

LEGAL ASPECTS
OF PSA
2010 UPDATE

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**LEGAL ASPECTS
OF PSA
2010 UPDATE
Teleconference March 8, 2010
Agenda**

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Professional Development Program

Alan Lawitz, Esq. Director, Bureau of
Adult Services

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Law, Brookdale Center for Healthy
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LEGISLATIVE DEVELOPMENTS

2009-2010

Federal Legislation

S 795 Elder Justice Act

The Senate's passage of its health care bill included the Elder Justice Act. This is the first time that the full bill has passed the Senate. The legislation now goes to a conference with the House which did not include the Elder Justice Act in its version of health care reform. Advocacy will be concentrated on key House leadership to ensure this critical seniors issue is a part of the final health care bill to be signed by the President. <http://www.elderjusticecoalition.com/>

Protecting Tenants at Foreclosure Act (PTFA) of 2009, Pub. L. 111-22,

The PTFA establishes a uniform national rule that leases survive a foreclosure. Under Section 702(a) of the Act, the “immediate successor in interest” in a residential property takes ownership of the property subject to any bona fide lease on the property in existence before notice of the foreclosure. In other words, the new owner of the property must honor the building leases. Thus the tenant may continue to rent the property until his/her lease expires. If on the date the new landlord takes title, the lease term ends in 90 days or less, he must give the tenant at least 90 days notice to vacate. The only exception to this rule is where the owner sells the property to a purchaser who plans to live in it as his primary residence. In that case, the new owner may terminate the lease on a minimum of 90 days notice from the date of the sale to the purchaser.

The Act and legislative history are clear that the Act does not preempt any state or local law giving tenants greater protections, nor does the law preempt other tenant rights or remedies.

For more information, see the National Law Center on Homelessness & Poverty’s online presentation at www.nlchp.org/program_multimedia.cfm?prog=5.

N.Y. State Legislation – Chapter Laws of 2009

Abuse/Domestic Violence

Chapter 80 (A00755A) Effective 7/7/09

Amends Sections 296 & 292 of the Executive Law to prohibit an employer or licensing agency, because of the actual or perceived status of an individual as a victim of domestic violence or stalking, to refuse to hire or employ or to bar or to discharge from employment an individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

Chapter 427 (A3378) Effective 3/16/10

Amends Section 131 of the Social Services Law to direct social services districts to inform applicants and recipients of public assistance of their option to receive an information packet appropriate for victims of sexual assault; such information shall include referrals and contact information for all local programs and services including sexual assault examiner programs, rape crisis centers and other advocacy, counseling and hotline services appropriate for such victims.

Chapter 428 (A3843A) Effective 12/12/09

Renumbers Section 459-g to be 459-h, and adds Section 459-g to the Social Services Law to prohibit the state, its political subdivisions, public authorities, and employees and agents thereof from compelling domestic abuse victims to contact their abusers directly as a condition of benefits and services; requires such political entity to provide a confidential intermediary.

Health Care

Chapter 60 (A00724) Effective 6/9/09

The law Amends Section 2801-d (10) of the Public Health Law to prohibit discrimination against a patient when the patient's legal representative sues a nursing home or its employee for alleged injury.

Chapter 61 (A763) Effective 6/9/09

Amends Section 2801-d of the public health law, in relation to private rights of action by patients in residential health care facilities to clarify the grounds for liability claims against nursing homes. The amendment includes a definition of “injury.”

Chapter 348 (A904A) Effective 10/26/09

Amends Public Health law Sections 4301, 4351, 2981 & 4201, to set forth an order of priority for organ donation including: the person designated as the decedent's health care agent subject to a health proxy form, the person designated as the decedent's agent per a written statement and the domestic partner; defines domestic partner.

Chapter 422 (S 3527) Effective 3/16/10

New section 2805-t, is added to the Public Health Law. The amendment requires facilities to disclose nursing quality indicators; provides for facilities with an operating certificate to make available to the public information regarding nurse staffing and patient outcomes; directs commissioner of health to promulgate rules and regulations on information to be disclosed.

Miscellaneous

Chapter 24 (A 4460-A) Effective 5/04/09

Amends CPLR Sections 5205, 5222, 5222-a, 5230 & 5232, to provide that personal property that is otherwise exempt from application for satisfaction of a debt, may be applied to a debt to the state or its political subdivisions, or if the debt is for child support, spousal support, alimony or maintenance.

Chapter 260 (S02782) Effective 7/28/09

The law amends Section 1757 of the Surrogates Court Procedure Act to increase the time a court has to confirm the appointment of a standby guardian from sixty to one hundred eighty days.

CASES OF INTEREST

2009

Article 9 Mental Hygiene Law and Assisted Outpatient Treatment (AOT)

In the Matter of the Retention of C.C., 23 Misc.3d 1110(A); 2009 N.Y. Misc. LEXIS 860

The patient, C.C., hospitalized pursuant to §9.37 of the Mental Hygiene Law, requested a hearing to determine whether she is in need of involuntary hospitalization. Her treating psychiatrist testified on behalf of the hospital, as did C.C.'s court appointed temporary guardian and two Adult Protective Services (APS) caseworkers. C.C. testified on her own behalf. The hospital record was received in evidence, subject to the ability to object to any individual matters. CC had an extensive history of mental illness with multiple referrals to APS. This case is an excellent example of individual autonomy and state agencies not overstepping their bounds. As the court stated,

C.C.'s constitutional right to live as she chooses, however unorthodox, difficult and challenging her choice may be, has repeatedly and correctly been respected and honored by APS, as well as the hospital. There does not appear to be a rush to judgment and resultant infringement on C.C.'s freedom. The cumulative effect of all of the circumstances presented to this Court demonstrate, however, clearly and convincingly, that C.C. is now in danger, due to her failure to care for her basic needs. In balancing C.C.'s constitutional right to follow her own desires and choose her destiny with the state's *parens patriae* power to protect and provide care to its citizens, unable to care for themselves due to mental illness, I find, that under the facts herein, she must be retained for care and treatment in the hospital against her will.

(Read the full case on page 17)

***Matter of William C., 64 AD3d 277; 880 NYS2d 317 (2nd Dept. 2009)**

The Appellate Division held that an Assisted Outpatient Treatment Order (AOT) may properly provide for money management. The Court's reasoning included the rationale that MHL Art 81 is not the exclusive remedy for money management and actually, for someone who has not been declared incapacitated, an AOT order allows him to have greater input into how his money will be spent.

In the Matter of Gail R. (Anonymous), 67 A.D.3d 808, 2009 NY Slip Op 08234; 2009 N.Y. App. Div. 2d Dept., LEXIS 8083,

Appellant patient appealed an order and judgment by the Queens County Supreme Court (New York) that granted petitioner psychiatry director's Mental Hygiene Law § 9.60 petition for Assisted Outpatient Treatment (AOT) Order. The petition alleged that the patient was a person over 18 years of age suffering from mental illness, was unlikely to survive safely in the community without supervision, had a history of lack of compliance with treatment for mental illness, and had been hospitalized at least twice within the preceding 36 months. The petition was supported by an affirmation of a psychiatrist who had evaluated the patient, as well as a prepared treatment plan worksheet pursuant to § 9.60 and a medication worksheet, outlining the treatment and prescribed medications. The appellate court found that due to the truncated nature of the hearing, at which no testimony was taken from the psychiatrist or any other witness, the patient was effectively deprived of her right to a hearing at which the psychiatrist's reasoning underlying his recommendation for AOT could be explored and his credibility assessed by the court. Accordingly, the trial court should not have issued the AOT order and should have dismissed the proceeding. The order and judgment were reversed, the petition was denied, and the proceeding was dismissed.

In the Matter of Miguel M. (Anonymous), 2009 NY Slip Op 06022; 66 A.D.3d 51; 882 N.Y.S.2d 698; 2009 N.Y. App. Div. LEXIS 5852

Respondent, the director of a hospital's department of psychiatry, filed a petition under Mental Hygiene Law § 9.60 for an order authorizing Assisted Outpatient Treatment (AOT) for appellant former patient. The Queens County Supreme Court (New York) denied appellant's motion to preclude the admission of his clinical records and testimony and granted respondent's petition after a hearing. Appellant sought review.

A director of AOT testified, based on his review of appellant's clinical records, that appellant had schizoaffective disorder. Appellant's counsel argued that the Health Insurance Portability and Accountability Act of 1996 (HIPAA) preempted those portions of the Mental Hygiene Law concerning AOT investigations. Therefore, before the director of AOT could obtain the hospital's clinical records, he had to comply with HIPAA by obtaining either a court order or appellant's written authorization. The appellate court held that the director of AOT qualified as a "public health authority," and that an AOT investigation qualified as a "public health investigation" or "public health intervention." Thus, the hospital's disclosure of appellant's clinical records as part of an AOT investigation was proper under HIPAA (45 C.F.R. Part 164.512, uses and disclosures where consent is not required) . Further, HIPAA did not preempt the Mental Hygiene Law with respect to AOT investigations. Respondent met the standard under Kendra's Law for issuing an AOT order, and the AOT sought was the least restrictive treatment appropriate and feasible for appellant. The order and judgment were affirmed.

Article 81 Guardianship

Confidentiality

300 W. 106th ST. CORP. v. SUSSELMAN, 2009 N.Y. Misc. LEXIS 2691; 241 N.Y.L.J. 113, (Sup. Ct., New York Cty.)

Petitioner land lord commenced this holdover proceeding on the assertion that it terminated the tenancy of the 65 year-old tenant of the subject rent-controlled apartment based upon a detailed nine-page notice of termination. The notice set forth facts which, petitioner asserts, show a history of conduct which has risen to the level of creating a nuisance in the subject premises, damaging property and endangering the safety and welfare of the tenant/respondent and the other tenants in the building. "Courtesy" copies of the termination notice were sent to Corporation Counsel for the City of New York (Corp. Counsel), Adult Protective Services (APS), Jewish Association for Services for the Aged (JASA), an attorney in Bronx County, and an individual residing in Brooklyn.

NYC Corp. Counsel sought the appointment of a guardian ad litem (GAL) in the housing court procedure for respondent, Mr. Susselman; that motion was granted and the guardian ad litem was appointed. Counsel then filed an order to show cause to have the court quash three subpoenas issued by the land lord's attorney, without prior court authorization and addressed to Human Resources Administration (care of JASA). The City and tenant/respondent asserted that all of the records being sought were confidential in nature and are protected by Section 473-e of the New York Social Services Law, which provides that the records "...shall only be released with the written permission of the person who is the subject of the report, or the subject's representative." Additionally, they argued that the subpoenas were overly broad and that land lord/petitioner failed to establish ample need for the documents being sought in the subpoenas. Landlord/petitioner asserted that respondent's condition had been made a part of this proceeding by virtue of the involvement of these agencies in the motion to have the GAL appointed; that motion contained otherwise "confidential" information which was used to secure the guardian ad litem's appointment therefore the agencies cannot now claim that petitioner should not be entitled to examine the rest of their records. The landlord further cites section 473-e of the Social Services Law, which permits disclosure of the otherwise confidential documents to "a court, upon a finding that the information in the record is necessary for the use of a party in a criminal or civil action or the determination of an issue before the court." Finally, landlord/petitioner argued that it is not merely fishing for information and the information sought is essential to the proceeding, as it would not be available to petitioner by other means and is directly related to the allegations set forth in the termination notice.

