



GUARDIANSHIPS

Under Article 81 of the Mental Hygiene Law

THE BASICS

BY GARY E. BASHIAN, ESQ.

OVER THE PAST DECADE, many practitioners have found that there has been an ever-growing need to assist clients with the long-term personal and financial care of a family member or close friend who, due to aging, injury, and/or physical or mental decline, can no longer take care of themselves.

Although there are many ways to address this issue involving joint efforts between healthcare providers, counsel, family, and friends, there is no more effective way to protect an incapacitated person's rights than having

a Guardian appointed for them pursuant to Article 81 of New York's Mental Hygiene Law.

Enacted in 1993, Article 81 of the Mental Hygiene Law revolutionized the way that state and the judiciary approached the appointment of a person, or persons, to be the officially recognized decision maker for another who is unable to make financial and/or personal healthcare decisions for themselves. Unlike "conservatorships" under the prior law, where a person suffered the stigma of being deemed judicially "incompetent," a "guardian-

ship" allows for greater flexibility and compassion in dealing with the needs of incapacitated people. Recognizing that the "needs of persons with incapacities are as diverse and complex as they are unique to the individual," the legislature purposefully designed a means by which the dignity and self-determination of an incapacitated person in need of care could be preserved to the greatest degree possible.

The statute states that "[a] guardian will be appointed only where it is necessary to provide for the personal needs of that person, including food,

“Non nobis solum nati sumus (Not for ourselves alone are we born).” — Cicero

clothing, shelter, health care, or safety and/or to manage the property and financial affairs of that person; and that the person agrees to the appointment, or that the person is incapacitated...” An individual is considered “incapacitated” if it is proven, by clear and convincing evidence, that they are likely to suffer harm because they are “unable to provide for personal needs and/or property management; and the person cannot adequately understand and appreciate the nature and consequences of such inability.”

The Article 81 court manages this by developing an individualized assessment of the functional daily needs and activities of the incapacitated person (the “IP”), and then granting an appointed guardian the power to intervene and act on behalf of the IP, but in the least restrictive form possible given the situation and circumstances. However, this tailor-made plan does not happen overnight; it involves the cooperation of many parties, can involve significant costs, and is largely achieved by following the expansive procedural framework set forth within Article 81 itself.

An Article 81 guardianship proceeding is commenced by filing a petition with an attendant order to show cause. “Any individual over eighteen years of age, or any parent under eighteen years of age, who is found by the court to be suitable to exercise the powers necessary to assist the incapacitated person” has standing to seek appointment as a guardian.

Guardians may be appointed over the person and/or property of an IP. The petition, a form that can be obtained from the state court website, must contain specified language and information that informs the court about the person alleged to be inca-

pacitated (the “AIP”), the petitioning party, and the facts that support the need for the appointment of a guardian. There is no need or requirement for a medical doctor’s supporting affidavit.

The petition, or cross-petition by another person with standing who objects to the appointment of the petitioner, can be supported by further evidence if necessary, such as supporting affirmations and/or affidavits. The order to show cause must also include required, formal language that the court will revise as necessary given the situation and circumstances.

In the order to show cause, the court may appoint a court evaluator, and, in the event that the AIP does not have private counsel, will appoint mental hygiene legal services as attorney for the AIP to protect the AIP’s rights. The order to show cause will also direct the means of service, the specific documents to be served, and the interested parties to be served, based on the information offered in the petition.

Lastly, the order to show cause will set a hearing date, which by statute must be within thirty (30) days of the signing of the order to show cause.

Where there are antagonistic and differing interests in a guardianship proceeding, a conclusion by the court evaluator that the AIP does not need a guardian or that the petitioner should not be appointed; and/or where the AIP, through their counsel, voices objections to the appointment of a guardian, a contested hearing will result.

In order to avoid this it is always the best practice for counsel to reach out to the various parties and attorneys involved to determine whether or not it will be a contested or com-

promised proceeding.

The court evaluator will interview the AIP and the other interested parties, and prepare a report to review by the guardianship judge. Though not binding, the evaluator’s report is usually persuasive as the evaluator has contact with all of the parties, is experienced in guardianship matters, and is trusted by the court to provide an honest and forthright appraisal of the AIP’s situation.

Importantly, the evaluator’s report is only available for review by the parties for a brief period of time before the hearing, and it is critical that it be carefully reviewed by counsel beforehand so that the evaluator’s position, and reasoning, as offered to the court is known.

Often, the parties concerns for the AIP are a common ground which—even if there is bitter disagreement about how the AIP should be cared for, and who should care for the AIP—should be used as a starting point for discussion and negotiation. No matter how heated or adversarial these proceedings may become—and they can often be very acrimonious—so long as the parties involved keep in mind that they are in court to protect the best interests of the AIP, some form of compromise can often be achieved pre-hearing.

Many guardianship parts encourage out of court discussions between the interested parties so that any issues that can be resolved without court intervention are addressed before the hearing even takes place. Any compromises that can be reached will result in a shorter hearing, and each party having at least some of the issues that they have voiced resolved.

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As indicated above, the parties will have the opportunity to review the evaluator's report before the hearing, and, depending on the county, there is a pre-hearing conference with the guardianship judge, counsel, the evaluator and any other parties (usually state or county representatives) that can provide insight into the facts.

This pre-hearing conference is another opportunity for the court to learn more about the AIP, their situation, and the parties that seek to be appointed guardian. These pre-hearing conferences typically involve comprehensive discussions about the respective parties' positions, and the practical needs of the AIP.

Although the formal hearing is the official forum where the guardianship judge renders his/her opinion, have no doubt that the pre-hearing conference is an essential part of the process, and one that can be very fruitful if handled

correctly by well-prepared counsel who can clearly and succinctly present their case to the court.

After the pre-hearing conference, if a compromise is still not reached, then the parties will proceed to the formal, judicial hearing. Witnesses may be called, evidence introduced, and the court will hear the arguments of each respective party.

The AIP will almost always be present, unless the court is offered a good reason why they should not appear, and has granted permission that they can be absent. Importantly, these hearings do not need to strictly comply with the CPLR rules of evidence, and are very different from a normal hearing or trial.

Post-hearing, if the guardianship judge deems the AIP to be an "incapacitated person" in need of a guardian, one will be appointed. Thereafter, the court will issue a "findings of fact, conclusions of law, and judgment" which outlines the hearing, the powers granted to the guardian, and is

then reduced to a written "commission" that grants the newly appointed guardian the authority to act, and specifies the scope of their powers.

Once this process is complete, the real work of providing short and long term care of the IP begins, an undertaking where the guardian is held to a strict fiduciary duty of care, and must periodically report/account to the court regarding the care and both physical and financial health of their newly appointed "ward," the IP.

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