKERS

When a guardian or receiver subject to the provisions of Part 36 seeks to retain counsel, or an accountant, appraiser, auctioneer, property manager or real estate broker, the retained professional becomes a Part 36 appointee (§ 36.1[a][10]). The guardian or receiver must request that the judge appoint such a professional (§ 36.2 [a]), and the professional must comply with all the provisions of Part 36, including those governing list enrollment (§ 36.3), disqualification and limitation based on compensation (§ 36.2), and all filing requirements (§ 36.4).

### (l) PUBLIC ADMINISTRATOR AND COUNSEL TO PUBLIC ADMINISTRATOR

Certain sections of Part 36 apply to the appointment of a Public Administrator within the City of New York and for the counties of Westchester, Onondaga, Erie, Monroe, Suffolk and Nassau and counsel to the public administrator. Those sections include the disqualifications due to family relationship, employment, former employment, political party office or judicial campaign office found in section 36.2 (c) and the approval of compensation reporting requirements found in section 36.4(f).

## 2. APPROVED LISTS: APPLICATION, ENROLLMENT, USE

All persons whose appointments are governed by Part 36 (§ 36.1 [a][1] – [10]), and who are not exempt under section 36.1 (b), must be enrolled on an approved list established by the Chief Administrator of the Courts (§ 36.3 [c]) from which all names for appointment must be selected (§ 36.2 [b][1]), except when good cause exists to appoint outside the list (§ 36.2 [b][2]). In those exceptional circumstances, the court must make a finding of good cause, in writing, and file its finding with the fiduciary clerk, who has the duty of supervising the filing of all papers in the Part 36 appointment process (see §§ 36.2 [b][2]; 36.4 [b][1], [c][1]-[3]). A copy of the finding also will be sent to the Chief Administrator of the Courts (§ 36.2[b][2]). A person not appointed from an appropriate list still must comply with all the other provisions of Part 36, e.g., the appointee must not be disqualified from appointment under section 36.2(c) or (d) and must file all Part 36 forms pursuant to section 36.4, but any education and training requirements may be waived (§ 36.2 [b][3]). At no time may a court appoint a person removed from a list for cause, or a person whom is currently suspended from an appointment list of the Chief Administrator of the Courts pending a final determination on the issue of removal (see §§ 36.2 [b][2]; 36.3[f]). (See § 36.3 [e] for the procedure for removal upon the Chief Administrator's determination of unsatisfactory performance or conduct incompatible with appointment from a list.)

To enroll on a list maintained by the Chief Administrator of the Courts, an applicant must have completed the required training for each category of appointment for which enrollment is requested (§ 36.3 [b]). Once all required training is completed, an application must be submitted on the application form promulgated by the Chief Administrator (UCS-870) (§ 36.3 [a]). Court examiners for proceedings under Article 81 of the Mental Hygiene Law and privately paid attorneys for the child in domestic relations actions first must be approved by the Appellate Division before being eligible for placement on a list.

Section 36.3 (d) provides for biennial re-registration, which will permit the Chief Administrator to keep all lists current.

## 3. DISQUALIFICATIONS

The following persons are disqualified from appointment (§ 36.2 [c]):

(a) a judge or housing judge of the Unified Court System, or a relative of, or a person related by marriage to, a judge or housing judge of the Unified Court System within the fourth degree of relationship;

(b) a judicial hearing officer in a court in which he or she serves as a judicial hearing officer (appointments may be accepted in courts in which he or she does not serve as a JHO);

(c) a full-time or part-time employee of the Unified Court System;

(d) the spouse, brother/sister, parent or child of a full-time or part-time employee of the Unified Court System at or above salary grade JG24, or its equivalent: 1) employed in a judicial district where the relative is applying for appointment or 2) with statewide responsibilities;

(e) a person who currently serves, or has served within the last two years as chair, executive director, or the equivalent, of a state or county political party (including any person or persons who, in counties of any size or population, possess or perform any of the titles, powers or duties set forth in Public Officers Law §73[1][k]); or the spouse, brother/sister, parent or child of such political party official; or a member, associate, counsel or employee of a law firm or entity with which such political party official is currently associated;

(f) a former judge or housing judge of the Unified Court System who left office within the last two years and who is applying for appointment within the jurisdiction of prior judicial service, as defined by section 36.2(c)(5) of the Rules of the Chief Judge; or the spouse, brother/sister, parent or child of such former judge;

(g) an attorney currently disbarred or suspended from the practice of law by any jurisdiction;

(h) a person convicted of a felony for which no certificate of relief from civil disabilities has been received;

(i) a person convicted of a misdemeanor for which sentence was imposed within the last five years and for which no certificate of relief from civil disabilities, or waiver by the Chief Administrator of the Courts, has been received; or

(j) a person who has been removed from an appointment list of the Chief Administrator of the Courts for unsatisfactory performance or conduct incompatible with appointment, or is currently suspended from an appointment list of the Chief Administrator of the Courts pending a final determination on the issue of removal.

The disqualifications for disbarred or suspended attorneys (see paragraph [g], supra) and convicted criminals (see paragraphs [h] and [i], supra) apply to any appointments under section 36.1 (a), even if otherwise exempted under the rules pursuant to section 36.1 (b).

Additionally, there are three disqualifications that do not limit list enrollment, but may render an enrollee disqualified from appointment due to the circumstances of a particular case. These disqualifications are: 1) receivers or guardians, or persons associated with the law firm of a receiver or guardian, are prohibited from being appointed counsel to the receiver or guardian (§ 36.2 [c][8]); 2) counsel to alleged incapacitated persons in Mental Hygiene Law Article 81 proceedings are prohibited from being appointed guardian, or counsel to the guardian, for an incapacitated person they have represented (§ 36.2 [c][9]); and 3) court evaluators in Mental Hygiene Law Article 81 proceedings are prohibited from being appointed guardian for an incapacitated person in a proceeding in which they served as court evaluator (§ 36.2 [c][10]). In the first and third of these disqualifications, exceptions may be made. If there is a compelling reason, such as savings to the estate of the receivership or guardianship, the receiver or guardian may be appointed counsel. Similarly, if there are extenuating circumstances, such as the unavailability of others to be appointed guardian and a familiarity and trust developed between court evaluator and incapacitated person, a court evaluator may be appointed guardian upon a written finding by the court of extenuating circumstances.

There is also a disqualification relating to judicial campaign activity. This does not prevent list enrollment, but limits appointment by a judge for whom the enrollee acted as campaign chair, coordinator, manager, treasurer or finance chair in a campaign for a judicial election that took place less than two years prior to the proposed appointment (§ 36.2 [c][4][ii]). If the candidate is a sitting judge, the disqualification also applies to a person who assumes any of the above roles during the campaign for judicial office. Included in this disqualification are the spouse, brother/sister, parent or child of the campaign official, or anyone associated with the campaign official's law firm.

## 4. LIMITATIONS ON APPOINTMENTS BASED UPON COMPENSATION

Subdivision (d) of section 36.2 establishes two additional disqualifications from appointment, not related to list eligibility, but based upon anticipated or previously awarded compensation. These restrictions do not limit compensation per se, but use compensation as a basis for determining availability for future appointment. There are no exceptions to the application of these limitations, unless the court determines the appointment is necessary to maintain continuity of representation of the same person or entity in further or subsequent proceedings.

### (A) THE $15,000 RULE

Section 36.2 (d)(1) prohibits appointees from receiving more than one appointment in the same calendar year (i.e., January 1 to December 31) for which compensation in excess of $15,000 is awarded in that calendar year or anticipated to be awarded in any calendar year. Two examples illustrate the rule. 1) If appointed as attorney for an alleged incapacitated person, and compensation of, for example, $20,000 for that appointment is awarded or anticipated to be awarded in that same year, then the appointee is precluded from receiving another appointment in that calendar year for which compensation in excess of $15,000 is anticipated either in that calendar or in any single future calendar year. 2) If appointed as guardian, and an annual commission of, for example, $20,000 is anticipated to be awarded in the following calendar year, the appointee is precluded from receiving another appointment in the current calendar year for which compensation in excess of $15,000 is anticipated to be awarded either in the current calendar year or in any single future calendar year.

### (B) THE $100,000 RULE

Section 36.2 (d) (2) establishes a limitation on appointments based on an annual, aggregate amount of compensation. If compensation is awarded in an aggregate amount of more than $100,000 during any calendar year (no matter what year the appointment was made), the appointee will be ineligible for any compensated appointments during the next calendar year. It is the year of the award of compensation, and not the year of its actual receipt, that activates the application of the rule. Like its $15,000 counterpart, the $100,000 rule is a limitation on appointments, and not on compensation; nothing in the $100,000 rule prevents a court's award, or an appointee's receipt, of total compensation exceeding $100,000 in any calendar year. Excess compensation in one calendar year simply prevents compensated appointments in the following calendar year.

## 5. PROCEDURE AFTER APPOINTMENT

### (A) COMBINED NOTICE OF APPOINTMENT AND CERTIFICATION OF COMPLIANCE

Part 36 appointees must complete and file with the fiduciary clerk within 30 days of appointment a notice of appointment and certification of compliance (§ 36.4 [b][1]), which will be sent to the appointee by the court immediately after appointment. If the appointee cannot certify qualification for appointment in the certification of compliance, or cannot accept appointment for any other reason, the appointee must immediately notify the court (§ 36.4 [b][4]).

The notice of appointment contains the date and nature of the appointment (§ 36.4 [b][2]), and the certification of compliance certifies that the appointee is not disqualified from service and is not otherwise precluded by any limitation based on compensation (§ 36.4 [b][3][i]; see § 36.2 [d], [e]). The appointee must list all appointments received during the current calendar year (§ 36.4 [b][3][ii]), report the amount of compensation awarded for each (§ 36.4 [b][3][ii][B]), or, if not awarded, the total amount of compensation anticipated for each (§ 36.4 [b][3][ii][c][i]), and separately identify appointments for which compensation is anticipated to exceed $15,000 in any calendar year (§ 36.4 [b][3][ii][c][ii]). The appointee must also list all appointments for which compensation was awarded in the year immediately preceding the current calendar year (§ 36.4 [b][3][ii]) and report the amount awarded for each (§ 36.4 [b][3][ii][B]). For all appointments, the name of the appointing judge must be indicated (§ 36.4 [b][3][ii][A]).

There are two exceptions to this procedure. Although exempt from the application of Part 36 (see § 36.1 [b][3]), uncompensated appointees must still complete and file the notice of appointment section of the form (§ 36.4 [b][1]). This will allow uncompensated fiduciary activity to be recorded and appropriately recognized. The other exception applies to referees to compute the value of, and sell, real property. Although subject to the application and list process of Part 36 (see § 36.1 [a][9]), referees to compute and sell are relieved from the obligation to file the notice of appointment and certification of compliance form for appointments where total compensation is not anticipated to exceed $750 (§ 36.4 [e][3]).

### (B) APPROVAL OF COMPENSATION

Judges who approve compensation of more than $500 are required to file a statement of approval of compensation with the Office of Court Administration pursuant to Judiciary Law § 35-a (1)(a) and 22 NYCRR Part 26. Whenever a court is requested to approve compensation in excess of $500 for a Part 36 appointee, a statement of approval of compensation on a form promulgated by the Chief Administrator of the Courts must be submitted for signature to the approving judge. The statement must contain a confirmation signed by the fiduciary clerk that the notice of appointment and certification of compliance was filed (§ 36.4 [c][1]). No judge may approve compensation of more than $500 without this statement and the signed confirmation of the fiduciary clerk (§ 36.4 [c][2]). Additionally, every approval of compensation in excess of $5000 must contain the judge's written statement of the reasons for such approval (§ 36.4 [c][3]). After signing the order awarding compensation and the statement of approval of compensation, the judge must file a copy of the order and the original statement with the fiduciary clerk. The fiduciary clerk will then forward the statement of approval of compensation to the Office of Court Administration for entry of the amount of compensation in its database under the name of the appointee. This will keep the database current for periodic publication under section 36.5.

The rules cite the standard for judicial approval of compensation, viz., fair value for all services rendered that are necessary to the performance of the appointee's duties (§36.4 [c][4]). This determination remains in the sound discretion of the court and depends on the factual circumstances of each case.

Unless the court directs otherwise, fiduciary appointees may utilize supporting attorneys and staff, however, all tasks must be directly supervised by the fiduciary appointee, and all appearances and reports must be made by the appointee (§36.4[c][5]). Court examiners and attorneys for the child must adhere to the rules of their respective Appellate Divisions, and should not assume that delegation is permitted.

## 6. REPORTING LAW FIRM COMPENSATION

Section 36.4 (d) obligates law firms to report, in writing, to the Chief Administrator of the Courts whenever the aggregate total compensation for Part 36 appointments of law firm members, associates or employees reaches or exceeds $50,000 in a single calendar year. The report of compensation received by law firms must be filed on form UCS-876 on or before March 31st of the following the calendar year.

The reporting of law firm compensation is for informational purposes only. Limitations based on compensation apply only to individual appointees, not firms, and the appointment and compensation of one person in a firm are only considered in certifying the eligibility of that individual for appointment and do not affect the eligibility of any other person in the firm.

## 7. PUBLICATION

The notice of appointment and certification of compliance, statement of approval of compensation, and report of compensation received by law firms, filed pursuant to section 36.4, are public records, and the names of appointees and of appointing judges, and the amounts of approved compensation, are subject to periodic publication by the Chief Administrator of the Courts (§36.5).

# INSTRUCTIONS: APPLICATION FOR APPOINTMENT PURSUANT TO PART 36 OF THE RULES OF THE CHIEF JUDGE

Welcome to Part 36 - Fiduciary Online

*After reading through the following instructions, click Proceed to Part 36 at the end of the page to continue to the Fiduciary Online system.*

Part 36 of the Rules of the Chief Judge requires that the judicial appointments listed below be made from lists established by the Chief Administrator of the Courts. Lists of eligible appointees are made public on the NYS UCS website. In addition, the Chief Administrator makes public the names of all persons and entities appointed by each appointing judge and the compensation approved for each appointee.

## ONLINE ACCOUNTS

To file an initial application, amend a current application, or to re-register as required every two years, you must have an online account. New York State Attorneys may access the Part 36 Fiduciary Online system using their Attorney Online Services account. If you are an attorney who does not yet have an Attorney Online Service account or not an attorney, you will be instructed on how to create the appropriate online account on the next page.

## RULES

Before proceeding to the Part 36 Fiduciary Online system, all applicants **MUST** read the Part 36 Rules (22 NYCRR 36) and the Explanatory Note. You will be asked to affirm that you have read both at the end of your application.

Part 36 Rules (22 NYCRR 36)

Explanatory Note

## CATEGORIES OF APPOINTMENT

Proof of certified training, and/or a resume, will be required as part of any new application, amendment of a current application, or a re-registration application as required every two years. Detailed information on certified training can be found in the FAQ.

Certified training is required to apply for the following categories:

- **Attorney for Alleged Incapacitated Person (MHL Article 81 training)**
- **Court Evaluator (MHL Article 81 training)**
- **Guardian (MHL Article 81 training)**
- **Guardian ad Litem**
- **Receiver**
- **Supplemental Needs Trustee**
- **Attorney for the Child (privately paid), formerly Law Guardian (privately paid)** ***(see FAQ for special instructions)***
- **Court Examiner** ***(see FAQ for special instructions)***

A resume must be attached to apply for the following categories:

- **Counsel to Receiver**
- **Counsel to Guardian**
- **Accountant**
- **Auctioneer**
- **Appraiser**
- **Property Manager**
- **Real Estate Broker**
- **Referee** ***(except special master or referee otherwise performing judicial functions in a quasi-judicial capacity)***

## BACKGROUND QUESTIONNAIRE

Personal Background questions and an Affirmation will be required in the application. If you answer YES to any of the background questions, you must attach an explanation in detail, giving all relevant dates. To read through the Personal Background questions, or the Affirmation, refer to the FAQ.