The court was not convinced that ample need for the documents listed in the subpoenas had been demonstrated by petitioner. However, the information which would be used in support of respondent's defense was, at that time, completely within the knowledge of these agencies, and it

was therefore difficult to ascertain the necessity for petitioner to acquire this information to respond to the defense. Therefore, the court determined that it was appropriate that there be an in camera disclosure to the court.

The court agreed that the Social Services Law applies to this proceeding and that the motion seeking the appointment of a guardian ad litem for tenant/respondent would normally not be grounds to violate the confidentiality of the records submitted in support of that motion or to warrant the full disclosure of respondent's files with APS, HRA, JASA or any other agency providing services to respondent. Additionally, while the statute provides for disclosure of confidential information if the Court deems the records "necessary" to determine the issues at trial, it was clear from the papers submitted, including the termination notice, that land lord/petitioner already had an overwhelming amount of information to provide to the Court in support of its petition, including the APS reports submitted as part of the motion for the GAL. Therefore, the additional information being sought would not be "necessary" for the court to issue a determination on the proceeding.

The court authorized the subpoenas submitted by petitioner, with the documents to be produced to the Court for inspection prior to any review by petitioner. Additionally, the petitioner was directed to serve the subpoenas in compliance with CPLR 2303 and to allow adequate time for the agencies to review and redact the requested documents pursuant to section 473-e of the Social Services Law.

***Matter of the Application of James B. and Patricia B., 881 NYS2d 837; 2009 N.Y. Misc LEXIS 1527 (Sup. Ct., Delaware Cty.)**

Upon a motion by (NYSARC) to quash an information subpoena issued under MHL 81.23, the court granted the subpoena to the extent that it sought financial information but denied it to the extent that it was seeking medical information. The court held that it was the intent of the legislature to give the power to the Court Evaluator under MHL 81.09(d) to seek permission to examine the AIP's medical records but not to give that authority to petitioner's counsel.

Presence of the AIP

In the Matter of LILLIAN U., 66 A.D.3d 1219; 887 N.Y.S.2d 321; 2009 N.Y. App. Div. LEXIS 7415

Pursuant to Mental Hygiene Law Art. 81, the Supreme Court, Delaware County (New York), granted petitioner department's motion to extend the department's appointment as guardian for

the personal needs and property management of respondent incapacitated person. The incapacitated person appealed.

The incapacitated person argued that the trial court erred by conducting the hearing in her absence. The trial court found that the incapacitated person's presence could be waived because she was physically outside the state when the hearing was conducted. However, the appellate court held that the Mental Hygiene Law did not permit a hearing to be held in the absence of the person alleged to be incapacitated simply because he or she lived outside of the state. Instead, Mental Hygiene Law § 81.11(c) provides that, in that circumstance, the individual had to be brought to the hearing, unless it was determined that the person physically could not have come or be brought to the courthouse. The order did not include any findings as to the incapacitated person's physical ability or her willingness to attend the hearing for purposes of § 81.11(c)(1), but instead merely concluded that her presence was waived because she was living outside the state when the hearing was held. Absent a statement setting forth a factual basis for concluding that the incapacitated person could not come or be brought to the courthouse, the hearing should not have been conducted in her absence.

The order and judgment was reversed, and the matter was remitted for a new hearing. The appellate court directed that the incapacitated person was to be produced at said hearing unless a determination was made that she was physically unable or unwilling to attend the hearing. Pending such hearing, the department was to continue to serve as temporary guardian of the personal needs and property management of incapacitated person.

Fees

***Matter of Kurt T., 64 AD3d 819; 881 NYS2d 688 (3rd Dept 2009)**

Appellate Division held that while it was undisputed that the AIP had functional limitations affecting his ability to manage his finances, the record lacked clear and convincing evidence that he was likely to suffer harm as a result of those limitations or that he was incapable of understanding and appreciating his limitations. In fact, the record established that despite his diagnosis of Expressive Aphasia and Dysarthria resulting from his stroke, he was aware of his assets, willing to seek the assistance of an attorney in managing those assets and that he would not be harmed if guardians were not appointed.

The Appellate Division found, contrary to the trial court's decision, that petitioner should be responsible for the full amount of her counsel fees because, although the petition was not wholly devoid of merit, there was evidence that it had been motivated by avarice and possible financial gain and there was no evidence that petitioner could not afford to pay her own counsel. The court however affirmed the trial court's decision that the AIP should be responsible for 80% of the Court Evaluator fees and also the fees of his own court appointed counsel since they had provided a valuable service to the AIP.

In the Matter of Charles X., 66 A.D.3d 1320; 887 N.Y.S.2d 731

County social services department filed a petition seeking the appointment of a guardian of the person and property of alleged incapacitated person (AIP), and also appointment of a court evaluator and an attorney for the AIP. The Supreme Court appointed an attorney and court evaluator and awarded them fees to be paid by the Department after the guardian was appointed. Department appealed.

The Supreme Court, Appellate Division, held that the Trial court lacked authority to ascribe responsibility to the county social services department for payment of court evaluator's fees, in department's proceeding seeking the appointment of a guardian where the petition was neither denied nor dismissed (Mental Hygiene Law § 81.09 (f)).

Powers of Attorney/Health Care Agents/Trustees

***Matter of Kufeld, 23 Misc3d 1131(A); 2009 N.Y. Misc. LEXIS 1265 (Sup. Ct.. Bronx Cty.)**

Although petitioner demonstrated by clear and convincing evidence that the AIP was presently incapacitated, the court declined to appoint a guardian because the AIP had executed sufficient advanced directives when he was competent and there was no evidence that the agent appointed by those instruments had abused her authority.

***S.S. v. R.S., 24 Misc3d 567; 877 NYS2d 860 (2009) (Sup. Ct. Nassau Cty.)**

After an evidentiary hearing held to determine the stated wishes of the subject of the proceeding, a petition pursuant to MHL 81.02(a) for special guardianship to make health care decisions and a related petition pursuant to PHL 2992(1, 3) voiding a health care proxy issued by the AIP to his wife prior to suffering a heart attack and resultant severe brain damage were both denied. Petitioners, the siblings of the AIP, were unable to overcome the evidence that their brother's stated wishes, despite his Orthodox Jewish background, and some confusing language in the Health Care Proxy instrument, were to be removed from life support, thus they were unable to establish that the health care agent, his wife, was acting contrary to his stated wishes. Since the Health Care Proxy was held valid, the court found that there was no need for the appointment of special guardian.

***Matter of Moulinos, 2009 N.Y. Misc. LEXIS 2412; 3/31/2009 NYLJ. 25 (col. 1) (Sup. Ct. Queens Cty.)**

The court declined to appoint a guardian for an elderly woman suffering from dementia where her husband, who held her Power of Attorney and Health Care Proxy, was providing proper care for her, even though he was preventing her from seeing her adult children and had complete control over the wife.

Miscellaneous

***1234 Broadway LLC v. Feng Chai Lin, 25 Misc3d 476; 883 N.Y.S.2d 864; 2009 N.Y. Misc. LEXIS 1849 (Civ. Ct., NY Cty. 2009)**

In an exceptionally thorough opinion that places great emphasis on the liberty and property interests of a mentally ill housing court litigant, the Housing Court in NYC held that a Housing Court Guardian ad litem appointed pursuant to CPLR Article 12 who believes that a ward's best interests will be served by consenting to a settlement forfeiting the ward's apartment may NOT consent on the ward's behalf to a final judgment to compel the ward to vacate the premises over the ward's objection. The court focused on the significantly greater substantive and procedural due process protections in an Art 81 proceeding and held that only an Art 81 guardian may make decisions that result in the loss of a fundamental right. The court stated: "The Housing Court appoints GAL's to assist incapacitated adults, not to live the ward's lives for them."

***Matter of John D., 9/15/09 NYLJ 40 (col 1) (Sup. Ct. Cortland Cty.)**

Upon finding that the AIP was not incapacitated and not in need of a guardian at the time of the court hearing, the court ordered, over the AIP's objection, an MHL 81.16(b) protective arrangement for an individual with substantial assets, who, during a period of mania, went on an irrational spending spree. Although he was stable at the time of the Court proceeding, there was a 30% chance of his relapse that could result in a waste of his assets. These assets were the subject of claim by his wife in a divorce proceeding for equitable distribution. The court further issued an order restraining financial institutions from transferring or releasing funds on deposit to the AIP or to a 3rd party without prior approval of the court appointed monitor.

***Matter of Swingearn (Nassau County Department of Social Services), 873 NYS2d 165 (2nd Dept. 2009)**

During the final accounting phase of an Article 81 proceeding, the nursing home that had provided care to the IP prior to her death cross-moved to have the court declare the priority of its claim for reimbursement for unpaid medical expenses over DSS's claim for reimbursement of incorrectly paid Medicaid. The Appellate Division held that pursuant to SSL 104 (1), DSS' claim had priority over the nursing home's claim which was a claim of only a "general creditor" and that contrary to the nursing home's contention, DSS was not required to bring a separate action or proceeding to recoup Medicaid benefits; it was sufficient to preserve its claim by asserting it in the guardianship proceeding notwithstanding the incapacitated person's subsequent death nor was any formal determination or fair hearing establishing DSS's claim needed, as pursuant to SSL 104.

ART 17-A of the Surrogates Court Procedure Act

Presumption of Parent as Best Guardian

***Matter of the Guardianship of Jon Z.K.Z., __Misc3d__; 2009 N.Y. Misc. LEXIS 2234**

Parents who had an acrimonious divorce and continuing relationship of hostility toward one another were co-guardians of their son, now a 21 year old autistic young man. Both parents filed various motions seeking control over the decisions concerning their son.. Both the special guardian and the MHLS attorney for the young man recommended that an independent guardian be appointed because the parents relationship was not in the best interests of the young man. The court determined that the parents' deep seated animosity for one another prevented them from cooperating, that they could not cooperate sufficiently to serve as either co- guardians or sole guardians. The court also held that the parents' siblings could not be appointed because the other parent would perceive that individual as too closely aligned with the other parent. Therefore, the court appointed the special guardian and her law partner, both on the Part 36 list, as the guardians.

***Matter of Fausto Miguel O. III, 8/10/09 NYLJ, 26 (col. 4), (Surr. Ct., NY Cty.)**

Although acknowledging that there is a presumption in favor of appointing a parent as the guardian under Article 17-A, the court held that this presumption could be rebutted "by a showing that the parent does not possess the requisite qualifications required of a fiduciary by reason of want of understanding, or that the parent is not capable of providing a safe, nurturing and stable environment, even where that parent shows genuine love for the child". In this case, the court removed the mother as guardian for her 31 year old mentally retarded son where there was evidence of volatile, erratic and sexually inappropriate behavior by the mother toward her son and where the mother refused to allow the GAL to evaluate the home and also refused in open court to divulge where she would be taking her son to live upon removing him from a group home in which he was thriving. The court found that her inability to recognize the court's role in overseeing the guardianship and thus its need to know the wards whereabouts gave rise to grave concerns for the well being of the ward.

Power of the Guardian

Matter of the Guardianship of Leo R., 2009 NY Slip Op 29462; 2009 N.Y. Misc. LEXIS 3114

Petitioner guardian brought a proceeding against respondent facility, asking that the facility be enjoined to give her unfettered access to the ward, her brother, anywhere in the facility, maintain one-on-one monitoring for the ward, not awaken the ward and force him to get out of bed until he was ready, and that an individual be removed from the unit where the ward resided. The

guardian argued that SCPA 1758 gave the court authority to compel the facility to do the specified acts. The remedies that the guardian sought related to the plan for treatment of the ward's disorders. The court found no reason why the surrogate, under SCPA 1758, had the authority to direct the treatment plan. The system for review of objections to a treatment plan under 14 NYCRR 633.12 included informal objection followed by written objection, a hearing, and appeal to the mental health commissioner. After the final decision of the commissioner, a CPLR Art. 78 proceeding may have been brought. At the oral argument, the guardian's attorney admitted there had been no written objection or hearing, only an attempt at informal resolution. Thus, the administrative remedies had not been exhausted. The fact that the guardian sought mandamus to compel action by the facility did not obviate the requirement for exhaustion of the administrative remedies, absent a showing of irreparable injury. The allegations did not show irreparable injury. Rather, since there had been no administrative hearing, there were merely disputed facts to be resolved at such a hearing. The petition was denied.

***Matter of Schulze, 1/7/09 NYLJ 38, (col. 5), (Surr. Ct., NY Cty.)**

There is no express provision in SCPA Art. 17-A empowering a 17-A guardian to make gifts as contrasted with the express grant of power to guardians under MHL Art. 81.21. The court held that despite the absence of such express language, Art. 17-A guardians do have such power and do not need to petition a court to be converted to Art. 81 guardians to make such gifts. The court noted that intra-family tax savings and maximization of gifts to charities are among the objectives that have been recognized as supporting guardians' exercise of such authority to make such gifts.

Art. 17-A vs. Art 81

***Matter of Mueller, ___ Misc3d ___; 2009 N.Y. Misc. LEXIS 1375 (Surr. Ct. Dutchess Cty)**

Parents of a young man whose father had been appointed as his guardian by the Surrogate's Court years earlier under Art 81 (81.04(b)) now petitioned for a 17-A guardianship before the same court at the expiration of the term of the Article 81 guardianship. He explained that the cost of proceeding under Art 81 was too great so they were proceeding under Art 17-A. Noting that there are different standards for appointment under both statutes, the court found that the instant petition was properly supported by certificates establishing the necessary criteria under 17-A. The court granted the 17-A on the condition that the father be discharged under Art 81 and his final accounting be approved.

***Matter of Chaim A.K., 2009 Slip Op 29384; 2009 NY Misc. LEXIS 2647 (Surr. Ct., NY Cty.)**

Court denied an application by parents for 17-A guardianship of their son without prejudice to file an application for an Art 81 guardian in Supreme Court, finding that the proposed ward, although mildly mentally retarded, also has a long history of psychological problems that may change over time and that he was in need of the more tailored and more carefully monitored supervision of an Art 81 Guardian. This opinion is especially well written and thoughtful and discusses the difference between the two types of guardianship and when each is most appropriate.

(see the case in full on page 24)

Note: * These case descriptions were taken from the “Guardianship Collected Cases” for Article 81 and Article 17-A compiled by the NYS Mental Hygiene Legal Services and are reprinted with permission. <http://www.courts.state.ny.us/ip/gfs/index.shtm>

In the Matter of the Retention of C.C., A Patient Admitted to NASSAU UNIVERSITY
MEDICAL CENTER HOSPITAL.

29267-IC

SUPREME COURT OF NEW YORK, NASSAU COUNTY

2009 NY Slip Op 50695U; 23 Misc. 3d 1110A; 885 N.Y.S.2d 710; 2009 N.Y. Misc. LEXIS
860

February 10, 2009, Decided

NOTICE: PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE
PRINTED OFFICIAL REPORTS.

CORE TERMS: heat, neighbor, roof, electricity, doctor, psychiatric, guardian, mental
illness, suffering, food, rash, severe, family members, hospitalization, cellulitis, phlebitis,
patient, foreclosure, diagnosis, shingles, pain, running water, hospitalized, involuntary,
inflammation, caseworker, appointed, emergency, personality disorder, paranoid

HEADNOTES

[**1110A] [***710] Incapacitated and Mentally Disabled Persons--Involuntary
Commitment. Mental Hygiene Law--§ 9.37 (Involuntary admission on certificate of director
of community services or his designee)

COUNSEL: For Petitioner: Joseph Hirsch, Esq., Mental Hygiene Legal Service, Mineola,
NY.

For Respondent: Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato Einiger
LLP, Att: Allan Silver, Esq., Lake Success, NY.

JUDGES: Karen V. Murphy, J.

OPINION BY: Karen V. Murphy

OPINION

Karen V. Murphy, J.

The patient, hereinafter, C.C., hospitalized pursuant to [§9.37 of the Mental Hygiene Law](#), requested a hearing to determine whether she is in need of involuntary hospitalization. The hearing was held on January 30, 2009. Her treating psychiatrist, Dr. S. testified on behalf of the hospital, as did C.C.'s court appointed temporary guardian, S.B., and two Adult Protective Services (APS) caseworkers, V.S. and K.M. C.C. testified on her own behalf. The [*2] hospital record was received in evidence, subject to the ability to object to any individual matters.

C.C. was brought to the Emergency Room of the hospital on the evening of December 15, 2008 as a result of 911 calls and after the police, the guardian and APS workers found C.C. living in a dilapidated dwelling with no heat, electricity or running water, during a snowstorm. She was admitted to a medical floor where she refused to allow medical examination or vital signs to be taken for three days. The blood test administered in the Emergency Room revealed no indication of malnutrition, nor did C.C. appear to be suffering from frostbite or other signs of exposure. Ultimately, on January 21, 2009 she was transferred to the psychiatric ward on the twelfth floor.

Dr. S. testified that C.C. had been hospitalized in 2004, under similar conditions, in that she was brought to the hospital because of an open APS investigation brought about by C.C. living in a house without heat, electricity or water and refusing services. She remained hospitalized for twelve days, but there was no psychiatric admission at that time. Upon the current admission, C.C. informed the hospital staff that she had been living without heat, electricity and water for two years, however, as was confirmed by the 2004 hospital record that information was false. The doctor came to learn that C.C. had actually been living like that for at least nine years.

Although C.C. is not delusional or suffering from hallucinations and does not have any cognitive deficits or indications of dementia, Dr. S. testified that in light of C.C.'s living conditions, her refusal to allow medical treatment for cellulitis/phlebitis, her diagnosis of very severe paranoid personality disorder, coupled with a pervasive distrust of people, poor insight and impaired judgment, she (C.C.) poses a danger to herself and needs to be cared for in a hospital. There is no indication that C.C. is a danger to others. She has not acted out against the neighbors she claims have vandalized her home nor has she been aggressive or a management problem on the ward.

APS caseworker, V.S. testified that she was first referred to C.C.'s home in 2001, possibly in the summer of that year. She observed that the grass was overgrown and the house was in poor condition. C.C. indicated to V.S. that she was working on a part-time basis investigating and assisting writers. C.C. refused services and the APS case was closed.

K.M., a second APS caseworker testified that she first became aware of C.C. in January 2004, because C.C. was deemed to be at risk due to the living conditions at her house. A mobile crisis unit interviewed C.C. and she was brought to the hospital for evaluation. Upon

her release, C.C. returned to the house, despite the fact that she was still without heat, water and electricity and had again declined services. The case was closed in the spring, without services being provided, because the risk factors were less in the warmer [*3] weather.

V.S. was referred again to C.C. in 2007, at which time C.C. avoided contact, speaking only through a window, with V.S. During that visit C.C. complained about her neighbors wanting to take her house. The house had deteriorated, had missing shingles and damage to the rear roof. Due to the condition of the roof, V.S. checked with the building department and learned there were open violations on record with that agency. V.S. was not permitted to testify as to the nature of those violations. Once again, C.C. refused any offers of assistance and the case was closed.

Another referral in September, 2008 found C.C. refusing to talk, declining offers of assistance and again complaining that her neighbors were damaging her house. She testified that C.C. was not as oriented as she had been, was unreasonable and was aging. At that point V.S. recommended a guardianship proceeding because of the worsening condition of the house, extreme conditions including the lack of heat, water and electricity and her concern that animals would be entering the house through the hole in the roof and further, because C.C. continued to refuse services.

C.C. testified on her own behalf. While approaching the bench to take the stand, she apologized for "the pajamas". She was wearing "scrub"-like clothing covered by a sweater coat and her apparel did not seem at all inappropriate in a hospital setting. Her large tinted sunglasses did seem out of place in the courtroom, yet she made no mention of them.

C.C. acknowledged that she lost heat and electricity in 2000 and that she had been uncomfortable at times, but dressed in layers and thermal clothes to keep warm. She testified that she goes out every day to shop for groceries and uses bottled water to drink, cleanse herself and to flush the toilet. C.C. contradicted the doctor's testimony that C.C. told the doctor she eats only canned foods such as tuna fish and claimed that she purchases produce and prepared foods, as well as canned goods.

C.C. testified that in the 60's and early 70's, extended family members visited the home, but after the mid 70's, while she and her mother occasionally went to other family member's homes they did not entertain at home. Contact with other family members seems lacking, especially since her mother's death in 1985. It appears that in addition to refusing to allow APS workers into her home, for many years she also refused admission to her cousin, now her court appointed guardian.

C.C. testified that after her mother's death a neighbor approached her and told her he wanted to purchase the house. She indicated it was not for sale, but that other properties on the block were. She said the neighbor was insistent it had to be her house and due to her unwillingness to sell the house that neighbor, and at least one other, began their ongoing [*4] efforts to vandalize her house. She testified that her front door had been vandalized

and shingles were removed from her house and roof by the neighbors. She took no steps to protect herself from the alleged vandals.