Proceed to Part 36 - Fiduciary Online
*(click here to sign in or create an account)*

# UCS-870 Application for Appointment: Qualification Statements

Help

* Required

**IMPORTANT**

All applicants must read Part 36 of the Rules of the Chief Judge (22 NYCRR), and the Explanatory Note prior to proceeding with their application.

## Qualification Statements

If you answer **Yes** to any of the statements below, you are **not** qualified to file this application for appointment pursuant to Part 36. Please check the appropriate box for each item.

| | | |
|---|---|---|
| a. | **I AM** a full-time or a part-time judge or housing judge of the Unified Court System of the State of New York or a relative of, or related by marriage to, a full-time or a part-time judge or housing judge of the Unified Court System within the fourth degree of relationship (Town and Village judges are judges of the Unified Court System); | ○ Yes ○ No |
| b. | **I AM** a full-time or part-time employee of the Unified Court System; | ○ Yes ○ No |
| c. | **I AM** the spouse, brother/sister, parent or child of a full-time or part-time employee of the Unified Court System who holds a position at or above salary grade JG24, or its equivalent: 1) employed in a judicial district in which I am applying for appointment or 2) with statewide responsibilities; | ○ Yes ○ No |
| d. | **I AM** a person who currently serves, or has served within the last two years, as chair, executive director, or the equivalent, of a state or county political party (including any person or persons who, in counties of any size or population, possess or perform any of the titles, powers or duties set forth in Public Officers Law §73[1][k]); the spouse, brother/sister, parent or child of such political party official; or a member, associate, counsel or employee of a law firm or entity with which such political party official is currently associated; | ○ Yes ○ No |
| e. | **I AM** a former judge or housing judge of the Unified Court System who left office within the last two years and who is applying for appointment within the jurisdiction of prior judicial service, as defined by section 36.2(c)(5) of the Rules of the Chief Judge, or the spouse, brother/sister, parent or child of such former judge; | ○ Yes ○ No |
| f. | **I AM** an attorney currently disbarred or suspended from the practice of law by any jurisdiction; | ○ Yes ○ No |
| g. | **I AM** a person convicted of a felony for which no certificate of relief from civil disabilities has been received; | ○ Yes ○ No |
| h. | **I AM** a person convicted of a misdemeanor for which sentence was imposed within the last five years and for which no certificate of relief from civil disabilities, or waiver by the Chief Administrator of the Courts, has been received; | ○ Yes ○ No |
| i. | **I AM** a person who has been removed from an appointment list of the Chief Administrator of the Courts for unsatisfactory performance or conduct incompatible with appointment, or is currently suspended from an appointment list of the Chief Administrator of the Courts pending a final determination on the issue of removal, or resigned from the appointment list in its entirety pursuant to an agreement with the Inspector General of the Courts; | ○ Yes ○ No |

# UCS-870 Application for Appointment: Personal Information

Help

* Required

## Current Name

First: * | Middle: | Last: * | Suffix:

## Prior Names

First: | Middle: | Last: | Suffix:

First: | Middle: | Last: | Suffix:

## Social Security Number

Social Security Numbers are required in order to administer the disbursement of moneys that may constitute taxable income. 42 U.S.C. §405 (c)(2)(C)(i).

SSN: * | Confirm SSN: *

## Business Information

Business Name:

Street: *

City/Town/Village: * | State: * | Zip: *

Country: *(if not USA)*

Phone Number: (***-***-****) * | Email Address: *

Self Employed: ○ Yes ○ No | Years Employed: *(nearest whole number)*

## Contact Information *(email & address to which all correspondences are sent)*

☐ **Use your Business Information as your Contact Information**

Business Name:

Street: *

City/Town/Village: * | State: * | Zip: *

Country: *(if not USA)*

Phone Number: (***-***-****) * | Email Address: *

# UCS-870 Application for Appointment: Categories of Appointment

Help

* Required

## Categories of Appointment *(certified training IS required, resume IS NOT required)*

Your application will NOT be processed unless training has been completed. Certified training must be completed within two (2) years before the date the application is submitted.

☐ **ATTORNEY FOR ALLEGED INCAPACITATED PERSON** (MHL Article 81 training)

Attorneys applying for this category must be current in their registration to practice law in New York State.

Year Training Completed: * | Full Name of Training Provider: *

Number of Appointments Received in the Last 10 Years: * ○None ○1-10 ○More Than 10

☐ **COURT EVALUATOR** (MHL Article 81 training)

Year Training Completed: * | Full Name of Training Provider: *

Number of Appointments Received in the Last 10 Years: * ○None ○1-10 ○More Than 10

☐ **GUARDIAN** (MHL Article 81 training)

Year Training Completed: * | Full Name of Training Provider: *

Number of Appointments Received in the Last 10 Years: * ○None ○1-10 ○More Than 10

☐ **GUARDIAN AD LITEM**

Attorneys applying for this category must be current in their registration to practice law in New York State.

Year Training Completed: * | Full Name of Training Provider: *

Number of Appointments Received in the Last 10 Years: * ○None ○1-10 ○More Than 10

☐ **RECEIVER**

Year Training Completed: * | Full Name of Training Provider: *

Number of Appointments Received in the Last 10 Years: * ○None ○1-10 ○More Than 10

☐ **SUPPLEMENTAL NEEDS TRUSTEE**

Year Training Completed: * | Full Name of Training Provider: *

Number of Appointments Received in the Last 10 Years: * ○None ○1-10 ○More Than 10

☐ **ATTORNEY FOR THE CHILD (PRIVATELY PAID)** *(formerly Law Guardian - Privately Paid)*

Approval for placement on the eligibility list must be obtained from each department of the Appellate Division in which you wish to accept appointments.

Attorneys applying for this category must be current in their registration to practice law in New York State.

Year Training Completed: * | Full Name of Training Provider: *

Number of Appointments Received in the Last 10 Years: * ○None ○1-10 ○More Than 10

☐ **COURT EXAMINER**

Approval for placement on the eligibility list must be obtained from each department of the Appellate Division in which you wish to accept appointments.

Year Training Completed: * | Full Name of Training Provider: *

Number of Appointments Received in the Last 10 Years: * ○None ○1-10 ○More Than 10

## Categories of Appointment *(certified training IS NOT required, resume IS required)*

☐ **COUNSEL TO RECEIVER**

Attorneys applying for this category must be current in their registration to practice law in New York State.

Number of Appointments Received in the Last 10 Years: * ○None ○1-10 ○More Than 10

☐ **COUNSEL TO GUARDIAN**

Attorneys applying for this category must be current in their registration to practice law in New York State.

Number of Appointments Received in the Last 10 Years: * ○None ○1-10 ○More Than 10

☐ **ACCOUNTANT**

Number of Appointments Received in the Last 10 Years: * ○None ○1-10 ○More Than 10

☐ **AUCTIONEER**

Number of Appointments Received in the Last 10 Years: * ○None ○1-10 ○More Than 10

☐ **APPRAISER**

Number of Appointments Received in the Last 10 Years: * ○None ○1-10 ○More Than 10

☐ **PROPERTY MANAGER**

Number of Appointments Received in the Last 10 Years: * ○None ○1-10 ○More Than 10

☐ **REAL ESTATE BROKER**

Number of Appointments Received in the Last 10 Years: * ○None ○1-10 ○More Than 10

☐ **REFEREE**

Except special master or referee otherwise performing judicial functions in a quasi-judicial capacity.

Number of Appointments Received in the Last 10 Years: * ○None ○1-10 ○More Than 10

# UCS-870 Application for Appointment: Qualifications

Help

* Required

## Counties Available for Appointment

1.

Add County

## Foreign Languages Spoken Fluently

1. Please specify other... Remove

Add Foreign Language

## Academic Degrees Awarded

1. Please specify other... Remove

Add Academic Degree

## Attorneys Admitted to Practice Outside New York State

1. Jurisdiction of Admission: * Year of Admission: * Active Status: * Remove

Yes No

Add Other Jurisdictions

## Areas of Special Interest of Attorneys Admitted to Practice in New York or Other Jurisdictions

1. Remove

Please specify other...

Add Special Interest

## Professions or Occupations Other Than Attorney

1. Please specify other... Remove

Licensing Entity: Year License Issued: Active Status: *

Yes No

Add Profession/Occupation

# UCS-870 Application for Appointment: Qualifications

Help

* Required

## Counties Available for Appointment

1.

Add County

## Foreign Languages Spoken Fluently

No Foreign Languages Entered

Add Foreign Language

## Academic Degrees Awarded

No Academic Degrees Entered

Add Academic Degree

## Attorneys Admitted to Practice Outside New York State

No Admissions Outside New York Entered

Add Other Jurisdictions

## Areas of Special Interest of Attorneys Admitted to Practice in New York or Other Jurisdictions

No Special Interests Entered

Add Special Interest

## Professions or Occupations Other Than Attorney

No Professions or Occupations Entered

Add Profession/Occupation

# UCS-870 Application for Appointment: Background Information

Help

* Required

## Personal Background

**Have you ever been, or are proceedings pending in which you may be... ***

| | | |
|---|---|---|
| 1. | convicted of a crime or offense, other than a traffic infraction (include military proceedings)? | ○ Yes ○ No |
| 2. | denied a professional or occupational license, or been censured by a licensing authority or had an occupational or professional license revoked or suspended? | ○ Yes ○ No |
| 3. | held in contempt of court? | ○ Yes ○ No |
| 4. | found civilly liable in an action involving fraud, misrepresentation, theft or conversion? | ○ Yes ○ No |
| 5. | discharged in bankruptcy? | ○ Yes ○ No |
| 6. | found liable for unpaid money judgments, liens or judgments of foreclosure? | ○ Yes ○ No |
| 7. | in default in the performance or discharge of any duty or obligation imposed by a judgment, decree, order or directive of any court or governmental agency? | ○ Yes ○ No |
| 8. | removed as a fiduciary by a court of competent jurisdiction for misconduct? | ○ Yes ○ No |
| 9. | in forfeiture of a bond? | ○ Yes ○ No |
| 10. | found to have committed an ethical violation as a member of a judicial, executive or legislative branch of government? | ○ Yes ○ No |

## Explanatory Notes

If you answered **YES** to any question, you **MUST** submit an explanation of your answer in detail, giving all relevant dates.

**Explanations can be entered in the text area below or attached as a file on the next page.**

# UCS-870 Application for Appointment: Attachments

Help

* Required

**ATTACHMENT REQUIREMENTS**

- A resume, of no more than four (4) pages, is ***required*** for your application for Counsel To Guardian. The resume should include information of government-issued licenses and certificates issued by professional schools or organizations.
- Explanatory notes are ***required*** for background questions answered **YES**. You may either upload an attachment containing your explanatory notes, or enter them in the text area on the Background Information page.

**Attachments** *(accepted files types: PDF, JPG, JPEG, BMP, PNG, TIF, TIFF)*

Browse... No files selected. **Attach**

No Uploaded Attachments

UCS-872-Effective 10/2011

NOA #: ( )

# NOTICE OF APPOINTMENT AND CERTIFICATION OF COMPLIANCE

**(Pursuant to 22 NYCRR § 36.4)**

| Date of Appointment: | [X] Non-List |
|---|---|

## PART A NOTICE OF APPOINTMENT

1. Appointee's Name and Fiduciary Identification Number:

FID #

FIRST MIDDLE LAST SUFFIX*(Sr.,Jr.,III)*

2. Address/Phone/Fax/Email:

BUSINESS NAME (IF ANY)

STREET 1 CITY/TOWN/VILLAGE STATE ZIP ZIP+4

STREET 2 COUNTRY

PHONE FAX E-MAIL

**3. Type of Appointment:**

4. Index/File No.: 5. Court: 6. County:

NUMBER YEAR

7. Title of Action/Proceeding: 8. Case Type:

9. Appointing Judge:

FIRST MIDDLE LAST SUFFIX*(Sr.,Jr.,III)*

**UCS-872-Effective 10/2011** NOA #: ( )

INSTRUCTIONS TO APPOINTEE

- Review the information in items 1 and 2 of Part A(Notice of Appointment) for accuracy; circle errors and enter corrections on form.
- If Fiduciary Identification Number does not appear in Part A, an appointed individual must enter Social Security Number; an appointed entity must enter Tax Identification Number:

SS/TID# __ __ __ - __ __ - __ __ __ __

(Social Security Numbers are required in order to administer the disbursement of moneys that may constitute taxable income. 42 U.S.C. § 405 (c)(2)(C)(i). Social Security/Tax Identification Number will not be made public.)

- Appointment WITH compensation: Complete Part B (Certification of Compliance); date and sign item 5 of Part B.

Appointment WITHOUT compensation: do NOT complete Part B (Certification of Compliance); date and sign here:

Date : _____ Signature : _____

- Return completed form as soon as possible, but no later than 30 days after appointment, to the Fiduciary Clerk for the court of appointment

IF UNABLE TO ACCEPT APPOINTMENT FOR ANY REASON, NOTIFY FIDUCIARY CLERK IMMEDIATELY.

## PART B CERTIFICATION OF COMPLIANCE

1. Appointment in Part A: If the compensation anticipated to be awarded in any single calendar year (current or future) is $15,000 or more, mark "X" in the box in Column E.

| A<br>Index/File No.<br>(Number/year) | B<br>Court | C<br>County | D<br>Appointing Judge | E<br>Anticipated Compensation of $15,000 or more |
|---|---|---|---|---|
| | | | | ☐ |

**UCS-872-Effective 10/2011** NOA #: ( )

2. Part 36 appointments RECEIVED during CURRENT calendar year: **2017**

a) Review information for current calendar year appointments provided below from the records of the Office of Court Administration; circle errors and enter corrections on this form. b) In the blank spaces below, provide information for all current calendar year appointments not pre-recorded on this form. c) Mark "X" in the box in Column E for any appointment (including pre-recorded appointments) for which compensation of $15,000 or more is anticipated to be awarded in any single calendar year (current or future). Include compensation already awarded in calculating anticipated compensation for the current calendar year.

| A<br>Index/File No.<br>(Number/year) | B<br>Court | C<br>County | D<br>Appointing Judge | E<br>Anticipated Compensation of $15,000 or more |
|---|---|---|---|---|
| | | | | ☐ |
| | | | | ☐ |
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| | | | | ☐ |

**UCS-872-Effective 10/2011** NOA #: ( )

3. Part 36 appointments for which compensation was AWARDED during prior calendar year: **2016**

a) Review information for prior calendar year compensation provided below from the records of the Office of Court Administration; circle errors and enter corrections on this form. b) In the blank spaces below, provide information for all appointments not pre-recorded on this form for which compensation was awarded during the prior calendar year. c) Total all amounts of compensation entered in Column E (including pre-recorded amounts) in the space provided at the bottom of the column.

| A<br>Index/File No.<br>(Number/year) | B<br>Court | C<br>County | D<br>Appointing Judge | E<br>Compensation Awarded |
|---|---|---|---|---|
| | | | | $ |
| | | | | $ |
| | | | | $ |
| | | | | $ |
| | | | | $ |
| | | | | $ |
| | | | | $ |
| | | | | $ |
| | | | | $ |
| | | | | $ |
| | | | | $ |
| | | | | $ |
| | | | | $ |
| | | | | $ |