C.C. denied that she had not paid taxes since her mother's death, testifying that she had paid taxes up until 1989 or 90. C.C. explained that things became difficult for her after a car accident in 1987. She testified that her automobile was hit in the rear and she suffered a pinched nerve. The pain was so severe that she took muscle relaxants, which rendered her unable to work or function. After four months the insurance company cut off benefits saying her pain was due to arthritis and degenerative disc disease. She said she was in a lot of pain and took muscle relaxants for five years and subsequent to that suffered three years of intermittent pain, which "took a lot out of" her.

C.C.'s home is in foreclosure due to her failure to pay taxes for over 19 years. She testified that she now plans to sell the house to a man who offered what she felt was a fair price and that she would close quickly and relocate. She gave no indication of where she would go or how she would get there, nor was any evidence of the proposed sale presented. C.C.'s guardian testified that the house had already been sold pursuant to a foreclosure of the tax lien, however the check bounced and title has not passed.

Dr. S. testified that when C.C. was transferred to the psychiatric ward, she ordered a medical consultation to determine the cause of a rash on C.C.'s leg. C.C. allowed the two doctors to examine the rash, but thereafter refused any treatment. The diagnosis was cellulitis infection of the skin/phlebitis. The doctors wanted to start her on antibiotics and perform an ultrasound. Her only reason for declining the antibiotics and ultrasound prescribed was her outrage over Dr. S.'s psychiatric diagnosis on the treatment plan. Although Dr. S. testified that the rash preceded her hospitalization, C.C. denied it, but did acknowledge that Dr. S. said that the inflammation of her leg had "been cooking a long time before it made its appearance and that I came in with it." When asked about her refusal to get medical care for her rash/inflammation, C.C. indicated that she would seek medical attention when she left the hospital. It did not appear, however that she has seen a doctor on her own, and that her last medical evaluation was when she was brought to the hospital in 2004 by the mobile crisis team. She testified that she would not sign anything (including the consent forms for treatment) in the hospital as a form of protest of her psychiatric diagnosis.

Her guardian, S.B., appointed in an Article 81 proceeding in December, 2008, testified that C.C. was afraid to sign papers for fear of losing her home. The temporary guardian is a second cousin of C.C., but prior to the guardianship proceeding, she had not seen C.C. for four years. She testified that there was a hole in the roof several feet wide, approximately the size of a large desk. S.B. further testified that while C.C. refused to allow her into the house, she admitted that the roof above the living room is sinking in. Indeed, [*5] C.C. testified that there were two layers of shingles on the roof. S.B. is fearful that the roof will collapse and that animals have or will enter the house through the hole, as will the elements, all to the detriment of her ward.

It is beyond cavil that it must be established by clear and convincing evidence that a person is mentally ill and poses a substantial threat of physical harm to herself or others to justify hospitalization against the patient's will. ([Matter of Luis A., 13 AD3d 441, 786 NYS2d 560 \(2d Dept., 2004\)](#); [Matter of Carl C., 126 AD2d 640, 511 NYS2d 144, \[2d Dept., 1987\]](#)). A threat of physical harm can be the refusal or inability to meet such essential needs as food, clothing, or shelter. (See [Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed.2d 323 \(U.S. Tex., 1979\)](#); [O'Connor v. Donaldson, 422 U.S. 563, 93 S. Ct. 2486, 45 L. Ed.2d 396 \(U.S. Fla., 1975\)](#); [Matter of Harry M., 96 AD2d 201, 468 NYS2d 359 \(2d Dept., 1983\)](#); [Matter of Edward L., 137 AD2d 818, 525 NYS2d 281 \(2d Dept., 1988\)](#); [Matter of Francine T., 302 AD2d 533, 755 NYS2d 276 \(2d Dept., 2003\)](#); [Matter of Luis A., supra](#)). A mere showing of mental illness or eccentricity is insufficient to retain a patient involuntarily admitted to a mental facility ([Matter of Carl C., supra](#); [Matter of Perra, 14 Misc 3d 438, 827 NYS2d 587 \[Sup. Ct., Oneida Co., 2006\]](#)).

I have credited the doctor's testimony, unrebutted, but for C.C.'s self-serving denial of mental illness, that C.C. suffers from severe paranoid personality disorder. She is pervasively distrustful. C.C. testified that she does not trust people, which has been borne out by the APS workers and the doctor who testified to her guarded speech and refusal to discuss certain topics. Furthermore, C.C. has, since 1985, harbored the belief that her neighbors are vandalizing her home and she is becoming increasingly vocal in her complaints about the neighbors. She has expressed a fear or refusal to sign papers, both in the hospital and in the community. C.C., a former teacher, is intelligent and articulate, but does not appear to have worked steadily for years. She has refused any assistance in the form of food stamps and other social services, but has accepted money from her brother in order to purchase food. There seems to be an inability to comprehend the consequences of her actions and reality, in that she failed to pay taxes for 19 years, was notified of foreclosures (the court docket reflects three, stemming back to 2001), yet now, after a foreclosure sale, she baldly professes to have found a purchaser. She also denies that her roof is in danger of collapse, believing that it is merely missing shingles. Her plans for what she will do after the house is sold are vague, to say the least.

C.C. has been advised that she may be suffering from either of two potentially deadly, if left untreated, conditions; cellulitis or phlebitis, yet she has refused treatment, thereby creating a danger to herself. ([Consilvio v. Diana W., 269 AD2d 310, 703 NYS2d 144 \[1st Dept., 2000\]](#)). I do not credit her testimony that she will seek treatment for her medical condition upon her release. While not corroborated by medical testimony and without regard for the underlying cause of her inflammation/rash, C.C. testified that without treatment it is [*6] getting better, already dismissing the condition. She will clearly not seek treatment for her psychiatric condition because she denies that she is suffering from mental illness.

While it is unthinkable that C.C. has been living in the middle of one of the wealthiest counties in the nation for nine years without heat, electricity or running water, she has, thus far, been fortunate enough to survive. Her steadfast determination, pioneer spirit and boundless independence have served her well over the years. However, during C.C.'s hospitalization, a 93 year old Bay City, Michigan man was not as fortunate. It was reported

that the medical examiner indicated that he died "a slow, painful death" caused by freezing, inside his home, just days after the power company restricted his use of electricity due to non-payment. The lack of water and refrigeration, in addition to other unsanitary conditions, was found to be "a threat of imminent danger" in a neglect proceeding ([In re Lillian H., 254 AD2d 237, 679 NYS2d 142 \[1st Dept., 1998\]](#)). No utilities, heat or running water resulted in a finding of "imminent danger" ([Matter of Tad M., 123 Misc 2d 1071, 475 NYS2d 996 \(Fam. Ct., Richmond Co., 1984\)](#); [State of Louisiana v. Russo, 567 So.2d 703 \[Louisiana Ct. App. 3rd Cir., 1990\]](#)). The New York City Administrative Code finds the lack of hot water to be an emergency condition ([Matter of Bozart Realty Corp., 65 Misc 2d 55, 316 NYS2d 709 \[Sup. Ct. Bronx Co., 1970\]](#)). Even in the widely publicized case of Billie Boggs, Ms. Boggs, a 40 year old homeless woman, while living on a sidewalk, provided heat for herself in the form of an air vent. ([Matter of Billie Boggs, 132 AD2d 340, 523 NYS2d 71 \(1st Dept., 1987\)](#); app. disp. [70 NY2d 972, 525 NYS2d 796, 520 NE2d 515 \[1988\]](#)).

There is no bright line rule as to at what age the lack of heat becomes deadly, as opposed to simply dangerous, but there can be no doubt that living in extreme conditions, such as those existing in C.C.'s house, is dangerous, especially to C.C., given her age and physical condition. The fact that C.C. has successfully weathered severe winter conditions in the past does not mean that she will continue to be so lucky, nor that such conditions are not dangerous. C.C. is nearly 61 years of age, suffering from arthritis, degenerative disc disease, varicose veins and possibly cellulitis or phlebitis, yet she does not recognize these changes in her life or prolonged exposure in a decaying building as posing any danger to herself.

While C.C. continues to express her will to persevere under the most adverse and trying conditions, the Court must weigh all of the competing interests. This is not a case of trying to confine, without more, a non-dangerous individual who is capable of surviving safely in freedom by herself or with the help of willing and responsible family members (See [O'Connor v. Donaldson, supra](#)), nor is it proposed that C.C. be deprived of her liberty merely for the purpose of providing treatment. ([Matter of Francine T., supra](#); [Matter of Luis A., supra](#); [Matter of Scopes, 59 AD2d 203, 398 NYS2d 911, \[3rd Dept., 1977\]](#)).

C.C.'s constitutional right to live as she chooses, however unorthodox, difficult and [*7] challenging her choice may be, has repeatedly and correctly been respected and honored by APS, as well as the hospital. There does not appear to be a rush to judgment and resultant infringement on C.C.'s freedom. The cumulative effect of all of the circumstances presented to this Court demonstrate, however, clearly and convincingly, that C.C. is now in danger, due to her failure to care for her basic needs. In balancing C.C.'s constitutional right to follow her own desires and choose her destiny with the state's *parens patriae* power to protect and provide care to its citizens, unable to care for themselves due to mental illness, I find, that under the facts herein, she must be retained for care and treatment in the hospital against her will.

Upon careful consideration of the demeanor of the witnesses and all of the evidence, C.C. is in need of retention. She suffers from a mental illness, which has been diagnosed as severe paranoid personality disorder; inpatient care and treatment are essential for her welfare, in

that, if released, she poses a substantial risk of harm to herself; her judgment is so impaired that she is unable to understand the need for such care and treatment and she fails to perceive the danger she presents to herself.

It is ORDERED that the request for C.C.'s release is denied and the patient may be retained for care and treatment at the above named hospital for a period not to exceed 60 days from the date of admission.

The foregoing constitutes the Order of this Court. February 10, 2009, Mineola, NY

PROCEEDING FOR THE APPOINTMENT OF A GUARDIAN FOR CHAIM A. K.
PURSUANT TO SCPA

ARTICLE 17-A. (1992/08)

New York Law Journal, Volume 242
Monday, September 21, 2009
Court Decisions, New York County
First Judicial Department
Surrogate's Court

Surrogate Glen

PROCEEDING FOR THE APPOINTMENT OF A GUARDIAN FOR CHAIM A. K.
PURSUANT TO SCPA ARTICLE 17-A. (1992/08)-- This case presents an important question for courts, and potentially for the legislature: [FN1] to what extent do the shortcomings of Article 17-A of the Surrogate's Court Procedure Act require that it be narrowly construed where mental illness, as well as mental retardation or developmental disability, may be the reason a guardian is required.