**Total compensation awarded during prior calendar year 2016 from Column E: $_____**

**UCS-872-Effective 10/2011** NOA #: ( )

4. **I certify that I am qualified** to accept the appointment in Part A of this form pursuant to section 36.2(c) of the Rules of the Chief Judge (22 NYCRR) because all the following are true. **Please check each box:**

a. I AM NOT a full-time or a part-time judge or housing judge of the Unified Court System of the State of New York or a relative of, or related by marriage to, a full-time or a part-time judge or housing judge of the Unified Court System within the fourth degree of relationship (Town and Village judges are judges of the Unified Court System); ☐ **TRUE**

b. I AM NOT a full-time or part-time employee of the Unified Court System; ☐ **TRUE**

c. I AM NOT the spouse, brother/sister, parent or child of a full-time or part-time employee of the Unified Court System who holds a position at or above salary grade JG24, or its equivalent: 1) employed in a judicial district in which I am applying for appointment or 2) with statewide responsibilities; ☐ **TRUE**

d. I AM NOT a person who currently serves, or has served within the last two years, as chair, executive director, or their equivalent, of a state or county political party (including any person or persons who, in counties of any size or population, possess or perform any of the titles, powers or duties set forth in Public Officers Law § 73 [1][k]), the spouse, brother/sister, parent or child of such political party official; or a member, associate, counsel or employee of any law firm or entity with which such political party official is currently associated; ☐ **TRUE**

e. I AM NOT a former judge or housing judge of the Unified Court System who left office within the last two years and who served within the jurisdiction of the court making the appointment in Part A of this form, as defined by section 36.2(c)(5) of the Rules of the Chief Judge, or the spouse, brother/sister, parent or child of such former judge; ☐ **TRUE**

f. I AM NOT a person who is serving or who has served as a campaign chair, coordinator, manager, treasurer or finance chair for the campaign of the judge making the appointment in Part A of this form, or the spouse, brother/sister, parent or child of that person, or anyone associated with the law firm of such person, within two years following the judicial election; ☐ **TRUE**

g. I AM NOT a judicial hearing officer pursuant to Part 122 of the Rules of the Chief Administrator serving on a judicial hearing officer panel for the court making the appointment in Part A of this form; ☐ **TRUE**

h. I AM NOT an attorney currently disbarred or suspended from the practice of law by any jurisdiction; ☐ **TRUE**

i. I AM NOT a person convicted of a felony for which no certificate of relief from civil disabilities has been received; ☐ **TRUE**

j. I AM NOT a person convicted of a misdemeanor for which sentence was imposed within the last five years and for which no certificate of relief from civil disabilities, or waiver by the Chief Administrator of the Courts, has been received; ☐ **TRUE**

k. I AM NOT a person who has been removed from an appointment list of the Chief Administrator of the Courts for unsatisfactory performance or conduct incompatible with appointment, or is currently suspended from an appointment list of the Chief Administrator of the Courts pending a final determination on the issue of removal, or resigned from the appointment list in its entirety pursuant to an agreement with the Inspector General of the Courts; ☐ **TRUE**

**I certify that I am qualified** to accept the appointment in Part A of this form pursuant to section 36.2(d) ("Limitations on appointments based on compensation") of the Rules of the Chief Judge (22 NYCRR) ☐ **YES** ☐ **NO**

***If you answered NO to the above, you are not qualified for the appointment pursuant to Part 36.***

Date: _____ Signature: _____

Fiduciary Clerk should submit all completed statements to:

Appointment Processing Unit, 25 Beaver Street, Room 840, New York, NY 10004

*(Mark "X" in appropriate boxes and provide all requested information.)*

SUPREME COURT OF THE STATE OF NEW YORK
*County:* _____ COUNTY
----------X

*Title of Action*

_____
_____
_____

----------X

**EX PARTE APPLICATION**
**for**
**APPROVAL OF SECONDARY APPOINTMENT**
**(Pursuant to 22 NYCRR § 36.1(a)(10)**

INDEX NO. _____ / _____
*No.* *Yr.*

APPROVAL of the following SECONDARY APPOINTEE is respectfully requested (attach o ne page resume):

*Name:* _____

*Address:* _____

_____

_____

*Phone/FAX/Email* _____

The secondary appointee will serve as: ☐ COUNSEL ☐ ACCOUNTANT ☐ APPRAISER ☐ AUCTIONEER ☐ REAL ESTATE BROKER ☐ PROPERTY MANAGER.

The secondary appointee

☐ is on the list established by the Chief Administrator of the Courts for the category of appointment requested.

☐ is NOT on the list established by the Chief Administrator of the Courts for the category of appointment requested, but is otherwise qualified for appointment pursuant to Part 36 of the Rules of the Chief Judge.

The reasons for the request are as follows (If a NON-LIST appointment is requested, include explanation of good cause for the appointment; if the Guardian or Receiver requests that he/she, or a person associated with his/her law firm, be appointed counsel, include an explanation of the compelling reason for the appointment.): _____

_____
_____
_____
_____
_____
_____

DATED: _____

*Signature:* _____
*Print Name:* _____

☐ GUARDIAN ☐ RECEIVER

*Address:* _____
_____
_____

*Phone* _____
*FAX* _____
*Email* _____

Sworn to before me this _____ day of _____, 200___.

_____
Notary Public

(Mark "X" in appropriate boxes and provide all requested information.)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
----------X

*Title of Action*

_____
_____
_____

----------X

**DECISION AND ORDER APPROVING EX PARTE APPLICATION for SECONDARY APPOINTMENT**
(Pursuant to 22 NYCRR § 36.1(a)(10)

INDEX NO. _____ / _____
*No.* *Yr.*

*Name of Judge:* _____

Upon ex parte application of _____, as
*Name*

☐ GUARDIAN ☐ RECEIVER, dated _____, for approval of a Secondary Appointment, it is determined that

1. A Secondary Appointment is necessary and

*Name:* _____

*Fiduciary ID:* _____

*Address:* _____

_____

*Phone/FAX/Email* _____

is appropriate for appointment as: ☐ COUNSEL ☐ ACCOUNTANT ☐ APPRAISER

☐ AUCTIONEER ☐ REAL ESTATE BROKER ☐ PROPERTY MANAGER;

2. *(Choose* (a) or (b) *by marking "X" in appropriate box.)*

a. ☐ The appointee is on the list established by the Chief Administrator of the Courts for the category of appointment requested;

**OR**

b. ☐ The appointee is NOT on the list established by the Chief Administrator of the Courts for the category of appointment requested, but is otherwise qualified for appointment pursuant to Part 36 of the Rules of the Chief Judge, and the Court is filing with the fiduciary clerk form UCS 872.5 (STATEMENT OF REASONS FOR NON-LIST APPOINTMENT (§ 36.2(b)(2));

3. *(If this is an appointment of Guardian or Receiver, or person associated with his/her law firm, as* COUNSEL, *mark "X" in following box and provide* compelling reason )

☐ The compelling reason for appointment of the Guardian or Receiver, or a person associated with his/her law firm, as counsel is as follows: _____
_____
_____
_____
_____
_____

**Title of Action:**_____ **Index No.** _____/_____
*No.* *Yr.*

**ACCORDINGLY, it is**

**ORDERED that this application for approval of a secondary appointment as**

☐ **COUNSEL** ☐ **ACCOUNTANT** ☐ **APPRAISER** ☐ **AUCTIONEER**
☐ **REAL ESTATE BROKER** ☐ **PROPERTY MANAGER** **is GRANTED.**

**ORDERED that** _____ **the secondary appointee shall immediately**
*Name of Secondary Appointee*
**file form UCS 872;**

**ORDERED that compensation for the secondary appointee is subject to PRIOR court approval upon submission of an application showing experience/expertise, services rendered, time expended, prevailing rate in the community, rate charged, challenges presented and results achieved;**

**ORDERED that the applicant shall serve a copy of this order upon the secondary appointee and all persons entitled to notice in this action/proceeding by certified mail.**

**DATED:** _____ *Signature:*_____

*File a signed copy of this order with the Fiduciary Clerk*

UCS - 876 - Effective January 1, 2004

# REPORT OF COMPENSATION RECEIVED BY LAW FIRMS FOR APPOINTMENTS PURSUANT TO PART 36 OF THE RULES OF THE CHIEF JUDGE (§ 36.4(c))

*(Complete if total compensation from appointment of law firm's members, associates and employees pursuant to Part 36 of the Rules of the Chief Judge exceeds $50,000 in a single calendar year (January 1 to December 31). File by March 31st following the calendar year reported.)*

1. Calendar Year Reported:

Year ☐☐☐☐

2. Law Firm Tax ID Number

TID# ☐☐-☐☐☐☐☐☐☐

3. Name of Law Firm:

4. Address/Phone/FAX/ E-mail:

Street City/Town/Village State Zip

Phone Fax E-Mail

5. List the names and Fiduciary Identification Numbers of the members, associates and employees of the law firm for whom compensation from appointments has been approved during the calendar year reported, and enter for each the total compensation approved during that year. For a member, associate or employee with no Fiduciary Identification Number (FID#), enter "Non-List" and his/her Social Security Number in space provided for FID#, (attach additional sheets as needed).

| NAME | FIDUCIARY IDENTIFICATION NUMBER | TOTAL APPROVED COMPENSATION IN CALENDAR YEAR REPORTED |
|---|---|---|
| | | $ |
| | | $ |
| | | $ |
| | | $ |
| | | $ |
| | | $ |
| | | $ |

6. Total of all compensation entered in item 5: $

Date: _____ Signature: _____

Print Name: _____

Title: _____
(e.g., managing attorney, member)

Mail to: *OCA, Appointment Processing Unit, 25 Beaver Street, Room 840, New York NY 10004*

# Suffolk County Supreme Court
# Guardianship Compliance Procedures

The following materials outline the compliance requirements for all court appointed Article 81 Guardians and the duties of all Court Examiners designated to serve in Suffolk County.

## Court Examiner

A Court Examiner designated to serve in the County of Suffolk and approved by the Presiding Justice of the Appellate Division Second Department shall be appointed in all Article 81 cases resulting in the appointment of a permanent guardian of the person and/or property.

Court Examiners oversee the administration of the guardianship and are, in effect, the court's watchdogs against the omissions or commissions of court appointed guardians. In that regard, Court Examiners are the eyes and ears of the court and are heavily relied upon to protect the personal needs and finances of the incapacitated person, and to uphold the integrity of the guardianship system.

## Compliance Conferences

Upon the completion of each guardianship case in Suffolk County, the presiding Justice will issue a bench order setting forth two return dates for compliance conferences to be heard before the Guardianship Referee. The first return date is scheduled forty-five (45) days from the signing of the bench order for the purpose of monitoring the filing of the final order and judgment and, where required, the guardian's progress toward obtaining a bond. The second return date is scheduled for one hundred and twenty (120) days after the issuance of the bench order to monitor the guardian's compliance with obtaining a bond, if required, filing of a commission and designation to act with the County Clerk, filing an initial report with the Court Examiner and the guardianship department, and fulfilling his or her education requirement.

In some cases, 120 days is not enough time for a guardian to complete all of their initial requirements. Accordingly, after the issuance of the bench order, it is the responsibility of the assigned Court Examiner to closely monitor their cases for compliance and to immediately report any delinquencies to the court. No compliance conference will be marked 'off-calendar' until full compliance is reported by the assigned Court Examiner and verified by the court.

**Notice of Settlement of the Order and Judgment**

Every bench order appointing a guardian contains the requirement that notice of settlement of the final order and judgment must be submitted within thirty (30) days from the date of the issuance of the bench order. Accordingly, Court Examiners must monitor their cases for timely filing of the order and judgment and are required to notify the Guardianship Referee of any delinquency beyond 30 days after the date of the bench order and prior to the scheduled 45 day compliance conference. Additionally, Court Examiners should investigate the cause of the delay and report their findings, if any, to the Guardianship Referee who will determine whether appearances will be required at the initial 45 day conference.

In most cases, it is petitioner's counsel that is responsible for the preparation and filing of the final order and judgment. Therefore, it is recommended that Court Examiners first contact the petitioner's counsel when investigating the cause of the delay. Additionally, all court appointed guardians are advised to maintain close communication with petitioner's counsel during this initial phase to help avoid any undue delays in the filing of the final order and judgment. Court Examiners are expected to closely monitor all of their assigned cases for the timely filing of the final order and judgment. However, particular attention should be afforded to any case where a temporary guardian has not been appointed in the interim.

**Commission and Designation of the Clerk to Receive Process**

Guardians are not authorized to act on behalf of their ward until they have filed their designation of clerk to receive process and have been issued their commission (see Mental Hygiene Law §81.26 and §81.27). As such, guardians are required to file their commission and designation with the County Clerk within fifteen (15) days after the issuance of the final order and judgment. Court Examiners should closely monitor these filings and immediately report any delinquencies to the Guardianship Referee who will determine what, if any, additional action is necessary at that time.

In an effort to streamline the commission process Suffolk County now utilizes a short form commission. Said short form commission is a one page document that incorporates the signed final order and judgment of the court by reference and annexation thereto. Once filed with the County Clerk the issuance of the commission should take no longer than seven (7) to ten (10) days. Copies of the new short form commission can be obtained through the Suffolk County Guardianship Department.

**Bonds**

The bond is the single most important facet in ensuring that the assets of incapacitated persons are protected from incompetent or malevolent fiduciaries. The court may require a property management guardian to acquire a bond amounting to the value of the incapacitated person's assets plus two years income. The County Clerk will not issue a property management guardian's commission to act prior to the filing and approval of a court ordered bond. As such, it is essential for a guardian to apply for a bond immediately following the issuance of the bench order and not to wait for a signed final order and judgment. Accordingly, the initial forty-five (45) day conference also includes monitoring the status of a guardian's bond application and Court Examiners must report to the court any guardian that has not obtained a court ordered bond prior to the initial conference return date.

Bonding companies, as sureties, assess an applicant's eligibility based on risk of loss. As such, applicants with low credit scores or a history of bankruptcy, money judgments, or previous defaults will likely be denied a bond. In such cases, Court Examiners must promptly notify the court, in writing, and a conference will be calendared before the issuing court. At this conference, the court will determine the reason(s) for the denial of a bond and explore whether there are any alternatives to requiring the guardian to obtain a bond. Such alternatives include the use of restrictive accounts that set a limit on the guardian's access to their wards finances. In those cases where a guardian cannot obtain a bond and no acceptable alternatives to bonding are available, the court will have to appoint a new property management guardian. However, under most circumstances, a property management guardian's inability to obtain a bond does not necessarily preclude that same person from serving as a personal needs guardian.

Annual expenditures and market trends may result in significant changes in the amount of assets in a guardianship estate during the course of an accounting year. Accordingly, it is common for the court to order a guardian to obtain an increased or decreased bond commensurate with the most current accounting of the guardianship assets. In most cases an increase or decrease in guardianship assets of ten (10) percent or more from the current ordered bond will require the issuance of a new bond, adjusted accordingly. However, Court Examiner's may in their discretion recommend that a guardian acquire a new bond in any matter where there has been an increase or decrease in guardianship assets, regardless of the amount thereof. In order to ensure adequate bonding throughout the calendar year a guardian of the property must immediately report to the Court Examiner any lump-sum increases in the amount of a guardianship estate. Such increases include but are not limited to an inheritance, settlement of a lawsuit, sale of real property, and insurance beneficiary proceeds.

In an effort to monitor compliance with obtaining an increased or decreased bond a compliance conference is scheduled, before the Guardianship Referee, thirty (30) days after the issuance of any court order increasing or decreasing a bond. Delays in obtaining an increased bond result in an under-insured guardianship estate increasing the risk of a financial loss in the event of a guardian's breach of fiduciary duty. Additionally, reduced bonds typically result in a lower premium cost and delays may result in unnecessary costs to the guardianship estate. As such, Court Examiners must closely monitor whether a guardian has complied with any court ordered changes in the amount of a bond. Adjournments of thirty (30) day compliance conferences will be granted at the discretion of the Guardianship Referee after consultation with the assigned Court Examiner.

**Education Requirement**

Absent a waiver from the appointing court all lay guardians must complete an approved guardianship training course (see Mental Hygiene Law §81.39). A certificate of proof of attendance must be filed with the Clerk of the Court, a copy of which must also be provided to the assigned Court Examiner. Court Examiners may not approve a guardian's initial report without proof of attendance or proof of a waiver. When a guardian has not fulfilled their educational requirement within ninety (90) days after the issuance of the commission, the assigned Court Examiner must determine the reason for the delay. Extensions of time to complete educational training will be granted where there is good cause shown for the delay.