The Instant Application

Petitioners here are the parents of Chaim A. K., born March 19, 1988. Because Chaim has reached his majority, his parents have lost legal authority to make decisions, especially medical decisions for him, unless they obtain some form of court authorized guardianship. This is particularly troubling because Chaim has required relatively frequent hospitalizations and, as he himself admits, cannot bring himself to authorize treatment even if it is in his best interests.

[FN2]

In support of their petition, Chaim's parents submitted information from four separate sources. Two are M.D.s who filled out form affidavits to which other documentation is attached; one is the report of a psychologist who did an evaluation in 2007; the last is a batch of information relating to Chaim's educational setting in the New York City public school system. Read together, they describe a young man who functioned adequately in regular school classes through fifth grade; he was subsequently placed in special education, where he remains to this day.

The report from his annual Individualized Education Program assessment conference states: 'Significant academic and emotional difficulties warrant a more restrictive setting to address his needs and provide functional academic and vocational training.'

Assessments and testing [FN3] done to determine his eligibility for educational benefits and services from the state Office of Mental Retardation and Developmental Disability (OMRDD) consistently show that Chaim scores 'low' in communication, daily living and socialization skills, and Stanford-Binet scores of 72 on nonverbal I.Q. (borderline range) and 51 on verbal I.Q. (mild to moderate mental retardation range) result in an overall Full Scale I.Q. of 59, just below the 1st percentile, thus resulting in a finding of cognitive functioning within the mild mental retardation phase. His scores on the Weschler Abbreviated Scale of Intelligence give him a 'Borderline' on Verbal, 'Low Average' on Performance, and 'Borderline' on Full-4. [FN4]

When, however, one looks behind the raw numbers, including the more fully fleshed out reports,

especially of Dr. Sheenie Ambardas, his treating psychiatrist, [FN5] a somewhat different picture emerges. Chaim has a long history of psychological and emotional problems which have contributed to his educational difficulties. [FN6] He has been diagnosed with impulsivity, hyperactivity, attention deficit disorder, audio and visual hallucinations, self-mutilating behavior, suicidal gestures and attempts, depression, anxiety, and psychosis: Dr. Ambardas's final report shows a diagnosis as follows:

Axis I: Depressive disorder N.O.S.--311

Psychotic disorder N.O.S.-- 298.9

R/O: R/O MDD w/Psychotic Features

R/O Schizophrenia, R/o Aspergers

Axis II: Borderline Intellectual Functioning

Axis III: Seizure D/O; Asthma; Nose Bleeds

Her early assessment notes 'multiple self-injurious behavior' and 'suicidal gestures and attempts.'

Another evaluator noted:

'Emotional state appeared tenuously stable with some indications of overt psychopathology' (Chaim Wakslak, Ph.D. 10/31/07) and [b] ased on background information and behavior observations, it is the opinion of the examiner that Chaim gives evidence... consistent with his previous diagnosis of Asperger's disorder' (Young Adult Institute evaluation 4/30/2009).

The Board of Education Individualized Education Program forms describe Chaim's 'disability' as 'Emotional Disturbance.'

The Court's own observation of, and conversation with Chaim suggested intelligence, reasoning and communication skills significantly greater than those of other wards in 17-A proceedings carrying diagnoses of mild20mental retardation, and/or developmental disabilities. At the same time it also indicated (in conjunction with his parents' testimony, and the history contained in documents submitted with the petition) serious issues of mental illness.

Statutory Framework

New York currently provides two distinct statutory schemes under which a personal or property guardian may be appointed for, and exercise power over, a disabled adult: [FN7] Article 17-A of the Surrogate's Court Procedure Act (17-A) and Article 81 of the Mental Hygiene Law (Article 81). Chaim's parents have chosen to pursue a 17-A guardianship for several reasons. It is thought to be faster than Article 81; petitioners are often pro se, and the combination of simplified forms, service requirements, and assistance by the clerks in Surrogate's Courts mean that a lawyer is not necessary, an important factor for petitioners like those here for whom such an expense is daunting, if not prohibitive. In New York City, at least, most proposed wards have carried diagnoses of mental retardation or developmental disability since early childhood, and they and their families have ongoing relationships with one of the two main organizations, AHRC (Association for Help for Retarded Children) and YAI (Young Adult Institute) that provide services to the mentally retarded and developmentally disabled communities. Those organizations recommend that parents seek 17-A guardianship as their children 'age out' [FN8] and often provide information and actual assistance in obtaining guardianship. [FN9] SCPA Article 17-A as originally enacted in 1969 applied to persons with 'mental retardation' (MR). [FN10] It was revised in 1989 [FN11] to add to its coverage persons who are 'developmentally disabled' (DR). [FN12] Mental Hygiene Law (MHL) Article 81, enacted decades later in 1992, applies to persons whose functional incapacities make the subject of the proceeding--denominated 'an allegedly incapacitated person,' or 'AIP'--unable to manage her

person or property such that she is both placed in danger and incapable of understanding the consequences of her incapacity (see MHL Art. 81.02 [b][1] and [2]).

As is apparent on the face of the two statutes, 17-A is almost purely diagnosis driven, while Article 81 requires a more refined determination linking functional incapacity, appreciation of danger, and danger itself. [FN13] This is not the only way in which they differ. The distinctions reflect, at least in part, a decades' long increasing sophistication about mental disabilities as well as an expanding constitutional framework through which the rights of mentally ill persons are protected.

Article 17-A was originally passed, with apparently little discussion, primarily to provide a means for parents of mentally retarded children to continue exercising decision making power after those children reached age twenty-one. [FN14] The belief at that time was that mental retardation was a permanent, and permanently disabling condition with no realistic likelihood of change or improvement over time. [FN15] Hence, the same powers that parents held over minors were seen as appropriately continued for the rest of the mentally retarded person's life. The extension of 17-A to the developmentally disabled in 1989 seems to have evoked a similar lack of comment or study, and apparently included the same assumptions. [FN16]

By contrast, Article 81, which replaces New York's prior 'conservator' and 'committee' statutes, [FN17] was the result of several years of study, comment, and public hearings undertaken by the New York State Law Revision Commission, in response to a national movement to review and rewrite adult guardianship statutes. [FN18] Article 81, directed primarily at adults who have lost or diminished capacity, begins with the assumption that all adults are fully capacitated, and requires proof of specific incapacity before a guardian can be appointed to remedy the particular proven incapacity. Article 81 anticipates closely tailored guardianships, granting the guardian, whether of the person or property, no more power than is absolutely necessary under the circumstances of the case, [FN19] and aims to preserve the AIP's autonomy to the greatest degree possible. [FN20]

Unlike Article 81, 2017-A provides no gradations and no described or circumscribed powers. Given a finding of either mental retardation or developmental disability, inability to care for one's self (making no distinctions between what the subject of the proceeding can and cannot do) and the amorphous 'best interests standard,' a guardian is appointed with seemingly unlimited power, [FN21] much like the old conservator and committee. There is no statutory guidance as to the extent of this power, [FN22] and surprisingly little case law explication. [FN23] Because of the wide range of functional capacity found among persons with diagnoses of mental retardation [FN24] and developmental disability, [FN25] the powers granted to provide protection to a 17-A ward may also need to vary, at least to meet the constitutionally mandated standard of least restrictive means. [FN26]

There are other significant differences between the two statutory schemes, especially procedural: A hearing must be held for the appointment of an Article 81 guardian, with the right to cross-examination and the right to counsel [FN27] ([MHL §81.11](#) [a], [b]). No hearing is required under 17-A where the petition is made by or on consent of both parents or the survivor ([SCPA 1754](#) [1]).

Even when a 17-A hearing is held, the presence of the allegedly mentally retarded or developmentally disabled person may be dispensed with in circumstances where the court finds the individual's attendance would not be in his or her 'best interest' ([SCPA 1754](#) [3]); presence of the subject is presumptively required in Article 81 (see [MHL §81.11](#)[c], [e]; [In re Anthon, 11](#)

[AD3d 937](#) [4th Dept 2004]).

Article 81 requires the appointment of an independent court evaluator to investigate and make recommendations to the court ([MHL §81.09](#)); the appointment of a guardian ad litem to perform a similar function is merely discretionary in 17-A proceedings ([SCPA 1754](#)[1]).

Almost all 17-A proceedings are determined by reference to a form 'Medical Certification[s] for Appointment of Guardian (SCPA Article 17-A)' which frequently contains conclusory assertions rather than useful information; they are subject neither to cross-examination nor even to the ordinary tests of credibility utilized by a fact finder with a live witness.

Article 81 requires proof by clear and convincing evidence ([MHL §81.12](#) [a]), while 17-A is silent as to the burden. [FN28]

Without assessing the constitutionality of these procedural differences, it should be noted that Article 81 affords the AIP substantially more procedural protection, and, as well, affords the court greater opportunity to make a nuanced determination of the proposed ward's functional capacities and the possible trajectory of her condition. [FN29] As discussed below, this procedural lacuna is one reason for denying the instant petition.

Finally, the two statutes differ dramatically in the reporting requirements following the appointment of a guardian of the person. [FN30] Article 81 guardians are mandated to file detailed reports [FN31] ninety days after appointment and thereafter on a yearly basis, while 17-A guardians have no duty to and, as a matter of practice, never file any report once their appointment has been made. [FN32] The appointing court thus has absolutely no way of knowing whether a guardianship is still necessary, or, of equal importance, whether it continues to serve the ward's best interests.

Early and simplistic assumptions about the permanency and unalterability of mental retardation and developmental disability, on the one hand, and the 'natural' obligation and desire of parents to pursue their disabled children's best interests may have provided justification for this lack of judicial oversight in 1966, but those assumptions are highly questionable in light of today's longer life expectancies [FN33] and advances in medical knowledge. [FN34] Where the appropriate treatment, with or without medication, is likely to change frequently, and over time, the absence of any continuing judicial oversight raises another red flag about the suitability of 17-A. Where it appears that the subject's inability to 'manage him20or herself and/or his or her affairs' is not necessarily attributable to mental retardation or developmental disability, an appointment under 17-A may not be in the 'best interest' of the subject, as the facts in the instant proceeding demonstrate.

Diagnosis of Mental Illness and the 'Best Interest' Test

In the vast majority of these cases, there is no question that the proposed ward's disability is the result of mental retardation or developmental disability and that, accordingly, she comes within the purview of 17-A. Chaim's case is, however, quite different.