In an effort to ensure that lay guardians receive proper and timely training, Suffolk County has adopted the use of the Office of Court Administration's online lay guardianship training program. The online training program is free of charge and utilizes the services of the Guardianship Assistance Network (GAN). Previously, all lay guardians appointed in Suffolk County received their guardianship training from the Bar Association either during a live presentation or on a recorded DVD of the program for a standard fee. Both programs acceptably fulfill the education requirement, and the choice of training is up to the individual guardian.

**Initial Reports**

Initial reports are due no later than ninety (90) days after the issuance of a guardian's commission, see MHL §81.30 (a), and under no circumstances should an initial report predate the issuance of a commission. The initial report is extremely important in that it serves as a starting off point for the first annual accounting as well as providing an overview of the incapacitated person's current physical condition and general well being. Depending on when a guardian is commissioned, an initial report may be the only review of the guardianship case until the first annual report is filed, which in some cases, could

amount to over a year's time. As such, Court Examiners must carefully review initial reports before confirming them, to ensure that any and all assets marshaled by the guardian are consistent with assets previously reported by the Court Evaluator in their report.

Particular attention must be given to those cases where inconsistencies in reported assets would result in insufficient bonding, or in those matters where assets appear to be under-reported, since conceivably the easiest path to a malfeasance is at this initial stage of the guardianship.

**Annual Accountings**

Article 81 guardians are required to file an annual report for the preceding year with the Clerk of the Court no later than May 31st of each calendar year (see MHL §81.31). Additionally, guardians are required to provide their assigned Court Examiner with a copy of the annual report inclusive of all supporting documentation necessary to complete an examination thereof (see MHL §81.31 and MHL §81.32). In order to monitor these filings, Court Examiners are required to send, via certified mail, a written demand to any guardian that has not filed an annual report by May 31st without exception (see MHL §81.32). A copy of the written demand must also be provided to the Guardianship Department. Court Examiners may not grant extensions to the May 31st filing deadline. Therefore, written demands should be sent out as early as June 1st and no later than June 15th. All written demands shall indicate that the guardian must file their annual report within fifteen (15) days from the date of service of the demand (see MHL §81.32). Any guardian failing to comply with the conditions of a written demand must be immediately reported to the court which thereupon may issue an order directing the guardian to appear for a compliance hearing. Additionally, Court Examiners are also required to file a formal removal motion in any case(s) wherein an annual accounting is delinquent for one or more calendar year.

The Clerk of the Court is only responsible for receiving and recording an annual report in the form that it is filed. Therefore, Court Examiners should review an annual report for facial sufficiency as soon as it is received. Incomplete or unsatisfactory annual reports, regardless of when filed, also require the issuance of a written demand for a revised report or for additional proof (see MHL §81.32[d] 1). Furthermore, all orders seeking confirmation of a Court Examiner's review of an annual report shall include copies of any previously issued court orders authorizing expenditures or designating a plan of compensation. If such order(s) are not available, the Court Examiner must specifically reference the date and terms of such order(s). This practice, if utilized, will minimize delays in processing orders confirming annual reports.

Court Examiners are required to examine and confirm an annual report within thirty (30)

days from the date of a guardians filing thereof (see MHL §81.32[a] 1 & 2). Therefore, to monitor compliance with this requirement, Court Examiners must provide the Guardianship Referee with a complete list of their assigned cases not in compliance with MHL §81.32[a] 1 & 2 by no later than June 30th each calendar year and should also include any explanations for the delinquent filings. Compliance hearings to address delinquent filings will be calendared on a case by case basis. Additionally, the Guardianship Department will conduct random in-house audits of Court Examiner inventories.

**Guardian Annual Visitation Requirements**

Pursuant to MHL§81.20(a)5 a guardian is required to visit with their ward no less than four (4) times per calendar year or more frequently as may be specified by the court. In an effort to better monitor compliance with this provision it has been a longstanding policy in Suffolk County that guardians provide Court Examiners with quarterly affidavits of visitation. However, to date, there is no evidence that this policy has been effective. Accordingly, guardians will no longer be required to file quarterly affidavits of visitation. Rather, going forward all guardians will now be required to swear in their testimony that they are in full compliance with the visitation requirements of MHL§81.20(a)5, and Court Examiners will be required to report whether compliance with visitation was met in the orders confirming a guardian's annual report.

Even though MHL§81.20(a)5 does not specifically direct quarterly visitation, it is implied that such visitations will be spread out over a calendar year and not just comprise of four (4) consecutive days at any one time. As such, Court Examiners must require guardians to include any actual dates of visitation in their testimony except in cases where a ward lives with the guardian(s), which speaks for itself. Additionally, advances in technology support the use of alternative methods such as SKYPE to supplement, but not entirely supplant, the visitation requirements of MHL§81.20(a)5. Whether a guardian is in compliance with MHL§81.20(a)5 shall be left to the discretion of the Court Examiner after a complete review of a guardian's annual report and testimony.

**Compliance Conference Procedures**

Compliance conferences are scheduled for Wednesday mornings, beginning at 9:30 a.m., in courtroom S-24 of the Suffolk County Supreme Court. During the last week of each month all Court Examiners will receive an E-mail from the Guardianship Department containing the compliance calendars for the upcoming month. It is the Court Examiner's responsibility to review these calendars, upon receipt, and to contact the Guardianship Referee no less than two (2) days prior to a scheduled conference date regarding the status of their cases.

Applications for adjournments, or to dispense with the necessity of a compliance conference, will be granted only in those cases where a Court Examiner has provided written confirmation (E-mail requests will be honored but must fully explain the reason for the adjournment or cancellation) of full compliance, or where a good-faith effort to comply with filings is substantiated by a Court Examiner and communicated to the Guardianship Referee no less than two (2) days prior to a scheduled compliance conference. This policy allows the court adequate time to address such requests and to communicate any decisions to the parties, where required. Letters or phone calls to the court from a guardian requesting an adjournment or cancellation, whether a lay guardian or a professional, will not be honored unless the Court Examiner for that case is unavailable, or it is determined that time is of the essence. If the Guardianship Referee is contacted by a guardian regarding the status of a compliance conference, he or she will be referred to the assigned Court Examiner. Court Examiners are required to appear at scheduled compliance conferences unless they have been previously adjourned or cancelled. Strict adherence to the foregoing policies will result in most issues being resolved and limit the need for court appearances.

**Periodic Case Review and Requests for Compliance Conferences**

Court Examiners must regularly review their assigned cases for guardian compliance and may request a conference with the Guardianship Referee in those cases where issues affecting the health, welfare or financial well-being of an incapacitated person or person in need of a guardian are present. Such matters will be placed on a compliance conference calendar but may need to be restored to the calendar of the assigned Guardianship Justice if the issue(s) to be resolved require judicial intervention. Whether a case conference requested by a Court Examiner will be scheduled before the Guardianship Referee or before one of the Guardianship Justices is in the discretion of the court.

**Requests for Approval of Expenditures from the Guardianship Estate**

The court will no longer accept "So Ordered" letter requests for the approval of expenditures from the guardianship estate. Going forward all requests for the advanced approval of an expenditure by a guardian must be submitted to the court by the Court Examiner on the approved Short Form Application/Order form. Such requests should include an explanation as to why the expenditure is necessary, how it will benefit the incapacitated person, and the overall impact that the expenditures will have on his or her financial situation. Also included should be a copy of the guardian's written request for said expenditure and two or more written itemized estimates. The court will sign the Short Form Application/Order indicating whether such expenditure is approved or not approved. If the court does not approve an expenditure request, a formal motion to be heard on the

matter may be interposed by the Court Examiner or guardian. Copies of the Short Form Application/Order may be obtained through the Suffolk County Guardianship Department.

**Retained Counsel and Hired Accountants or Other Professionals by a Guardian**

Unlike part 36 court appointed guardians which must apply to the court for the appointment of counsel, accountants and other professionals from the part 36 list of eligible fiduciaries, it is commonplace for a non-part 36 lay guardian to be granted this authority, which will, in most cases, be reflected both in the final order and judgment and the guardian's commission to act. Absent such specific authority, a lay guardian must first apply to the court to amend their order to include this power. Any and all fees payable from guardianship assets to privately retained counsel, accountants or other professionals remain subject to the court's approval and are typically awarded based on a fair and reasonable standard for the nature of services rendered in the jurisdiction. Consequently, the court-awarded fees may amount to less than any agreed upon rates between the parties. As such, Court Examiners should inform non-part 36 lay guardians that retainer agreements or contracts for accounting or other professional services should include an acknowledgment that the parties are aware that requested fees are subject to the court's approval, and that they will accept any such award as paid in full. Absent such an agreement, a guardian may be held personally responsible for any shortfall in the amount of fees billed and those awarded by the court.

In most guardianship cases the preparation and submission of an annual accounting is considered an ordinary duty of a guardian. Accordingly, in any matter where a guardian both receives compensation and has also requested the authority to expend guardianship assets to pay an outside source for preparation of the annual accounting, the court shall use its discretion in awarding payments, which may then be deducted from the amount of the guardian's commission. Such practice is, in most cases, an impermissible delegation of ordinary guardianship duties. Notwithstanding, if a Court Examiner feels that the payment of a full commission to the guardian and a secondary payment for the preparation of the annual accounting is warranted, specific reasoning must be provided in the order submitted by the Court Examiner confirming said annual accounting.

This rule shall also apply in any matter where a guardian receives compensation in the form of a monthly or annual stipend. However, it shall not apply in those matters where a guardian has waived their right to receive compensation altogether. In such cases, the amount of any compensation awarded for the preparation of the annual accounting shall remain subject to the court's approval. Furthermore, this rule shall only apply to costs associated with preparing and filing an annual accounting and does not apply to the hiring of an accountant or other professional to prepare Federal and/or State income taxes.

In as much as Part 36 guardians cannot retain professionals this issue is most likely to appear in those cases where non-part 36 lay guardians are appointed. However, there have been some reports of instances where Part 36 guardians have utilized their own personal staff in the preparation and filing of annual accountings and have sought additional compensation for such services. This type of arrangement is also impermissible and shall be subject to the same policies and procedures applied to non-part 36 lay guardians. So as to avoid future issues, it is strongly recommended that Court Examiners immediately notify any guardians that have previously outsourced their annual accountings of these new policies and procedures.

It is also important to note that it is common for attorneys to submit affirmations of services which include duties not of a legal nature but more akin to an accountant. In as much as the fees typically awarded by the court for legal services are significantly higher than for accounting services, the lumping of all services rendered under the title of legal services may be misleading and result in an unjust enrichment at the cost of the guardianship estate. Therefore, it is incumbent upon the Court Examiner to ensure that the fees requested by attorneys are separated into proper categories of services rendered.

**Part 36 Guardians Serving as Legal Counsel to Their Ward**

Only under very limited circumstances and only after receiving prior court approval should a Part 36 guardian also serve as legal counsel to their ward. Accordingly, any Part 36 guardian seeking to serve as their own counsel must first make a formal application to the court outlining the specific reasons why the court should appoint them to serve in this capacity. Typical reasons for such an appointment include but are not limited to guardianship estates with little or no assets essentially rendering the appointment pro-bono in nature, extraordinary legal expertise in the area of law at issue, or an extensive factual knowledge of the underlying issue(s) that will likely result in a significant savings in billable hours and costs associated with the particular litigation. It is important to note that such appointments are considered as secondary appointments under the part 36 rules of the court, thus fees payable to said appointees are subject to the approval and discretion of the court and must also be reported to the Office of Court Administration.

**Guardianship Referee**

As an employee of the Unified Court System, the Guardianship Referee cannot provide legal advice or aid in the preparation of annual or final accountings. Accordingly, the Guardianship Referee will advise a guardian to speak with their attorney if they have one, or refer him or her to the appointed Court Examiner.

Questions regarding the content of this memorandum should be directed to Jeffrey Thomas Grabowski, Guardianship Referee, Suffolk County Supreme Court at (631) 740-3894.

# Medical Terminology in Guardianship Proceedings

## Learning Objectives

At the conclusion of this presentation, participants will be able to:

- Identify and discuss the medical terminology associated with various impairments implicated in guardianship proceedings;
- Verbalize awareness and understanding of other medical terminology that relates to guardianship proceedings;
- Apply decision-making standards to the process of making medical decisions as a surrogate.

## The 3 D's: Delirium, Dementia, and Depression

Delirium: disturbance of awareness

Dementia: disturbance of memory

Depression: disturbance of mood

## Delirium: Definition and Characteristics

"Delirium is sudden severe confusion due to rapid changes in brain function that occur with physical or mental illness."

- Hyperactive
- Hypoactive
- Mixed

## Delirium: Causes and Risk Factors

- Infection
- Medication
- Withdrawal
- Intoxication/ Drug Use
- Age > 65
- Prior Brain Damage or Disease
- Recent Surgery
- Dehydration/ Malnutrition

## Delirium: Screening Tools

NuDESC:

- Disorientation
- Inappropriate Behavior
- Inappropriate Communication
- Illusions/Hallucinations
- Psychomotor Retardation

## Delirium: Treatment

Remove Root Cause(e.g., Medication)

Treat Underlying Cause

Joseph Fromm, Jr., MD, MPH & G. Brian Young, MD, FRCPC, Patient education: Delirium (beyond the basics), UpToDate, https://www.uptodate.com/contents/delirium-beyond-the-basics (last visited Feb. 21, 2019).

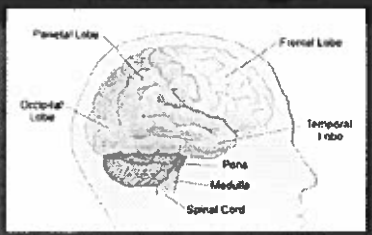
## Dementia: Definition and Characteristics

"Dementia is a gradual and progressive decline in mental processing ability ...."

"Significant impairment" of at least two core mental functions:

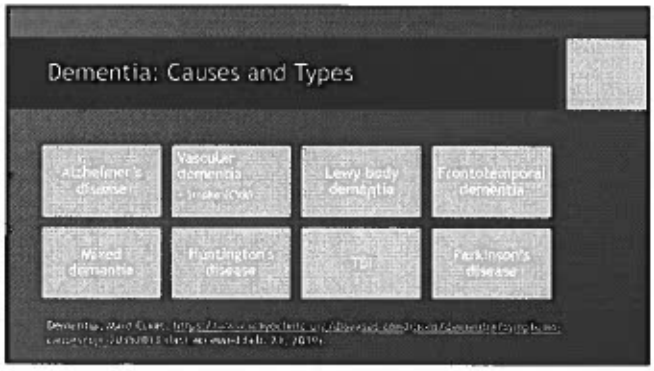
- Memory
- Communication/language
- Ability to focus
- Reasoning and judgment
- Visual perception

## Dementia: Causes and Types

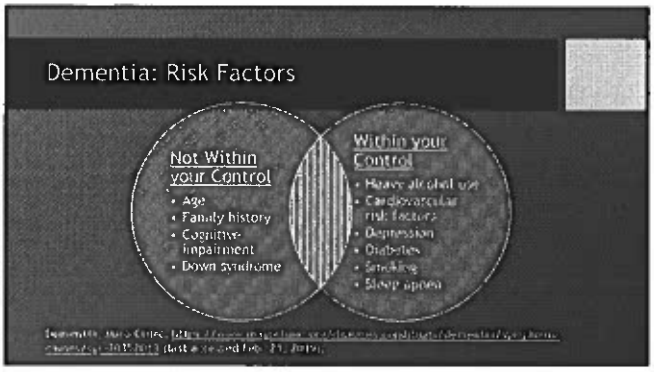



Anatomy of the Brain, [www.thebrain.mcgill.ca], available at http://www.thebrain.mcgill.ca/flash/i/i_01/i_01_cr/i_01_cr_ana/i_01_cr_ana.html (last accessed Feb. 24, 2019).

## Dementia: Causes and Types




## Dementia: Risk Factors




## Dementia: Screening Tools for Cognitive Function

Mini-Mental State Exam (MMSE)

- **Orientation**
- **Word registration and recall**
- **Attention and calculation**
- **Language ability**
- **Visuospatial ability**

## Dementia: Treatment

- Medications
- Occupational therapy
- Modify environment
- Modify tasks

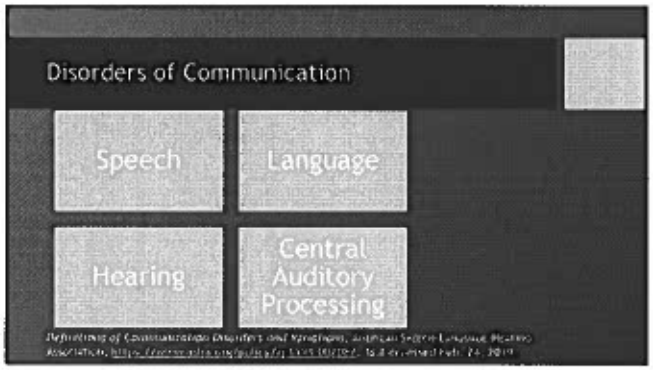
## Delirium vs. Dementia

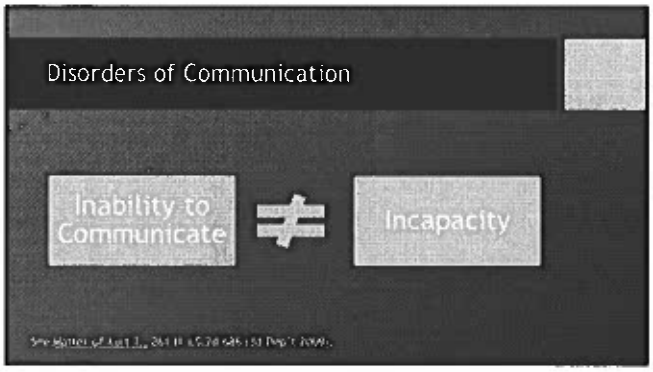
| | Delirium | Dementia |
|---|---|---|
| Onset | Acute and sudden | Insidious, chronic |
| Duration | Variable, fluctuating | Progressive or static |
| Cause | Underlying cause (e.g., infection) | Condition that damages brain cells |

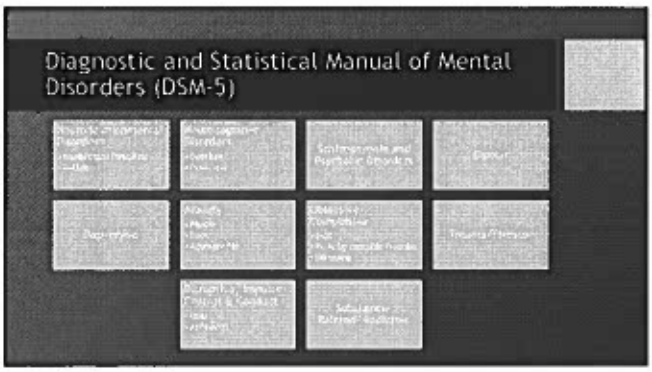
## Pain in Cognitive Disorders

PAINAD Scale

- Breathing
- Negative vocalization
- Facial expression
- Body language
- Consolability


Disorders of Communication
Speech
Language
Hearing
Central Auditory Processing


Disorders of Communication
Inability to Communicate
≠
Incapacity


Diagnostic and Statistical Manual of Mental Disorders (DSM-5)

## Common Symptoms of Mental Health Disorders


Might necessitate guardianship if:

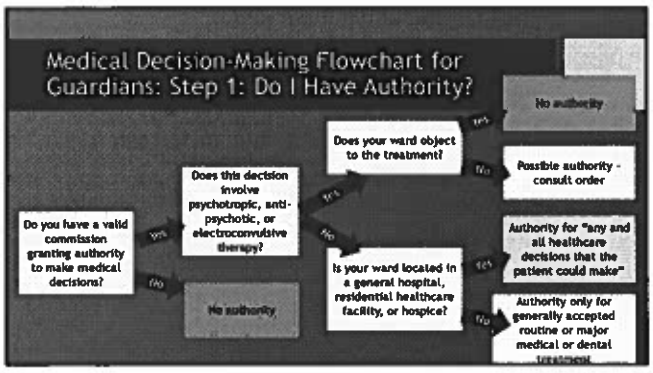
- Risk of Harm absent guardian; and
- Inability to understand risk of harm

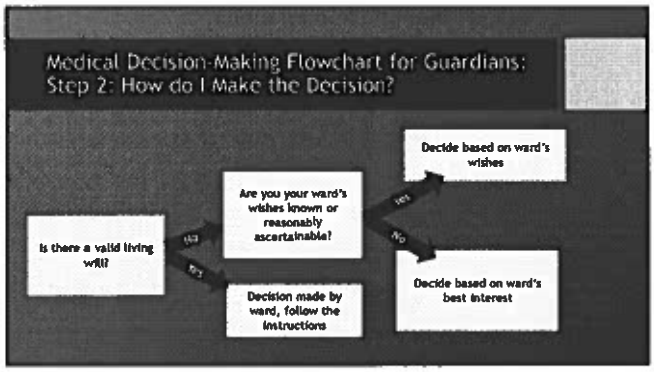
## Miscellaneous Medical Terms

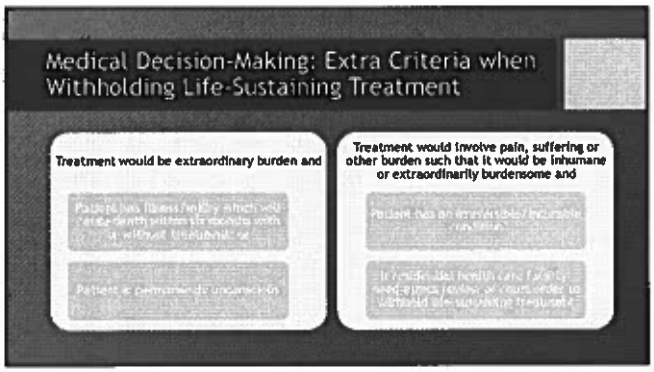
- HIPAA
- Psychotropic, anti-psychotic, electroconvulsive therapy
- Life-sustaining treatment

## Advanced Directives

| | |
|---|---|
| Medical Directives | • Health Care Proxy<br>• Living Will<br>• MOLST<br>• DNR/DNI |
| Non-Medical Directives | • Power of Attorney<br>• Last Will and Testament |


Medical Decision-Making Flowchart for Guardians: Step 1: Do I Have Authority?
Do you have a valid commission granting authority to make medical decisions?
Yes
No
No authority
Does this decision involve psychotropic, anti-psychotic, or electroconvulsive therapy?
Yes
No
Does your ward object to the treatment?
Yes
No authority
No
Possible authority - consult order
Is your ward located in a general hospital, residential healthcare facility, or hospice?
Yes
Authority for "any and all healthcare decisions that the patient could make"
No
Authority only for generally accepted routine or major medical or dental


Medical Decision-Making Flowchart for Guardians: Step 2: How do I Make the Decision?
Is there a valid living will?
No
Yes
Are you your ward's wishes known or reasonably ascertainable?
Yes
No
Decide based on ward's wishes
Decide based on ward's best interest
Decision made by ward, follow the instructions


Medical Decision-Making: Extra Criteria when Withholding Life-Sustaining Treatment
Treatment would be extraordinary burden and
Treatment would involve pain, suffering or other burden such that it would be inhumane or extraordinarily burdensome and

## Case Study: Mrs. Jones

- 94 year old widow
- 1 adult son in California
- No living will; Son was health care proxy (revoked at hearing)
- Lives in nursing home
- Has irreversible vascular dementia and is otherwise healthy
- You think Mrs. Jones is a Jehovah's witness
- New development - anemia (fatigue, elevated heart rate - otherwise comfortable)
- MD recommends a blood transfusion, but says injections to increase her red blood cells are also possible treatment
- MD seeks your consent - what do you do?

## Case Study: Mrs. Jones - Change the Facts

Mrs. Jones gets worse instead of better
Her anemia is now severe
MD tells you death is imminent if she does not receive a blood transfusion
MD also tells you that she will fully recover with blood transfusion

How does your analysis change?

## Case Study: Mrs. Jones - Change the Facts Again

- Mrs. Jones has a living will
- It clearly states no blood product transfusions under any circumstances

How does your analysis change?

66 A.D.3d 1344
Supreme Court, Appellate Division,
Fourth Department, New York.

In the Matter of the Application of
Rosanna E. HECKL, Olivia J. Corey,
Christopher M. Corey and Thomas J. Corey,
Petitioners–Respondents–Appellants,
For the Appointment of a Personal Needs
and Property Management Guardian
of Aida C., an Alleged Incapacitated
Person, Appellant–Respondent.
Permclip Products Corp., Intervenor–Respondent.

Oct. 2, 2009.

**Synopsis**

**Background:** Children petitioned for appointment of guardians over the person and property of their mother, an alleged incapacitated person (IP). The Supreme Court, Erie County, Penny M. Wolfgang, J., appointed the IP's granddaughter and the IP's personal assistant as coguardians of the IP's person and corporate counsel for corporation of which IP was the president and sole shareholder as guardian of the IP's property. IP and her children appealed.

**Holdings:** The Supreme Court, Appellate Division, held that:

[1] granddaughter was appropriate person to appoint as guardian of IP's person;

[2] conflict of interest disqualified personal assistant from serving as guardian over IP's person;

[3] appointing corporate counsel as guardian over property was warranted; and

[4] court did not violate IP's due process rights by requiring her to testify at hearing.

Affirmed as modified.

West Headnotes (5)

[1] **Mental Health**
Heirs, next of kin, and relatives in general

Granddaughter was appropriate person to appoint as guardian of grandmother's person, even though grandmother mistakenly believed she did not have grandchildren and was not aware that she was related to granddaughter; evidence indicated grandmother and granddaughter shared a very close and loving relationship, granddaughter had experience in caring for two elderly women and had taken a training course with respect to the duties and responsibilities of a guardian of the person, and granddaughter recognized grandmother's dependence upon her personal assistant and expressed a willingness to work with him. McKinney's Mental Hygiene Law § 81.19(d).

Cases that cite this headnote

[2] **Mental Health**
Persons Who May Be Appointed

Conflict of interest disqualified personal assistant to alleged incapacitated person (IP) from serving as guardian over her person, even though assistant was IP's trusted and constant companion and maintained her home in immaculate conception; assistant had worked for IP for 34 years and had never received a paycheck, he resided in IP's home, had limited assets, and was dependent upon IP for his food, clothing, and shelter, and he testified that he did pretty much whatever the IP told him to do. McKinney's Mental Hygiene Law § 81.19(d)(8).

Cases that cite this headnote

[3] **Mental Health**
Persons Who May Be Appointed

Appointing the corporate counsel for corporation of which alleged incapacitated

person (IP) was the president and sole shareholder as guardian of the IP's property was warranted; counsel had worked for the corporation for a few years, he arranged to secure in excess of $2 million that had been left in various unsecured places in the IP's home, and IP's children who petitioned for appointment of guardian had removed themselves from consideration as guardians of IP's property. McKinney's Mental Hygiene Law § 81.19.

Cases that cite this headnote

[4] **Mental Health**
Discretion of court

It is within the discretion of the court to appoint a guardian of an alleged incapacitated person's (IP's) property.

Cases that cite this headnote

[5] **Constitutional Law**
Guardianship
**Mental Health**
Evidence

Court did not violate alleged incapacitated person's (IP's) due process rights by requiring her to testify at hearing in proceeding for appointment of a guardian, as the court was charged with determining her best interests. U.S.C.A. Const.Amend. 14; McKinney's Mental Hygiene Law § 81.11(c).

3 Cases that cite this headnote

**Attorneys and Law Firms**

****296** Phillips Lytle LLP, Buffalo (Alan J. Bozer of Counsel), for Appellant–Respondent.

Lippes Mathias Wexler Friedman LLP, Buffalo (Kevin J. Cross of Counsel), for Petitioners–Respondents–Appellants.

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

**Opinion**

MEMORANDUM:

***1345** The alleged incapacitated person, Aida C. (hereafter, IP) appeals and petitioners cross-appeal from an order and judgment appointing the IP's personal assistant and granddaughter as coguardians of the IP's person and the corporate counsel of intervenor-respondent, Permclip Products Corp. (Permclip), as guardian of the IP's property in this proceeding pursuant to Mental Hygiene Law article 81. As we noted in a prior decision concerning this proceeding, the IP is the mother of petitioners, as well as the president and sole shareholder of Permclip (Matter of Aida C., 44 A.D.3d 110, 112, 840 N.Y.S.2d 516). In an amended petition, petitioners removed themselves from consideration as guardians of the IP's property and, during ***1346** the pendency of this proceeding, they proposed that the IP's granddaughter, rather than any of the petitioners, be named guardian of the IP's person inasmuch as petitioners and the IP have been estranged since 2005.

Contrary to the contention of the IP on her appeal, Supreme Court properly denied her motion to dismiss the amended petition and determined that she is incapacitated and requires a guardian to provide for her personal needs as well as a guardian to manage her property (*see* Mental Hygiene Law § 81.15[b], [c] ). We reject the further contention of the IP that the court erred in appointing her granddaughter as a coguardian of her person. We conclude with respect to petitioners' cross appeal, however, that the court erred in appointing the IP's personal assistant as a coguardian of the IP's person, and we therefore modify the order and judgment accordingly.

[1] Pursuant to Mental Hygiene Law § 81.19(d), in appointing a guardian the court should consider, inter alia, the social relationship between the IP and the proposed guardian (§ 81.19[d][2] ); the care provided to the IP at the time of the proceeding (§ 81.19[d][3] ); the educational and other relevant experience of the proposed guardian (§ 81.19[d][5] ); the unique requirements of the IP (§ 81.19[d][7] ); and the existence of any conflicts of interest between the IP and the proposed guardian (§ 81.19[d][8] ). With respect to the IP's granddaughter, the record establishes that, although the IP mistakenly believes that she does not have grandchildren, the IP and her granddaughter had shared a very close and loving ****297**

relationship. Although the IP was not aware that she was related to her granddaughter, she enjoyed an evening with her granddaughter and other family members at a restaurant, and the IP invited her granddaughter to visit her at her home. In addition, the record establishes that the IP's granddaughter has experience in caring for two elderly women and has taken a training course with respect to the duties and responsibilities of a guardian of the person. The IP's granddaughter testified at the hearing on the amended petition that she is willing to work with the IP's personal assistant and recognizes her grandmother's dependence upon him. We thus conclude that there is no basis upon which to disturb the court's appointment of the IP's granddaughter as coguardian of the IP's person (*see Matter of Anonymous*, 41 A.D.3d 346, 839 N.Y.S.2d 78).

[2] As noted, however, we agree with petitioners that the court erred in appointing the IP's personal assistant as coguardian of the IP's person, inasmuch as there is a conflict of interest that prevents him from serving in that capacity (*see* **1347 Mental Hygiene Law § 81.19[d][8]). The personal assistant testified that he has worked for the IP for 34 years and has never received a paycheck. He further testified that he resides in the IP's home; the IP provides for his personal needs; and he has limited assets and is dependent upon the IP for his food, clothing and shelter. Furthermore, he testified that he does "pretty much" whatever the IP tells him to do. By way of example, he admitted that he summoned the police at the direction of the IP when her grandchildren came to visit and that, although the police handcuffed the IP's grandson, the personal assistant did not advise the police that the alleged intruders were the IP's grandchildren and that the IP had, the previous evening, invited her grandchildren to visit her. It is undisputed that the personal assistant is the trusted and constant companion of the IP and maintains her home in an "immaculate" condition. Nevertheless, we conclude that he is disqualified to serve as coguardian of the IP's person based upon a conflict of interest, inasmuch as he is dependent upon the IP to meet his basic needs and he does not exercise independent judgment, but rather simply does what the IP instructs him to do.