While it would be inappropriate for a non-medically trained court to substitute its own 'diagnosis' for that of physicians and psychologists, the first question presented in a 17-A proceeding is whether it appears to the satisfaction of the Surrogate's Court that a person is mentally retarded or developmentally disabled, and that the person is incapable of managing herself and/or her affairs by reason of that disability ([SCPA §1750](#)) [emphasis added]. Only after such findings are made is the court authorized to appoint a guardian of the person and/or property of such person, and then only if such appointment is in the best interests of the mentally retarded or developmentally disabled person. [FN35]

Here, although two medical doctors checked boxes on forms that state their 'conclusion[s] that the respondent is developmentally disabled' and that 'the condition of the respondent is permanent in nature or likely to contrive indefinitely,' the mass of additional information provided, including Dr. Ambardar's detailed records, show a young man with serious psychiatric and emotional problems, including an Axis I diagnosis of Depressive Disorder NOS. It is at least as likely, if not more likely, that Chaim's unquestioned difficulties and 'impaired ability to understand and appreciate the consequences of decisions' are due to mental illness rather than developmental disability or mental retardation.

This failure of proof prohibits the appointment of a 17-A guardian. At the same time, it suggests that an Article 81 guardian is more appropriate, given the differences in the statutory schemes. As the reports in evidence demonstrate, without underestimating the difficulties, Chaim's condition is susceptible to medication and he has the potential, if so far unrealized, for a relatively productive and independent life. [FN36] More significantly, this case illustrates the need for caution in 17-A proceedings, and the constitutional necessity of strictly confining the provisions of that article to those specific disabilities which it encompasses.

While Chaim may require a guardian, especially, as he himself acknowledges, to make medical decisions, he does not need, nor would it be appropriate to appoint a guardian with total, unfettered power over his life, the only choice available under 17-A. Further, changes in his circumstances, whether as a result of different or improved medications or otherwise, may require altered powers in the guardian or perhaps even, someday, no guardian at all. The periodic reporting provisions and underlying autonomy-enhancing spirit of Article 81 keep these possibilities open to the appointing court, while 17-A, with its assumption of permanence and unchangeability, does not.

For all these reasons, the petition to appoint a 17-A guardian of the person for Chaim A. K. is denied without prejudice to commencing an Article 81 guardianship proceeding in the appropriate court. [FN37]

This constitutes the order of the Court.

FN1. In 1990 the legislature directed a study to re-evaluate SCPA Article 17-A including possible procedural changes, in light of changes in 'care, treatment and understanding of [mentally retarded and/or developmentally disabled] individuals' as well as new legal theories and case law relating to the rights of such persons. L. 1990, ch 516, §1. The legislature noted 'since this statute was enacted in 1969, momentous changes have occurred in the care, treatment and understanding of these individuals. Deinstitutionalization and communitybased care have increased the capacity of persons with mental retardation and developmental disabilities to function independently and make many of their own decisions. These are rights and activities which society has increasingly come to recognize should be exercised by such persons to the fullest extent possible. While guardians appointed pursuant to article 17-A of the surrogate's court procedure act must have the authority to make decisions to ensure the ward's best interest, such decision-making authority by the guardian should not infringe on the right of the ward to make decisions when he or she is capable. The legislature also notes that there exists a national consensus that guardianship, for all persons, should be subject to review.'

Proposed amendments were to be submitted to the legislature by the close of 1991. During that period the Law Revision Commission studied adult guardianship and recommended passage of Mental Hygiene Law Article 81, discussed below. No action, however, was taken as to SCPA

Article 17-A, and the reassessment and changes anticipated almost two decades ago have yet to occur.

FN2. At his hearing Chaim was candid about his unwillingness or inability to deal with doctors or medical issues, and expressed his preference that his parents do so in his stead. Unfortunately, there is no provision in SCPA Article 17-A that permits a guardianship limited to medical decision making.

FN3. The assessment measures employed include the Weschler Abbreviated Scale of Intelligence (WASI), the Woodcock Johnson Achievement Tests, 3d Edition (WJ-III), the Vineland=2 0Adoptive Behavior Scales, Second Edition (Vineland--II), and the Stanford-Binet Intelligence Scales, Fifth Edition.

FN4. These privately done evaluations are slightly suspect as their purpose is to obtain benefits for which Chaim would not be eligible in the absence of some finding of retardation.

FN5. From 2007, into early 2008, Chaim received regular care, including frequent visits for changes in medication, from Dr. Ambardas at St. Vincent's Hospital. Records submitted contain detailed reports of Chaim's examinations, medications, diagnosis, and prognosis. Unfortunately, however, his (or his parents') medical insurance changed so he is no longer able to avail himself of what appears to have been that excellent treatment.

FN6. In one assessment, his treating psychiatrist ranks Chaim's intelligence as 'Average-Below Average' while another assessment notes that, while being tested, 'Chaim seemed insecure about his responses to items and often changed his mind. He repeatedly changed correct responses to incorrect responses and insisted that the latter were correct. This behavior was consistent through testing and had a negative impact on Chaim's overall performance.' Another report notes: 'Testing behavior was characterized by an extremely excruciating process of attempting to engage Chaim in some reasonable repertoire' and concludes: 'It is very clear that Chaim is inhibited by what appears to be behaviors consistent with ADHD, a mood disorder, dysthymia, anxiety disorder and oppositional defiance. These conditions result20in a curious clinical picture...'

FN7. As a technical matter, both schemes are also available for minors, but since the law presumes a minor's parents to be her 'natural guardian' until she reaches her majority, they are seldom necessary and only rarely utilized. But see Matter of Baby Boy W, 3 Misc 2d 3d 656 (Sur Ct. Broome County 2004) (17-A guardian appointed to make end-of-life decisions for severely mentally retarded month old infant with 'terminal and irreversible' condition).

FN8. Persons under 21 who have been diagnosed with mental retardation or developmental disability are entitled to educational benefits and services provided by the appropriate education authorities. Upon attaining their majority their entitlements are derived from the state Office of Mental Retardation and Developmental Disability (OMRDD) and the benefits available to them are substantial. See [Mental Hygiene Law §13.01](#); see also Office of Mental Retardation and Developmental Disabilities, Services, <http://>

www.omr.state.ny.us/ws/servlets/WsNavigationServlet (last updated Aug. 20, 2008). Services available to adults with other kinds of mental disabilities, including mental illness, are significantly harder to come by than those provided by the OMRDD safety net. Thus, the progress from special education to 17-A guardianship and OMRDD benefits is usually a temporal continuum unavailable to others with different disabilities.

FN9. A staff attorney from AHRC occasionally represents petitioners, and AHRC also has an arrangement with a pro bono initiative at a major New York City law firm.

FN10. Mental retardation is defined in [MHL §1.03](#) (21) as 'subaverage intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior.' The American Association of Mental Retardation (AAMR), arguably the leading professional organization in the field of mental retardation, offered the following definition of mental retardation in 2002 in its 10th edition of the AAMR reference manual on definition and terminology (Luckasson, Borthwick-Duffy, Buntinx, Coulter, Craig, Reeve, et al.):

Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.

This definition has been widely adopted. It forms the basis for the definition included in the IDEA, the Individuals with Disabilities Education Act of 1990. See Jack Hourcade, *Mental Retardation: Update 2002*. ERIC Digest, available at <http://www.ericdigests.org/2003-4/mental-retardation.htm> (accessed Apr. 7, 2009).

For purposes of Article 17-A, a mentally retarded person is defined as a person who has been certified as being incapable of managing him or herself and/or his or her affairs by reason of mental retardation and that such condition is permanent in nature or 'likely to continue indefinitely.' [SCPA §1750](#).

FN11. See Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 58A, [SCPA §1750-a](#).

FN12. A developmentally disabled person is defined in Article 17-A as a person who has been certified as having an impaired ability to understand and appreciate the nature and consequences of decisions to such an extent that he or she is incapable of managing himself or herself and/or his or her affairs by reason of such disability. This condition must be permanent in nature or likely to continue indefinitely. The disability must be attributable to: 1) Cerebral palsy, epilepsy, neurological impairment, autism or a traumatic head injury, or 2) Any other condition of a person found to be closely related to mental retardation because such condition results in similar impairment of general intellectual functioning or adaptive behavior to that of mentally retarded persons; or 3) Dyslexia resulting from a disability described in (1) and (2), above, or from mental retardation. [SCPA 1750, 1750-a](#).

An estimated nine million children and adolescents are affected by developmental or behavioral disorders, including cerebral palsy, autism, and various forms of mental retardation whether genetic (such as Down syndrome and fragile X syndrome) or due to some intrauterine or perinatal insult to the brain. W. Maxwell Cowan, MD and Eric R. Kandel, MD, *Prospects for Neurology and Psychiatry*, *The Journal of the American Medical Association*, Vol. 285 No. 2 05

(Feb. 7, 2001).

FN13. The statute quite deliberately rejected a diagnosis driven approach, requiring instead a fact specific determination of an individual's functional incapacities. See Art. 81.02 (c) and (d)(1).

FN14. See [Matter of Maryanne Cruz, 2001 NY Slip Op 40083* 4\(U\) \(2002\)](#); see also Lawrence R. Faulkner and Lisa Klee Friedman, Distinguishing Article 81 and Article 17-A Proceedings, II Guardianship Practice in New York State, p. 160 (New York State Bar Association 1997).

FN15. See 4 Warren's Heaton, Surrogate's Court Practice §49.02 (2)(a), at 49-6, §49.03 (1) (b), at 49-8 (7th ed).

FN16. The medical certifications required for an Art. 17-A petition require the doctor or other appropriate health care professional to state that 'the condition [of mental retardation or developmental disability] is permanent in nature or likely to continue indefinitely.'

FN17. Repealed Mental Hygiene Law Article 77 governed conservators of conservatees and repealed Article 78 concerned committees of incompetents. Those statutes were characterized by the same 'all or nothing' finding, primarily diagnosis driven, as Article 17-A, and also implicitly assumed irreversibility. See 4 Warren's Heaton, Surrogate's Court Practice §50.01 (2), at 50-7 (7th ed).

FN18. The movement began with exposes of abuses by the Associated Press in 1987. See National College of Probate Judges, Hon. Steve M. King, Guardianship Monitoring: A Demographic Imperative, available at http://www.ncpj.org/guardianshippercent20monitoring.htm#_ednrefl (accessed Apr. 17, 2009), and was largely spearheaded by the ABA Commission on Legal Problems of the Elderly (now the Commission on Law and Aging) which developed guidelines for adult guardianship at a widely attended and highly regarded conference, The National Guardianship Symposium, held at Wingspread Conference Center in 1988. Since that eponymous 'Wingspread Conference,' eighteen states including New York have substantially or entirely revised their adult guardianship statutes, incorporating some or all of the Wingspread recommendations, and all states made at least minor or moderate revisions. See Pamela B. Teaster et al., Wards of the State: A National Study of Public Guardianship, available at <http://www.abanet.org/aging/publications/docs/wardofstatefinal.pdf> (Apr. 2005).