[3] [4] We reject the further contention of petitioners on their cross appeal that the court erred in appointing Permclip's corporate counsel as guardian of the IP's property. It is well established that it is within the discretion of the court to appoint a guardian (*see Matter of Wynn*, 11 A.D.3d 1014, 1015, 783 N.Y.S.2d 179, *lv. denied* 4 N.Y.3d 703, 790 N.Y.S.2d 649, 824 N.E.2d 50). Here, the record establishes that Permclip's corporate counsel had worked for Permclip for a few years, and that he arranged to secure in excess of $2 million that had been left in various unsecured places in the IP's home. Inasmuch as petitioners in the amended petition deferred to their mother's wishes and no longer sought to be named guardians to manage the IP's property, we perceive no reason to disturb the exercise of the court's discretion in appointing Permclip's corporate counsel as guardian with respect to the IP's property (*cf. Matter of Chase*, 264 A.D.2d 330, 331, 694 N.Y.S.2d 363).

[5] We reject the contention of the IP that the court violated her due process rights by requiring her to testify at the hearing. Although the Mental Hygiene Law is silent on the issue whether the person alleged to be incapacitated (AIP) may be compelled to testify, we note that section 81.11(c) requires the presence of the AIP at the hearing "so as to permit the court to obtain its own impression of the person's capacity." In addition, we note **298 that we previously rejected the contention of the IP that her Fifth Amendment rights against self-incrimination are implicated in an article 81 proceeding (*see Aida C.*, 44 A.D.3d at 115, 840 N.Y.S.2d 516; *cf.* **1348 *Matter of A.G.*, 6 Misc.3d 447, 452–453, 785 N.Y.S.2d 313). We likewise conclude that her due process rights are not violated inasmuch as the court is charged with determining her best interests (*see generally Wynn*, 11 A.D.3d at 1015, 783 N.Y.S.2d 179). We have reviewed the remaining contentions of the parties and conclude that they are without merit.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by vacating that part appointing Daniel Walsh coguardian of the person of Aida C. and as modified the order and judgment is affirmed without costs.

**All Citations**

66 A.D.3d 1344, 886 N.Y.S.2d 295, 2009 N.Y. Slip Op. 06897

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37 Misc.3d 418
Supreme Court, Dutchess County, New York.

In the Matter of the Application for the Appointment of A Guardian by Robert B. ALLERS, as Commissioner of Social Services of Dutchess County Department of Social Services, Petitioner, for G.P., A Person Alleged to be Incapacitated, Respondent.

July 26, 2012.

**Synopsis**

**Background:** In guardianship proceeding under Mental Hygiene Law, county department of social services moved in limine for order directing that alleged incapacitated person (AIP) could be required to testify against himself at hearing on capacity. Counsel for AIP responded in opposition.

**[Holding:]** The Supreme Court, James D. Pagones, J., held that AIP would not be required to testify against himself at hearing on his capacity.

Opposition sustained.

West Headnotes (4)

[1] **Statutes**
Plain Language;Plain, Ordinary, or Common Meaning

Words of ordinary import used in a statute are to be given their usual and commonly understood meaning, unless it is plain from the statute that different meaning is intended.

Cases that cite this headnote

[2] **Mental Health**
Standard of proof in general

Determination that a person is incapacitated under Mental Hygiene Law must be based on clear and convincing evidence. McKinney's Mental Hygiene Law § 81.12(a).

Cases that cite this headnote

[3] **Mental Health**
Evidence

Provision of Mental Hygiene Law permitting court to waive rules of evidence applies only in uncontested proceedings where there is consent to the appointment of a guardian. McKinney's Mental Hygiene Law § 81.12(b).

Cases that cite this headnote

[4] **Mental Health**
Evidence

Alleged incapacitated person (AIP) would not be required to testify against himself against his wishes at hearing on his capacity in guardianship proceeding under Mental Hygiene Law; AIP had not consented to appointment of guardian, affirmatively placed his condition in issue, or waived any of his statutory privileges, AIP's personal liberty had been at stake, and Mental Hygiene Law had been silent as to whether AIP could be required to testify. McKinney's Mental Hygiene Law §§ 81.11(4), 81.12(a, b).

1 Cases that cite this headnote

**Attorneys and Law Firms**

**903 William F. Bogle, Jr., Esq., Corbally, Gartland & Rappleyea, LLP, Poughkeepsie, for AIP, G.P.

Janet V. Tullo, Esq., Bureau Chief, Poughkeepsie, for Petitioner, Dutchess County Department of Social Services.

Eugenia B. Heslin, Esq., Mental Hygiene Legal Service, Court Evaluator, Second Judicial Department, Poughkeepsie, Kevin L. Wright, Esq. Temporary Guardian of the Property, Mahopac, for G.P.

**Opinion**

JAMES D. PAGONES, J.

  

*419 The issue for the court's determination is whether the Alleged Incapacitated Person ("AIP") in this guardianship proceeding under Mental Hygiene Law ("MHL") Article 81 can be required to testify against himself at a hearing conducted pursuant to section 81.11.

*BACKGROUND*

The court recently completed a hearing under MHL § 81.23(a) to determine whether a temporary guardian for the property management needs of the AIP and a guardian for personal care needs were necessary. The court determined that a temporary guardian for the property management needs was warranted and denied the application for a personal care needs guardian in its Decision, Findings of Fact and Order, dated and entered July 19, 2012.

The AIP attended the hearing with his court appointed attorney. The AIP did not testify, present witnesses or submit documentary evidence for consideration (p. 2). The Court sustained the objection of the AIP's attorney when counsel for the petitioner Department of Social Services ("DSS") attempted to call the AIP as a witness for its case in chief (Transcript, 07/13/12 at p. 3).

The parties and temporary guardian for property management have been directed to appear for a hearing on July 26, 2012 at 2:00 p.m. for the purpose of determining whether the temporary guardianship should be made permanent.

In the interim, counsel for DSS submitted correspondence supported by case law and legal analysis indicating that the petitioner intends to call the AIP to testify at the hearing. Counsel for the AIP has, in turn, responded in kind in opposition. As such, the court treats these submissions as an application for *in limine* determination.

*DECISION*

Among its findings and declaration of purpose when enacting MHL Article 81, the New York State Legislature expressed the following sentiment:

> *420 "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 **904 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." (81.01).

Procedural due process safeguards are included in the statute. The AIP is entitled to proper notice, legal representation, the right to demand a jury trial, the right to be present at any hearing, present evidence and otherwise participate. Moreover, the record of any hearing and records obtained by the Court Evaluator pursuant to MHL § 81.09, Mental Hygiene Facility records and records subject to 42 CFR 2.64 and New York Public Health Law § 2785 are potentially subject to an order sealing them from the public. (Article 81 of the Mental Hygiene Law, *Best Practices Manual,* Chap. 2, IV(B), December 2005.)

[1] The statute (MHL § 81.11[4]) mandates that a hearing to determine whether the appointment of a guardian is necessary for the AIP must, unless it is established that the AIP is completely unable to participate in the hearing, be conducted in the presence of the AIP "so as to permit the court to obtain its own impression of the person's capacity." Words of ordinary import used in a statute are to be given their usual and commonly understood meaning, unless it is plain from the statute that different meaning is intended. (*McKinney's N.Y. Statutes,* Book 1, § 232.) The word impression means, "a characteristic, trait or feature resulting from some influence" (*Merriam–Webster's Collegiate Dictionary,* Tenth Ed.); "an effect, feeling, or image retained as a consequence of experience" (*The American Heritage Dictionary of the English Language,* Fourth Ed.). Noticeably silent from the cited statute is that the AIP is required to testify. The Court's impression of *421 the AIP is set forth in its Decision, Findings of Fact and Order (p. 8, ¶ 20).

[2] [3] A determination that a person is incapacitated under Article 81 must be based on clear and convincing evidence. The petitioner bears the burden of proof. (MHL § 81.12[a] ). The court is only permitted to waive the rules of evidence "for a good cause shown." (MHL § 81.12[b] ). The waiver provision applies only in uncontested proceedings where there is consent to the appointment of a guardian. (*Matter or Rosa B.-S.*, 1 A.D.3d 355, 767 N.Y.S.2d 33 [2d Dept.2003].)

Even with the protections afforded the AIP so as to implement the Legislature's stated findings and purpose, MHL Article 81 has been described as a "statute at war with itself." (Fish, "Does the Fifth Amendment Apply in Guardianship Proceedings?", NYLJ, 02/25/11, at 3, col. 1.) The statute "has at its core the contradictory notions of an adversarial model and a paternalistic model." (*Id.*)

[4] The AIP in this proceeding does not consent to the appointment of a guardian. He has not affirmatively placed his condition in issue, nor has he waived any of his statutory privileges.

Counsel for the petitioner has cited *Matter of Heckl*, 66 A.D.3d 1344, at 1347, 886 N.Y.S.2d 295 (4th Dept.2009) and *Matter of Aida C.*, 44 A.D.3d 110, at 115, 840 N.Y.S.2d 516 (4th Dept.2007) as the authority to compel the AIP to testify at the hearing. The Appellate Court in *Matter of Heckl* relied in part upon its ruling in *Matter of Aida C.* that an AIP's Fifth **905 Amendment rights against self-incrimination are not implicated in an Article 81 proceeding (at 1347). The issue before the Court in that decision involved the AIP's refusal to meet and speak with the Court Evaluator, not testify at a hearing on capacity under MHL § 81.11. The *Heckl* decision then states:

"We likewise conclude that [the AIP's] due process rights are not violated inasmuch as the court is charged with determining her best interests (*see generally In re Wynn*, 11 A.D.3d 1014 at 1015, 783 N.Y.S.2d 179)."

The case relied upon the Appellate Court in *Wynn* is *Matter of Lyon*, 52 A.D.2d 847, 382 N.Y.S.2d 833 (2d Dept.1976), aff'd 41 N.Y.2d 1056, 396 N.Y.S.2d 183, 364 N.E.2d 847 (1977). The *Lyon* court based its determination upon Mental Hygiene Law Article 77 which was in effect at the time. While Article 77 may have allowed for a best interests standard at that time, Article 77 was replaced by Article 81, effective April 1, 1993 (*McKinney's Consolidated Laws of New York*, Book 34A, Mental Hygiene Law Article 81, Historical and Statutory Notes, at 4).

*422 There are only two (2) references to best interests in Article 81. The first is § 81.07(g)(1)(iv) which addresses itself to who is entitled to notice of the proceeding. The second is § 81.21(b)(6)(iii) which relates to authorizing the guardian for property management to turn over a photocopy of the incapacitated person's will or similar instrument.

The appointment of a guardian under Article 81 must be based upon clear and convincing evidence (§ 81.12[a] ) as demonstrated by the petitioner. This standard is much higher than best interests. It is consistent with the stated legislative findings and purpose to afford persons who are the subject of an Article 81 proceeding the opportunity to exercise the independence and self-determination of which they are capable (§ 81.01). The rules of evidence cannot be waived when the matter is contested. (*Matter of Rosa B.-S., supra.*)

By providing the AIP with an abundance of safeguards so as to insure that any guardianship shall only result in the least restrictive form of intervention (§ 81.01; § 81.02[a][2]; § 81.03[d]; § 81.21[a]; and § 81.22[a] ), the legislature clearly expressed its intention that he or she have heightened rights previously absent under former Articles 77 and 78 of the Mental Hygiene Law. Those articles dealt with conservators and committees.

A decision more directly on point is *Matter of United Health Services Hospitals, Inc. (A.G.)*, 6 Misc.3d 447, 785 N.Y.S.2d 313 (Broome County 2004). In sum, the Court carefully dissected the issue of an AIP's right to refuse to testify based upon Federal and State Constitutional grounds, the statutory right against self-incrimination incorporated in CPLR 4501, and the important decision by our state's Court of Appeals, *Rivers v. Katz*, 67 N.Y.2d 485, 504 N.Y.S.2d 74, 495 N.E.2d 337 (1986), rearg. den'd 68 N.Y.2d 808, 506 N.Y.S.2d 1039, 498 N.E.2d 438 (1986). That decision made it clear that a person retains his or her civil rights in a proceeding where personal liberty is at stake.

One only need review the powers of a guardian for property management (§ 81.21) and personal needs (§

81.22) to understand that a person's liberty interest is most definitely at stake once a finding of incapacity is made. Determining where the person can live, with whom the person can associate, make medical and dental decisions, determine whether the person should travel, decide the person's social environment, authorize access to or the release of confidential records, whether the person can operate a motor vehicle, **906 make decisions with respect to the management *423 and expenditure of one's assets, go to the very core of one's independence and ability to enjoy the pleasures of life. As one noted authority succinctly states: "Simply put, the burden is on the petitioner to prove incapacity, not on the AIP to disprove it." (1 Abrams, *Guardianship Practice in New York State,* Ch. 12, § VI, at 583). A petitioner has available other possibilities. Testimony can be obtained from lay witnesses, such as family members, neighbors or friends, as well as experts. (Fish, "Does the Fifth Amendment Apply in Guardianship Proceedings?", *supra* at 6; MHL § 81.11[2].)

The determination in *Heckl,* which relied upon the determination in *Wynn,* which in turn based its decision on the determination in *Lyon,* was based upon a standard that had already been repealed by the enactment of Article 81. Therefore, this court is not bound by *stare decisis* as stated in *Mountain View Coach Lines, Inc. v. Storms,* 102 A.D.2d 663, 476 N.Y.S.2d 918 (2d Dept.1984).

For the foregoing reasons, the AIP's objection to being compelled to testify as a witness for the petitioner is sustained.

The foregoing constitutes the decision and order of the Court.

**All Citations**

37 Misc.3d 418, 948 N.Y.S.2d 902, 2012 N.Y. Slip Op. 22204

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KeyCite Yellow Flag - Negative Treatment
Disagreement Recognized by In re Heckl, N.Y.A.D. 4 Dept., October 2, 2009

6 Misc.3d 447
Supreme Court, Broome County, New York.

In the Matter of the Application of UNITED HEALTH SERVICES HOSPITALS, INC., Petitioner, Pursuant to Article 81 of the Mental Hygiene Law for the Appointment of a Guardian of the Person and Property of AG, An Alleged Incapacitated Person, Respondent.

Nov. 4, 2004.

**Synopsis**

**Background:** Proceeding was brought for appointment of guardian over person and property of an alleged incapacitated person (AIP). AIP objected to being called as a witness on Fifth Amendment grounds.

**[Holding:]** The Supreme Court, Broome County, Eugene E. Peckham, J., held that AIP could not be compelled to testify against his wishes.

Ordered accordingly.

West Headnotes (2)

[1] **Constitutional Law**
Fifth Amendment

The Fifth Amendment privilege against self-incrimination is made applicable to the states by the Fourteenth Amendment to the U.S. Constitution. U.S.C.A. Const.Amends. 5, 14.

3 Cases that cite this headnote

[2] **Witnesses**
Proceedings to Which Privilege Applies

Alleged incapacitated person could not be compelled to testify against his wishes in a hearing brought regarding whether a guardian over person and property should be appointed for that person. U.S.C.A. Const.Amend. 5; McKinney's Mental Hygiene Law § 81.01 et seq.

5 Cases that cite this headnote

**Attorneys and Law Firms**

**313 *448 Alyssa M. Barreiro, Esq., Hinman, Howard & Kattell, LLP, Binghamton, Attorney for Petitioner.

Mental Hygiene Legal Service for the Third Dept., April Smith, of Counsel, Binghamton, Attorney for Respondent.

**Opinion**

EUGENE E. PECKHAM, J.

This is a proceeding under Article 81 of the Mental Hygiene Law for the appointment of a guardian of the person and property of AG, an alleged incapacitated person (AIP). AG did not answer the petition, take any steps to place his condition affirmatively in issue; call any witnesses or waive any of his civil rights or privileges. The petitioner is United Health Services Hospitals, Inc. (UHS), and the proposed guardian is the Broome County Commissioner of Social Services. Mental Hygiene Legal Services was appointed by the Court as counsel for the AIP.