FN19. [MHL §81.01](#)

FN20. Rose Mary Bailly, Practice Commentaries, McKinney's Con Laws of NY, Book 34A, [MHL §81.01](#) at 7 (2006 ed.) ('The Legislature recognized that even when guardianship must be invoked, the authority granted to the guardian should be tailored to the individual's needs rather than a 'one size fits all' power, and the authority of the guardian should be limited by those needs').

FN21. Unlike an Article 81 proceeding, where the court is obligated to make specific findings on the record and detail the specific powers granted to the guardian ([MHL §81.15](#)), the court in a

17-A proceeding simply makes a decree appointing a guardian of the person and/or property. [SCPA 1754](#) (5).

FN22. The provisions of [SCPA §1756](#) which permit appointment of a limited property guardian for an employed person, and which permit that person to retain his wages and to bind himself by contract or to an amount 'not exceeding one month's wages....or three hundred dollars, whichever is greater' suggest that in other cases persons with 17-A guardians have no right to contract.

FN23. Courts have, however, imposed limitations where constitutionally protected rights are at stake. The Second Department denied a 17-A guardian the power to authorize sterilization of his ward because 'no provision of the SCPA confers jurisdiction [on the Surrogate's] court to grant such relief.' And, in [Matter of B., 190 Misc 2d 581 \(County Ct, Tompkins Co. 2002\)](#) there is dicta that '...the equal protection provisions of the Federal and State Constitutions would require that mentally retarded persons in a similar situation be treated the same whether they have a guardian appointed under Art. 17-A or Art. 81.'

FN24. Mental retardation is determined by IQ scores, themselves subject to challenge, as illness, motor or sensory impairments, language barriers or cultural differences may hamper a child's test performance, The Merck Manual of Diagnosis and Therapy, Mental Retardation (18th ed 2006), (available at <http://www.merck.com/mmpe/sec19/ch299/ch299e.html>). Utilizing the Stanford--Binet scoring instrument, mental retardation begins at an IQ of 70 or less, but DSM-IV notes that due to a generally estimated five-point margin of error in standardized intelligence testing, a person with a measured IQ as high as 75 could be deemed to have met the diagnostic criteria for mental retardation if the requisite functional shortcomings are also noted. See John Parry and F. Phillips Gilliam, Handbook on Mental Disability Law, at 51 (American Bar Association 2002). The American Association of Mental Retardation emphasizes the importance of moving beyond a primary focus on IQ to a more comprehensive assessment and consideration of deficits in adaptive behavior, without which a diagnosis of mental retardation cannot properly be made. *Id.* Mental retardation can be mild, moderate or severe, with persons in one end incapable of speech or ordinary reasoning, and at the other end, capable of working and living by themselves. See The Merck Manual, Mental Retardation, *supra*. As noted above at footnote 22, the statute recognizes this variation in part by a provision permitting mentally retarded individuals who work to retain a portion of their wages.

FN25. Developmental disability is even more of a mot valise diagnosis, encompassing such disparate conditions as cerebral palsy and autism,²⁰with accompanying variations in levels of physical and mental capacities.

FN26. Due process requires that the least restrictive means be utilized when the state, invoking its *parens patriae* powers, infringes on an individual's liberty or property interests for that person's protection. See e.g. Antony B. Klapper, [Right in State Constitutions for Community Treatment of the Mentally III, 142 U Pa L Rev 739, 759 \(1993\)](#).

This standard is specifically incorporated in MHL Article 81.01:

'The legislature finds that it is desirable for and beneficial to person with incapacities to make available to them the least restrictive from of intervention which assists them in meeting their

needs but, at the same time, permits them to exercise the independent and self determination of which they are capable.'

FN27. In certain instances, as where involuntary transfer from the community to a nursing home is sought, counsel is constitutionally required, and where the AIP cannot afford counsel, the city is obligated to provide representation. See [Matter of St. Luke's Roosevelt Hospital Center, 226 AD2d 106 \(1st Dept 1996\)](#).

FN28. The only caselaw found suggests that the usual civil burden of preponderance of the evidence applies. See [Matter of Jaime S., 9 Misc 3d 460 \(Family Ct, Monroe Co. 2005\)](#).

FN29. Rose Mary Bailly, Practice Commentaries, McKinney's Con Laws of NY, Book 34A, [MHL §81.01](#) at 10 (2006 ed.)

FN30. Both require annual reports by guardians of the property, [MHL §81.31](#); [SCPA §1719](#), incorporated into Art. 17-A by [SCPA §1761](#), though the former is subject to review by statutorily denominated court examiners, [MHL §81.32](#), while the requirements for, and subsequent examination of, 17-A reports of property guardians vary from court to court.

FN31. The ninety day report is intended to inform the court as to whether the guardian has put into place the plan which she proposed prior to appointment, and whether fewer or greater powers are then warranted. The yearly report includes the requirement of a report from medical professionals, as well as information about medications, rehabilitative services and living situation. [MHL §81.30](#). Law Revision Commission Comments, 34 A McKinney's Cons. Laws of NY, [MHL §81.30](#) at 344 (2006).

FN32. See Matter of Natalie Stevens, 2007 NY Misc LEXIS 7877 *12 (Sur Court, NY County 2007); NYLJ, Oct. 25, 2007, at 37, col 3 (SCPA Article 17-A provides no continuing oversight of guardians of the person once they have been appointed).

FN33. For example, because children with Down syndrome seldom lived past their 20s when Article 17-A was enacted, see American Geriatrics Society, the AGS Foundation for Healthy Aging, Aging in the Know, Mental Retardation, available at http://www.healthinaging.org/agingintheknow/chapters_ch_trial.asp?ch=37 (last updated May 31, 2005), it was reasonable to assume that their parents would outlive them, and continue to provide guardianship for their wards' lifetime. Today with life expectancy for that population greatly enhanced (see Diane Lynn Griffiths and Donald G. Unger, Views About Planning for the Future among Parents and Siblings of Adults with Mental Retardation, Family Relations, Vol. 43, No. 2 at 221 [April 1994] (increase in the life span of persons with mental retardation); see also National Association of Parents With Children in Special Education, Mental Retardation, available at <http://www.napcse.org/exceptionalchildren/mentalretardation.php> (accessed Apr. 14, 2009) (older adults with developmental disabilities are living longer than ever before), it is not uncommon to see 17-A petitions for mentally retarded persons in their late 40's or 50's, where parents are elderly or deceased, and petitioners are siblings, more distant relatives, or even persons not related by blood.

FN34. For example, advances in treatment of autism, included in the broad category 'developmental disability,' may result in substantial and potentially legally significant increases in functional capacity, see Susan Kabot, Wendy Massi, Marilyn Segal, *Advances in the Treatment and Diagnosis of Autism Spectrum Disorders*, Professional Psychology, Research and Practice, Vol 34(1) (Feb. 2003); see also Sarah Spence and Daniel Geschwind, *Autism Screening and Neurodevelopmental Assessment*, at 39, Medical Psychiatry Series, Autism Spectrum Disorders, edited by Eric Hollander (Informa Health Care Books 2003) (showing increasing evidence that early intervention can improve outcomes).

FN35. See [SCPA §§1750, 1750-a](#).

FN36. The Board of Education's Individual Education Program Assessment of Long Term Adult Outcomes proposes the following goals:

'Chaim will integrate into the community with min. support
Chaim will attend vocational training program
Chaim will require support for independent living
Chaim will be gainfully employed with support'

FN37. Unfortunately, Surrogate's Court lacks jurisdiction to entertain Article 81 proceedings for guardian of the person in any circumstances, and guardian of the property only in narrowly circumscribed circumstances, such as when the incapacitated person is the beneficiary of an estate, or is entitled to proceeds from a wrongful death action or the proceeds of a settlement of a cause of action brought on behalf of an infant for personal injuries. [MHL §81.04](#) (b). Were there concurrent jurisdiction as, for example, between Family Court and Surrogate's Court in adoptions, the instant proceeding could have been converted after technical service and notice additions were made.

9/21/2009 NYLJ 27, (col. 1)

END OF DOCUMENT

ARTICLE 81 GUARDIANSHIP CHECK LIST

Duties of the Guardian 81.20

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

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

NOTE: document every time you visit the IP noting the general mental and physical condition

Post Appointment Procedures

After the Hearing you do not have the legal authority to act as guardian until the following steps have been completed:

- Receive the Written Order or Judgment of the Court appointing you guardian
- If the Order or Judgment has given you the power to prosecute or defend civil judicial proceedings file, in the County Clerk's Office, a Designation
- If the Order or Judgment has required a bond you must file in the County Clerk's Office a Bond in the required amount (bonds may be obtained from insurance brokers/agents in Surety Bonds)
- Present your Commission (prepared by your attorney) at the County Clerk's Office for his/her signature
- If the incapacitated person owns real estate you must file in the County Clerk's Office a Statement Identifying Real Property
- Once you have completed these steps, you may act as guardian and exercise the powers contained in the Commission, which are identical to those granted in the Order or Judgment.

In the Order or Judgment appointing you guardian, the Court assigned you a Court Examiner (this is not a court evaluator). The Court Examiner will review your Initial Report which is due 90 days after the date of your Commission, and your Annual Report which is due in May of each year. The Court Examiner is not only obligated to assist the Court in supervising your work as guardian by the review of filed reports, but also to serve as an available resource to answer any questions you might have about your powers or duties.

The clerk of the local guardianship court and the Court Examiner are your primary resources for help, as well as your own county attorney

Initial Report

(see section 81.30 for content and service requirements)

Within 90 days of receiving your Commission the guardian must file with the court that appointed the guardian a report in a form prescribed by the court stating what steps the guardian has taken to fulfill his or her responsibilities. Ask the court clerk if they have a specific form to be used for the Initial and Annual Reports in your county.

NOTE:

- Proof of completion of the guardian education requirements under section 81.39 must be filed with the Initial Report.
- If you need additional powers the initial report must give reasons for a change in the powers authorized by the court. The county attorney should be consulted regarding expansion of powers before filing the Initial Report.
- The guardian must make a formal application to amend the Order within ten days of the filing of the report.

Annual Report

(see section 81.31 for the content and service requirements)

File the Annual Report in the month of May.

NOTE:

- The report must include information concerning the guardians visits with the IP. The law requires four visits per year or more frequently as specified in the court order
- The report must include any major changes in the physical or mental condition of the incapacitated person and any substantial change in medication and the date that the incapacitated person was last examined or otherwise seen by a physician and the purpose of that visit.

In January or February make an appointment for a professional evaluation of the IP to be scheduled in March, April or May.

- The report must include a statement by a physician, psychologist, nurse clinician, or social worker, or other person that has evaluated or examined the incapacitated person within the three months prior to the filing of the report (March, April or May) regarding

- Make sure the “Evaluation Statement” is on the professional’s letterhead.
- The Annual Report does NOT require the IP be seen by a Medical Doctor every year.