At the trial petitioner called a discharge planner at UHS who testified that since March 2003, AG had been admitted to the hospital over 25 times and had signed himself out against medical advice 16 times. Petitioner also called a registered nurse and case manager who confirmed some of the discharge planner's testimony, but was prevented from testifying further due to objections on the grounds of the nurse-patient privilege. CPLR § 4504.

Petitioner next called the AIP as a witness. The AIP's attorney objected on two grounds: 1) The Fifth Amendment right not to testify when a liberty interest is at stake, and 2) that permitting petitioner to call the AIP would shift the burden of proof that is imposed upon Petitioner by MHL § 81.12(a). The question of whether the Fifth Amendment right to remain silent applies to an

Article 81 hearing is a matter of first impression in New York.

[1] The Fifth Amendment privilege against self-incrimination is made applicable to the states by the Fourteenth **314 Amendment to the U.S. Constitution. *In re Gault*, 387 U.S. 1 at 49, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1966). Article 1 § 6 of the New York Constitution contains a similar privilege. This privilege has been incorporated as a rule of evidence in CPLR § 4501, which says "This section does not require a witness to give an answer which will tend to accuse himself of a crime or to expose him to a penalty or forfeiture ..."

In an Article 81 proceeding, a guardian can be given the power to manage and control the decedent's property, including powers *449 to make gifts, provide support for the AIP and his or her dependents, renounce or disclaim property interests and release confidential records. MHL § 81.21. In addition, a guardian of the person can be given power to decide whether the AIP can have a driver's license, to make medical decisions for the AIP and to choose the place of abode of the AIP, including the power to place the AIP in a nursing home or residential care facility. MHL § 81.22. The petition in this case requested all of these powers.

There has been great debate over the last 30 years as to whether the Fifth Amendment privilege applies in proceedings for the commitment of a mentally ill person. The U.S. Supreme Court declined to reach the issue in *McNeil v. Patuxent Institution*, 407 U.S. 245 at 250, 92 S.Ct. 2083, 32 L.Ed.2d 719 (1972). But see *Allen v. Illinois*, 478 U.S. 364, 106 S.Ct. 2988, 92 L.Ed.2d 296 (1986) where the Supreme Court said the right against self incrimination does not apply in proceedings for commitment of "sexually dangerous persons". However, in a concurring opinion in *McNeil*, Justice Douglas argued the privilege should apply.

"Whatever the Patuxent procedures may be called—whether civil or criminal—the result under the Self Incrimination Clause of the Fifth Amendment is the same. As we said in *In re Gault*, 387 U.S. 1, 49–50 [87 S.Ct. 1428, 18 L.Ed.2d 527], there is a threat of self-incrimination whenever there is a 'deprivation of liberty'; and there is such a deprivation whatever the name of the institution, if a person is held against his will." Id. at 257, 92 S.Ct. 2083.

Thereafter, in reliance primarily on Justice Douglas' opinion, a number of state and federal courts ruled on the issue with the cases going both ways. The cases are collected in Perlin, 1 *Mental Disability Law*, § 2C-4.11 at pp. 358–364 (2d Ed.). Most of these cases involved the question of whether an allegedly mentally ill person could refuse to answer questions in a psychiatric interview for the purposes of the commitment hearing. E.g. *Ughetto v. Acrish*, 130 Misc.2d 74, 494 N.Y.S.2d 943 (Sup.Ct. Dutchess Co.1985) *modified on other grounds* 130 A.D.2d 12, 518 N.Y.S.2d 398 (2d Dept.1987) *appeal dismissed* 70 N.Y.2d 871, 523 N.Y.S.2d 497, 518 N.E.2d 8 (1987) (privilege does not apply to pre-hearing psychiatric interview for a retention hearing under Article 9 of the Mental Hygiene Law).

[2] The precise question presented here is: Can the AIP be called by petitioner to testify against himself in an Article 81 guardianship hearing? *Matter of Matthews*, 46 Or.App. 757, 613 P.2d 88 (1980) involved a civil commitment proceeding for a mentally ill person. The Oregon appellate court stated:

> *450 "This is an appeal from an order of commitment finding appellant to be a mentally ill person as defined in ORS 426.005(2). The sole issue on appeal is whether an alleged mentally ill person has a right to remain silent in a civil commitment proceeding. The trial court concluded that the Fifth Amendment privilege did not apply and directed appellant to speak. We affirm."

**315 On the other hand, *Tyars v. Finner*, 518 F.Supp. 502 (C.D.Calif.1981) *aff'd on other grounds* 709 F.2d 1274 (1983) held the opposite. The case was a habeas corpus petition by a patient committed to a state mental hospital after a jury trial. At the trial, the patient was called as an adverse witness by the state prosecutor. Over the objection of his counsel on Fifth Amendment grounds, the trial court nevertheless required him to testify. The Federal District Court held that this was an error saying "Instead of shouldering the entire load, proving its case by its own independent labors, California violated petitioner's right to remain silent" Id. at 510. Although the issue is similar, neither of these two cases involved a guardianship hearing.

The leading treatise on guardianship in New York agrees with *Tyars* and states that the AIP cannot be compelled to testify against his wishes in an Article 81 proceeding.

"... There is no ... authority under Article 81 for the court to compel an unwilling AIP to take the stand to assist the petitioner in establishing incapacity ..." Abrams, *Guardianship Practice in New York State*, pp. 583–5.

The New York Court of Appeals has repeatedly made it clear that a person retains his or her civil rights in a proceeding where personal liberty is at stake. In *Rivers v. Katz*, 67 N.Y.2d 485 at 497, 504 N.Y.S.2d 74, 495 N.E.2d 337 (1986) it held

> "We likewise reject any argument that involuntarily committed patients lose their liberty interest in avoiding the unwanted administration of antipsychotic medication ... We hold, therefore, that in situations where the State's police power is not implicated, and the patient refuses to consent to the administration of antipsychotic drugs, there must be a judicial determination of whether the patient has the capacity to make a reasoned decision with respect to proposed treatment before the drugs may be administered pursuant to the State's *parens patriae* power. The determination should be made at a ***451** hearing following exhaustion of the administrative review procedures provided for in 14 NYCRR 27.8. The hearing should be de novo, and the patient should be afforded representation by counsel (Judiciary Law § 35[1][a]). The State would bear the burden of demonstrating by clear and convincing evidence the patient's incapacity to make a treatment decision."

A few years later in *Matter of Grinker (Rose)*, 77 N.Y.2d 703 at 710, 570 N.Y.S.2d 448, 573 N.E.2d 536 (1991) the Court held under the former conservatorship statute, Article 77 of the Mental Hygiene Law, that a conservator of the property did not have power to place an incapacitated person in a nursing home involuntarily. The court held:

> "Assuming, without deciding, that Mental Hygiene Law § 77.19 authorizes a grant of limited power over a conservatee's person incidentally related to the primary power over property, we conclude that it clearly does not authorize the potent personal transformation of involuntary commitment of a conservatee to a nursing home. The availability of such a significant involuntary displacement of personal liberty should be confined to a Mental Hygiene Law article 78 incompetency proceeding, with its full panoply of procedural due process safeguards." (Citations omitted)

Most recently, our highest court has held that the AIP in an Article 81 proceeding has a constitutional right to counsel. The court said:

> "In any proceeding brought pursuant to Mental Hygiene Law article 81 ... in which the petition seeks powers for a guardian of the person to either place ****316** the indigent allegedly incapacitated person (AIP) in a nursing home or other institutional facility, or to make major medical decisions, an indigent AIP is constitutionally entitled to counsel at public expense." *Matter of St. Luke's–Roosevelt Hospital*, 89 N.Y.2d 889, 653 N.Y.S.2d 257, 675 N.E.2d 1209 (1996).

Another similar privilege that is frequently invoked in Article 81 proceedings is the privilege of confidential communication between doctor and patient. CPLR § 4504. The Second Department has recently held that the doctor-patient privilege applies in Article 81 proceedings unless the AIP waives the privilege or affirmatively asserts his or her mental condition at trial. *Matter* ***452** *of Rosa B.*, 1 A.D.3d 355, 767 N.Y.S.2d 33 (2d Dept.2003). Accord, *Matter of Janczak*, 167 Misc.2d 766, 634 N.Y.S.2d 1020 (Sup.Ct. Ontario Co.1995); *Matter of Higgins*, N.Y.L.J., 10/6/95, p. 27, col. 2 (Sup.Ct. New York Co.); *Matter of Tara X*, N.Y.L.J., 9/18/96, p. 27, col. 1 (Sup.Ct. Suffolk Co.).

MHL § 81.12(b) permits the Court for good cause shown to waive the rules of evidence in an Article 81 proceeding. However, the courts have repeatedly held that the rules of evidence may only be waived in uncontested proceedings.

If the AIP contests the proceeding, the rules of evidence are waived only if the AIP affirmatively places his or her mental condition in issue. *Matter of Rosa B.*, supra; *Matter of Tara X, supra; Matter of Higgins, supra; Matter of Seidner*, N.Y.L.J., 10/8/97, p. 28, col. 4 (Sup.Ct. Nassau Co.).

In addition to being a Constitutional right, the right to remain silent of the Fifth Amendment is also a rule of evidence in civil proceedings in New York. It is a privilege set forth in CPLR § 4501 just as the physician-patient privilege is set forth in CPLR § 4504. In this contested Article 81 proceeding, AG has neither waived his privileges nor affirmatively placed his mental condition in issue. Rather when called to testify by the petitioner, he asserted his constitutional privilege to remain silent and not testify against himself. In a contested proceeding where the rules of evidence, including the CPLR § 4501 privilege, are not waived, he had that right.

*In re Gault, supra,* held that juvenile delinquency proceedings even though nominally denominated civil proceedings could result in placement in an institution with concomitant deprivation of liberty. Thus the Court held that the Fifth Amendment privilege against self incrimination applied in those proceedings. Equally as much in Article 81 proceedings, the AIP can be deprived of liberty. If the evidence warrants, the guardian can be given the power to place the incapacitated person involuntarily in a nursing home or other institution, to make medical decisions for him or her, including the power to withhold or withdraw life sustaining treatment. MHL § 81.22 and § 81.29(e).

If patients do not lose their rights to make their own decision regarding administration of antipsychotic drugs, in similar fashion AIP's should not lose to a guardian their rights to make their own medical decisions. If an AIP has a right to counsel, he or she should also have the right to remain silent on the advice of that counsel. The potential deprivation of liberty in Article 81 ***453** mental hygiene proceedings is potentially the same as or even more severe than the deprivation of liberty in juvenile cases. In both situations the respondent can be placed in an institution against his or her will. Under Article 81, the guardian may even be given the power of life or death, that is to withhold or withdraw life sustaining treatment. MHL § 81.29(e). ****317** The Fifth Amendment should apply equally in both situations.

It is inherently offensive to our Constitution and due process to require a person to testify against himself or herself in a proceeding where that persons's liberty is at stake. The Fifth Amendment triumphantly says it cannot be done in criminal prosecutions. The Supreme Court has held it cannot be done in juvenile proceedings. *In re Gault, supra.* The same has to be true of proceedings where a person's life and liberty is at risk due to allegations of mental illness or incapacity. The right not to testify set forth in CPLR § 4501 and the Constitution has not been waived. The next step that follows logically from the Court of Appeals decisions in *Rivers, Grinker*, and *St. Luke's* is that AG has the right to remain silent and refuse to testify against himself in this Article 81 proceeding. Due process requires nothing less.

The evidence presented that AG has been hospitalized numerous times and has signed himself out of the hospital against medical advice numerous times, standing alone, is not clear and convincing evidence of lack of capacity. The burden of proof is on the petitioner and does not shift to the respondent. It cannot be shifted by calling the AIP as a witness in the petitioner's case in chief. *Tyars v. Finner, supra; Abrams, supra.* Petitioner has not met its burden of proof.

It is therefore the order of the Court that the petition be dismissed. The temporary guardianship of AG granted to Arthur Johnson as Commissioner of Social Services is revoked. This decision is the Order of the Court.

**All Citations**

6 Misc.3d 447, 785 N.Y.S.2d 313, 2004 N.Y. Slip Op. 24454

27 Misc.3d 1215(A)
Unreported Disposition
(The decision of the Court is referenced
in a table in the New York Supplement.)
Supreme Court, Suffolk County, New York.

In the Matter of the Application of The INCORPORATED VILLAGE OF PATCHOGUE, Petitioner, Pursuant to Article 81 of the Mental Hygiene Law for the Appointment of a Guardian of the Property of Alice Zahnd, An Alleged Incapacitated Person.

No. 42301/08.
|
April 9, 2010.

**Attorneys and Law Firms**

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Mental Hygiene Legal Service, Riverhead, NY.

Daniel J. Smith, Esq., Special Guardian, David A. Smith, Esq., PLLC, Garden City, NY.

**Opinion**

MARTHA L. LUFT, J.

*1 The petitioner commenced this proceeding to seek the appointment of a Guardian of the property of Alice Zahnd pursuant to article 81 of the Mental Hygiene Law, with powers relating generally to responding to alleged Village Code violations existing on her property located at 16 Bransford Street, Patchogue, New York. A hearing was held in this matter at which Ms. Zahnd was represented by counsel. Ms. Zahnd chose not to attend the hearing as, apparently, is her prerogative (*see, Matter of Lillian U.*, 66 A.D.3d 1219, 887 N.Y.S.2d 321 [3d Dept 2009] [suggesting an Alleged Incapacitated Person's presence at a hearing could be excused based on that person's unwillingness to attend] ).

The Court finds that it has jurisdiction over Alice Zahnd and that Suffolk County is the proper venue of this proceeding. Ms. Zahnd resided at the Patchogue Nursing Center, 25 Schoenfeld Boulevard, Patchogue, New York when this proceeding was commenced, and continues to reside there. As noted above, she also owns property at 16 Bransford Street in Patchogue.

Alice Zahnd was born on XX/XX/1931, and, thus, is seventy-eight years old. She entered the Patchogue Nursing Center in November of 2006, coming from Brookhaven Memorial Hospital where she had spent the prior couple of weeks.

Ms. Zahnd has not consented to the appointment of a Guardian. For the reasons stated below, the Court finds that a Special Guardian should be appointed for Alice Zahnd with powers pertaining to her property management needs, and the power to explore and investigate whether additional powers are required.

The clear and convincing evidence before the Court establishes that the alleged incapacitated person, Alice Zahnd, suffers from functional limitations. Specifically, she requires assistance with all of her activities of daily living at the Patchogue Nursing Center. She needs assistance with her mobility and has fallen frequently in the Nursing Center. Prior to entering the hospital and then the nursing home, Ms. Zahnd was living in deplorable conditions, without a functioning kitchen and bathroom, and with animal feces scattered about the floor. She is not able to manage her property, and is, at times, under the misapprehension that her parents are looking after her house for her. Although she has been in the Patchogue Nursing Center for almost three and a half years, she states that she is just a visitor there and will return home. Due to the high level of care she requires, her statement is unrealistic, to say the least. She claims that she pays her own property taxes although Village records indicate that taxes have not been paid for the past couple of years. Thus, the clear and convincing proof further establishes that Ms. Zahnd lacks the understanding or appreciation of the nature and consequences of her functional limitations relative to the management and potential liabilities that exist and that may arise in connection with her property at 16 Bransford Street, Patchogue, New York, and that she is likely to suffer harm based thereon.The appointment of a Special Guardian to address issues relative to, and

arising out of, such real property is, therefore, necessary to prevent harm to Ms. Zahnd.

*2 Although, even without drawing any inference based on Ms. Zahnd's election not to appear at the hearing of this matter, there is sufficient clear an convincing evidence in the record to support a finding that Ms. Zahnd is an incapacitated person requiring the assistance of a Special Guardian, the Court's findings are, nevertheless, further supported by an inference drawn against Ms. Zahnd based on her non-appearance (*see, e.g., Brown v. City of New York,* 50 A.D.3d 937, 856 N.Y.S.2d 665 [2d Dept 2008]; *see generally, Matter of Heckl,* 66 A.D.3d 1344, 886 N.Y.S.2d 295 [4th Dept 2009] ).

The Court Evaluator recommended that a Guardian be appointed with personal needs powers, as well as property management powers. However, the petition did not request the former relief, and the Court, therefore, cannot find that there was proper notice to Ms. Zahnd of such a request. Moreover, the evidence adduced did not present a clear picture of how and whether all of Ms. Zahnd's personal needs are currently met without the benefit of a Mental Hygiene Law article 81 Guardian.

The powers requested in the petition focus exclusively on addressing the legal issues surrounding the property at 16 Bransford Street, Patchogue, New York. The petitioner did not take the trouble to investigate and address any other property management needs Ms. Zahnd might have. The Court is thus constrained in detailing the powers appropriate for Ms. Zahnd's Guardian due to the paucity of information presented at the hearing. For example, the Court Evaluator alluded to the fact that a sale of the property might be in Ms. Zahnd's interests to enable her to perhaps reside in a more pleasant nursing facility.

Under all of the above circumstances, the Court finds that the appointment of a Special Guardian to address the legal issues surrounding the property at 16 Bransford Street, Patchogue, New York, to investigate and report back to the Court whether additional powers should be sought, and/or a permanent guardian appointed, and to make whatever application may be appropriate based upon such investigation is warranted.

The Special Guardian shall be Daniel J. Smith, Esq.

The Special Guardian shall have the following powers:

To undertake an investigation to determine the assets of Alice Zahnd, and to marshal accounts or other liquid assets sufficient to allow him to exercise the additional powers granted to him as Special Guardian for Alice Zahnd, and to pay such compensation as the Court may award herein;

To prosecute, defend, settle and maintain any cause of action, arbitration or civil judicial proceeding concerning, or arising out of Alice Zahnd's ownership interest, in the real property located at 16 Bransford Street, Patchogue, New York, including commencing a summary proceeding to recover possession of such real property or an ejectment action, as may be appropriate, provided that any settlement of any judicial action or civil judicial proceeding shall be subject to the approval of the Judge or Justice presiding therein;

*3 To nominate for appointment by the Court counsel to appear for the Special Guardian in any such cause of action, arbitration or civil judicial proceeding;

To nominate for appointment by the Court counsel to represent the rights and interests of Alice Zahnd relative to any criminal proceeding pending or that may be commenced against Alice Zahnd arising out of or in connection with her ownership interest in the real property located at 16 Bransford Street, Patchogue, New York;

To take reasonable and appropriate steps to cure or eliminate any unsafe or illegal conditions existing at the real property located at 16 Bransford Street, Patchogue, New York, including retaining the services of appropriate, qualified contractors, the compensation of which shall be subject to the approval of the Court;

To conduct an appropriate investigation of all relevant circumstances to assess whether it is in the best interests of Alice Zahnd to sell her interest in the real property located at 16 Bransford Street, Patchogue, New York, and as he may deem appropriate, to move for an expansion of his powers as Special Guardian to include the power to commence a proceeding to sell Alice Zahnd's interest in the subject real property pursuant to article 17 or the Real Property Actions and Proceedings Law;

To nominate for appointment by the Court attorneys, accountants, brokers and similar professionals in

connection with the Special Guardian's powers relative to issues concerning the real property located at 16 Bransford Street, Patchogue, New York and Alice Zahnd's interest therein;

To investigate whether Alice Zahnd has additional property management needs requiring the expansion of the Special Guardian's powers or the appointment of a permanent Mental Hygiene Law article 81 Guardian, to report to the Court with respect to the result of such investigation, and to move for an expansion of powers or the appointment of a permanent Property Management Guardian as may be warranted;

To investigate whether Alice Zahnd has personal needs issues, (including an issue as to whether a more suitable or pleasant place of abode should and can be obtained), requiring the expansion of the Special Guardian's powers or the appointment of a Mental Hygiene Law article 81 Guardian, to report to the Court with respect to the result of such investigation, and to move for an expansion of powers or the appointment of a permanent Personal Needs Guardian as may be warranted; and

To serve as his own counsel for the purpose of making further applications to this Court in this proceeding, inasmuch as there is compelling reason to avoid the additional expense and complication that would arise if the Special Guardian is required to nominate counsel for appointment for each subsequent application that may be made to this Court (*see*, 22 NYCRR 36.2[c][8] ).

The Special Guardian shall report to the Court on all matters done pursuant to the order of appointment, and shall serve as such until discharged by order of the Court (*see*, Mental Hygiene Law § 81.16[b] ).

***4** The requirement of a bond is waived.

The appointment of a Special Guardian with the powers specified above constitutes the least restrictive form of intervention consistent with this Court's findings after the hearing.

As provided in Mental Hygiene Law § 81.16[b], the Court may approve "a reasonable compensation" for the Special Guardian. Accordingly, the Special Guardian is granted leave to submit a detailed affidavit of services actually rendered and accompanying time records in support of an application for compensation to be based on the actual services rendered and the time expended. It should be noted that the services of a Guardian are not calculated at the same rate as are legal services (*see, Matter of Helen C.*, 2 A.D.3d 729, 768 N.Y.S.2d 617 [2d Dept 2003]; *Matter of Arnold "O"*, 256 A.D.2d 764, 681 N.Y.S.2d 627 [3d Dept 1998] ).

The proposed Special Guardian shall submit to the Guardianship Clerk of this Court and the Guardianship Referee the designation of the Clerk to receive process and consent to act, and the proposed commission, within twenty days from the date of the signing of the order and judgment.

A compliance conference will be scheduled to allow the Court to monitor whether a proposed order and judgment has been noticed for settlement. The compliance conference may be cancelled if the Court has received a proposed order and judgment with a notice of settlement.

In addition, a control date shall be set to allow the Court to monitor whether the Special Guardian has reported with respect to accomplishing the tasks for which he has been appointed. The Court may seek a status report if the Special Guardian's tasks are not concluded by the control date.

Any of the Court's appointees and anyone else in this matter seeking an award of compensation from the assets of Alice Zahnd should submit a detailed affidavit of services.

Counsel for Alice Zahnd is directed personally to deliver to her a copy of the order and judgment to be issued hereon and explain it to her in a manner which she can reasonably be expected to understand as required by Mental Hygiene Law § 81.16(e).

The petitioner is directed to settle the order and judgment within thirty days on at least ten days notice to all parties served with the order to who cause and petition or notice of proceeding.

Consistent with the foregoing, it is

***ORDERED*** that a copy of this memorandum and order shall be served together the proposed order and judgment to be noticed for settlement herein, and filed with the

Guardianship Clerk of this Court together with the proposed order and judgment, and it is further

***ORDERED*** that the decretal paragraph of this memorandum and order scheduling the control date set to allow the Court to monitor whether the Special Guardian has reported with respect to accomplishing the tasks for which he has been appointed shall be referenced in the recital in order and judgment to be issued herein, and (unless otherwise modified) shall remain in full force and effect upon issuance of the order and judgment, and it is further

*5 ***ORDERED*** that counsel for the petitioner appear for a conference before the Guardianship Referee, Jeffrey T. Grabowski, Esq., [ (631) 853–5160] on May 26, 2010 at 9:30 A.M. at the Supreme Court, 400 Carleton Avenue, Central Islip, New York, to monitor compliance with the requirement of serving a notice for settlement of a proposed order and judgment, unless prior to that date the conference is cancelled. The conference may be cancelled if the Court has received a proposed order and judgment with a notice of settlement.

It is further

***ORDERED*** that the Guardianship Referee notify the Court immediately if the proposed order and judgment is not noticed for settlement as directed, and it is further

***ORDERED*** that this matter is scheduled for control purposes only on August 18, 2010 to allow the Court to monitor whether the Special Guardian has reported with respect to accomplishing the tasks for which he has been appointed

**All Citations**

27 Misc.3d 1215(A), 910 N.Y.S.2d 762 (Table), 2010 WL 1712242, 2010 N.Y. Slip Op. 50755(U)

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## EXPANDED FACT PATTERNS FOR THE QUESTIONS

**QUESTION 1:** "A lawyer admitted in New York State "believes" that an individual admitted to the practice of law in another state has appeared before New York courts without being admitted or authorized to practice law in New York. The Inquirer also "believes" that the individual lawyer is no longer appearing in New York Courts."

**QUESTION 2:** "The inquiring attorney represents clients in workers' compensation and personal injury matters. Some of the attorney's clients receive large sums of money as a result of their cases, and when that happens, clients commonly ask the attorney for advice regarding how to manage the settlement funds.

When clients ask about managing their settlement funds, the inquiring attorney would like to refer them to a licensed investment professional with whom he has a relationship and receive a fee or commission from the investment firm. The inquirer represents that he may receive such a fee or commission because he holds a number of securities and insurance licenses.

The inquirer states he would make the referral only after all legal work has concluded, the client's case has closed and the inquirer has fully disclosed to the client that the inquirer will financially benefit from the referral."

**QUESTION 3:** "The inquirer is a family/matrimonial lawyer. In that connection, the inquirer may prepare Statements of Net Worth and value assets for settlement purposes. The inquirer recently received certification from a non-governmental entity as a "Certified Financial Planner," and would like to provide stand-alone financial planning services to new and existing clients. The services would include recommendations for investments and insurance as well as education and retirement planning."

**QUESTION 4:** "The inquirer represents a client in a domestic relations matter that resulted in a judgment of divorce. The inquirer's legal services for the client are almost complete, although the representation continues. The client owes the inquirer legal fees for the services provided to date.

The client is not readily able to make timely payment of the fees owed to the inquirer. The client is sole owner of a house in New York State which the client intends to sell as soon as possible, a transaction consistent with the client's rights under the divorce judgment. The client has requested that the inquirer defer payment of the outstanding legal fees until the client sells the house, with the fees to be paid from the sale proceeds.

Discussions between the client and the inquirer have led to a tentative understanding, which the inquirer would like to incorporate into a written agreement, to be signed by both parties as a revision of the original retainer agreement. The proposed revision would provide: (1) that the inquirer would accept a specified amount – significantly less than the amount currently owed – in full payment of the fee obligation; (2) that the inquirer would take a mortgage against the house in the amount of the reduced fees; and (3), recognizing that the client may not be able to sell the house immediately, the inquirer would charge no interest on the fee balance for approximately seven months, after which interest at a low rate would start to accrue."

**QUESTION 5:** "After a divorce case resulted in a decree of divorce and property distribution, the inquiring lawyer's client revealed the existence of an asset that was omitted from the client's sworn Statement of Net Worth ("SNW"). The omitted asset was legally required to be included in the SNW and was subject to equitable distribution in the divorce. The client now wishes to use the omitted asset to pay off other obligations under the judgment of divorce. The value of the omitted asset is material to the size of the estate."

**QUESTION 6:** "After an attorney drafted separate wills for a Husband & Wife, may one of the spouses subsequently retain that attorney to represent them in a divorce action against the other spouse? If there is a conflict, can it be waived via the consent of the other spouse?"

**QUESTION 7:** "A court assigned the inquirer to represent an individual who has been charged with several criminal offenses. Prior to the inquirer's assignment, the client had been represented by a number of other lawyers. The client has unsuccessfully moved to have the inquirer relieved as counsel.

The client has ongoing mental health issues for which the client receives treatment. According to the inquirer, the client is physically intimidating, verbally abusive, and often non-responsive. The inquirer wishes to impose some restrictions on the time and manner in which the client may communicate with the lawyer, including limiting communications to scheduled appointments and written communications. If the client does not abide by these limits, or otherwise continues to disrupt communications, then the lawyer wishes to consider withdrawing from the representation."

**QUESTION 8:** "The inquirer is admitted to practice law in California but not New York, where the inquirer currently resides. The inquirer works for a municipal agency in New York, but the scope of the inquirer's employment does not involve the practice of law; the municipal agency employs a New York lawyer who acts as the agency's counsel. The inquirer would like to use the term "Esq." on business cards relating to the municipal employment.

In addition, the inquirer is a volunteer immigration lawyer for a non-profit organization, representing individuals in proceedings before the federal immigration court, an administrative agency. The inquirer has registered with the court and is identified as counsel on the court's forms when representing clients before the court. The inquirer advises these clients that the inquirer is not admitted to the practice of law in New York but is admitted in California."

**QUESTION 9:** "A residential real estate law firm wishes to create and publish a newsletter to send to former and current clients. The newsletter would contain information about changes to local laws and also would contain relevant market data provided by a real estate brokerage firm (the "Brokerage Firm").

The law firm has no contractual or referral relationship with the Brokerage Firm. Additionally, the law firm will not be paying the Brokerage Firm for any market information. However, the Brokerage Firm has offered to pay the law firm to offset the cost of publishing the newsletter.

The law firm also wants to send the newsletter to customers of certain lenders that the law firm has represented on purchase or refinance transactions. (The customers of the lenders have provided written consent for the lenders to release their contact information.)"

**QUESTION 10:** "A series of communications containing grievously insulting language, often of a racial nature, was received by defense counsel. In one communication a cover illustration was included from a 19th Century novel or musical broadsheet. It depicts a demeaning racial stereotype of those times. In a letter to the Court requesting recusal, an inquiry is made as to my race. A female attorney is referenced in a particularly graphic and clinical manner. There is what appears to be a threat against the Court in the event that I do not grant his request for recusal:

'[the Judge]—soon as I get finished with the racists business ... what with the appeals which will now include first amendment stuff that I will be forced to charge him with...he's going to take recusal out like a shot and thank me for the opportunity ... And if he does not take the easy way out—which you boys better pray he does—than I will drop the smoking gun on him ...'

Additionally, correspondence sent directly to this Court has included language which could only be interpreted as racist and inflammatory, utilizing the slang of the [19th Century]...as well as utter vulgarities to emphasize his points. Decorum prevents the Court from further reciting, in detail what is included in the letters."

**QUESTION 1**

Question: What is an ethical factor presented when an attorney learns that another lawyer (admitted in another state but not in New York except *pro hac vice*) is representing clients in New York Courts?

1) _____

2) _____

3) _____

4) _____

**QUESTION 2**

Question: The referring of a client to an investment firm, in return for a fee, raises what ethical concerns?

1) _____

2) _____

3) _____

4) _____

**QUESTION 3**

Question: What are the Ethical concerns involving an attorney engaging in a dual practice as a financial planner?

1) _____

2) _____

3) _____

4) _____

**QUESTION 4**

Question: What are the ethical factors presented when an attorney who continues to represent the client in connection with the divorce proceeding where the judgment of divorce has been issued, amends the retainer agreement to give the attorney a mortgage against the client's house in order to secure payment of the balance of the attorneys' fees?

1) _____

2) _____

3) _____

4) _____

**QUESTION 5**

Question: What are the ethical factors presented when an attorney learns post judgment that her client omitted an asset from the mandatory Statement of Net Worth?

1) _____

2) _____

3) _____

4) _____

**QUESTION 6**

Question: After drafting wills for a married couple, what ethical concerns are raised for the attorney in representing one of the spouses in a subsequent divorce?

1) _____

2) _____

3) _____

4) _____

**QUESTION 7**

Question: After having been assigned 18-B in a case to a difficult (i.e. abusive) client suffering from mental illness, what are the ethical concerns in limiting communications to certain hours of the day, certain days of the week and limiting the mode of communication?

1) _____

2) _____

3) _____

4) _____

**QUESTION 8**

Question: What ethical concerns are involved when a lawyer not admitted to practice in New York uses the term "Esq." in connection with a non-legal business in New York?

1) _____

2) _____

3) _____

4) _____

**QUESTION 9**

Question: What are the ethical implications raised by creating and publishing attorney newsletters and/or blogs?

1)_____

2)_____

3)_____

4)_____

**QUESTION 10**

Question: What ethical implications arise from an attorney, during the course of litigation, treating his/her adversary with habitual rudeness, including misogynist and racist language, writings and blogs?

1) _____

2) _____

3) _____

4) _____