If you need additional powers the county attorney should be consulted before filing the Annual Report. The report must give reasons for a change in the powers authorized by the court,

- The guardian must make a formal application to amend the Order within ten days of the filing of the Annual Report.

Property Management Guardian

81.21

The Guardian may be authorized to exercise those powers necessary and sufficient to manage the property and financial affairs of the Incapacitated Person; to provide for the maintenance and support of the Incapacitated Person, and those persons dependent upon the Incapacitated Person.

The Guardian may, transfer part of the Incapacitated Person's assets to or for the benefit of another person on the grounds that the Incapacitated Person would have made the transfer if he/she had capacity to act.

Whenever you do business for your ward you must bring a certified Commission and a copy of the certified Order and Judgment with you to prove that you are authorized by the court to act on behalf of your ward.

Bank Accounts

- Identify all bank accounts owned by your ward such as checking, savings, money market, etc. Divide any joint account and separate your ward’s share from it
- If you think your IP has more accounts than you know for sure, you may fill out IRS Form 4506T (Request for Transcript of a Tax Return
- Search for unclaimed funds belonging to the IP. The National Association of Unclaimed Property Administrators, www.naupa.org, has links to unclaimed property in each state such as: tax refunds, insurance reimbursement, neglected bank accounts, etc. Also check the NY State unclaimed funds website <http://www.osc.state.ny.us/>

- Close your ward's accounts and open a Guardianship checking account with your ward's Social Security Number on it and with the name "Joe Smith, Commissioner of Right County DSS, and his/her Successors, as Guardian for Property Management" on the title. Check with your superiors for the appropriate account title designations used in your county
- Place all your ward's funds into the Guardianship Account

Safe Deposit Box

- Check if your ward rents a safe deposit box
- Arrange to make an inventory of its contents
- Change the title on the account as directed above

Sources of Income

- Identify all sources of your ward's income such as pension benefits, rental income from tenants, interest income from investments, Social Security Income, Supplemental Security Income and Veterans Benefits
- Arrange for all income to be deposited into the Guardianship Account
- If your ward receives Social Security or Supplemental Security or Veterans benefits you should apply to the Social Security Administration or Veterans Administration to be appointed Representative Payee and have the checks automatically deposited into the Guardianship Account
- If your ward lives in a nursing facility or a residence for the disabled the facility or residence can act as Representative Payee
- Apply for public benefits on behalf of your ward if appropriate

Investments

- Identify all stocks, bonds, mutual funds, and investment accounts
- Notify all companies of your guardianship appointment (send them a copy of your Certified Commission) and request that all correspondence be re-directed to you.
- Change the Title on these accounts

- If your ward's assets are complicated, request permission from the judge to hire an investment broker or accountant to manage your ward's assets
- Implement an investment strategy: sell or transfer assets, open new accounts, or arrange for an investment advisor with the approval of the judge. Make a plan for your ward's future financial needs
- Generally the guardian is to use the prudent investor standard with a duty to maximize returns but not risk loss on the overall investment (EPTL Section 11-2.3)

Insurance Policies

- Identify all insurance policies such as Household, Valuable Items, Liability, Life, Fire, Auto, Long Term Care and Medical insurance
- Notify the companies of your guardianship appointment and request that all correspondence be re-directed to you
- If a premium has lapsed work with the insurer to pay the amount due to reinstate the policy

Valuable Personal Items

- Identify all valuable property at your ward's home
- You should have the items appraised for their estimated value and insure them

Valuable Documents

- Search for important documents among your ward's papers. Look for: a Will, a Health Care Proxy, a Living Will, a Power of Attorney. Place these documents in a safe place.

Real Property

- Real property should be maintained in your ward's name
- If you wish to sell the property you must first get permission from the judge.

Tax Returns

- File tax returns in a timely manner. Tax returns must be filed in the ward's name and Social Security number, but they must be signed by you, as Guardian for your ward, "an incapacitated person"
- If your ward missed filing tax returns in previous years, get court approval to hire an accountant to prepare and file them. Request that the IRS waive penalties and send the IRS a copy of your Certified Commission

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

Payment of Bills

- Request that all recurring bills be re-directed to you so that they can be paid in a timely fashion
- If your ward is able, arrange that he or she receives weekly spending money. You may also set up a local account with a grocery store or arrange for petty cash for home care workers.
- Identify non-recurring bills and arrange for payment

Payment of Outstanding Debts

- Arrange for payment of all current debt including court ordered payments to various professionals that were involved in the Guardianship process
- Social Security and SSI payments are exempt from seizure by creditors (42 USC Section 407) EXCEPT for:
 - Refunds of Title II or Title XVI overpayments;
 - An IRS levy for income tax purposes;
 - Court ordered child support or alimony; and bank account fees.

Guardian of the Person

81.22

With respect to personal care, the Guardian may be granted those powers necessary to provide for the personal needs, including food, clothing, shelter, health care or safety, of the Incapacitated Person.

If you have the power to establish the place of abode of the Incapacitated Person it must be consistent with the court findings. Thus the IP's home must meet the functional and safety needs of the IP. Any major move or alterations to the home must be done under court approval.

If you have the power to make medical or dental treatment decisions they must be made in accordance with the Incapacitated Person's wishes or if not known, in accordance with the person's best interests.

- Document any discussions with the IP regarding medical issues.
- Document all aspects of medical care needed and/or provided.

The Guardian may not consent to voluntary formal or informal admission to a mental hygiene facility under Articles 9 or 15 or to an alcoholism facility under Article 21 of the Mental Hygiene Law or revoke Powers of Attorney, Do Not Resuscitate Orders, Health Care Proxies or Living Wills.

Article 81 Special Remedies Available to the Guardian

The Court has powers to address issues of abuse (81.29)

- The court has the power to vacate a Power of Attorney or Health Care Proxy for invalid execution or breach of fiduciary power (81.29);
- if abuse by an attorney-in-fact is alleged the court has jurisdiction to demand an accounting from the fiduciary during the entire period of agency;
- Allegations of financial abuse can be addressed by commencing a Summary Discovery Turnover Proceeding under section 81.43.

Provisional Remedies 81.23

If an emergency or abuse exists, Article 81 provides both short and long term solutions:

1. Injunction and Temporary Restraining Order
 - May be issued while proceeding is pending or at any time after the appointment of the guardian
 - Issued to protect the IP or property of the IP such as an injunction to stop a person from transferring or disposing of the property or acting in a manner which threatens to endanger the Incapacitated Person

Discovery and Turnover Proceedings 81.43

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

1. Discovery Proceeding

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

2. Turnover Proceeding

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

Post Death Procedures

81.44

Within 20 days of the death of the IP the guardian must:

Prepare a Statement of Death (last residence of the IP, date and place of death, names and addresses of all persons entitled to Notice, including the estate representative)

Prepare a *Statement of Death* (last residence of the IP, date and place of death, names and addresses of all persons entitled to Notice, including the estate representative)

Serve copy of Statement of Death upon the court examiner, appointed estate representative or representative named in the will and the Public Administrator in the county where the guardian was appointed

File the original Statement of Death together with proof of service with the court that appointed the guardian

Within 150 days of the death of the IP the guardian must:

Prepare a *Statement of Assets and Notice of Claim* must be served upon the personal representative of the decedent's estate or, if no personal representative, upon the Public Administrator

Prepare a *Statement of Assets* - a description of the nature and approximate value of the guardianship property at the time of the incapacitated persons death and

Prepare a *Notice of Claim* - the approximate amount of any claims or liens against the guardianship property

Deliver all guardianship property to the appointed personal representative of the IP's estate or the Public Administrator. The guardian may retain, pending the settlement of the guardian's Final Report, guardianship property equal in value to the claim for administrative costs, liens and debts

A Final Report must be filed with the court

Public Administrator

The Office of Public Administrator administers a decedent's estate where no person entitled to take or to share in the estate will accept the responsibility to act, or where the decedent leaves no will or a personal representative entitled by law to act.

The Public Administrator (PA) investigates the affairs of the decedent. The PA's office may authorize a funeral as well as an amount of money permitted for the funeral out of the estate of

the decedent. Also the Pa's office may search for relatives, pay debts of the estate and perform other duties. If a relative is located, the PA determines whether that individual is prepared to accept responsibility for the estate of the decedent. Contact the PA in the Borough or county in which the decedent resided.

A good resource for the duties and responsibilities of guardians:

“Guide to guardianship – For Lay Guardians Appointed Under Article 81 of the New York State Mental Hygiene Law” <http://www.courts.state.ny.us/ip/gan/manual/index.shtml>

BROOKDALE CENTER for Healthy Aging & Longevity

Hunter College / The City University of New York

Continuing Legal Education Credits Instructions for Staff Development Coordinators

You have received a (1) CLE attendance roster and an (2) evaluation form for CLE credits via email from OCFS. These forms are to be used for attorneys only. All non-attorneys have separate sign-in sheets and evaluation forms to be filled out and sent back to OCFS.

Please be certain that the attorneys sign in when they arrive and sign out when they leave. We need to confirm that the attorneys fully attended the session.

The evaluation form for CLE credits is to be handed out to the attorneys at the end of the session, only if you can confirm from the attendance roster that they successfully completed this training.

All completed CLE attendance rosters and evaluation forms for CLE credits should be mailed to the following address:

Brookdale Center for Healthy Aging & Longevity
Attn: Steven Jones
425 E 25th St., 13th Floor North
NY, NY 10010

Do not send any CLE information to OCFS, only send OCFS sign-in and evaluation forms from non-attorneys.

Thank you for your assistance in this task,

Steven Jones
Project Assistant
Brookdale Center for Healthy Aging & Longevity
(212) 481-5393
steven.jones@hunter.cuny.edu

REGISTRY FOR CONTINUING LEGAL EDUCATION CREDITS

FOR ATTORNEYS ONLY

Program Title: Legal Aspects of Protective Services for Adults - 2010 Update Course #WIL0432

Date of Program: March 8, 2010

Start Time: 1:30pm

End Time: 3:30pm

Print Name	Sign In	Time In	Sign Out	Time Out

Note: You must attend the full session (from 1:30pm - 3:30pm) in order to be eligible for CLE credits. A CLE request form will be distributed at the end of the session to all attorneys who successfully complete this training.

**TRAINING EVALUATION
&
CONTINUING LEGAL EDUCATION (CLE) REQUEST FORM**

Your response to the following questions will aid the Law Institute in its efforts to better serve you. Please take a few minutes to respond to the following questions. If you wish to receive Continuing Legal Education (CLE) credit for attending this training, completion of this form is required.

Thank you in advance for your assistance.

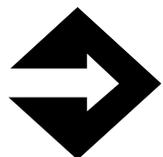
**Legal Aspects of Protective Services for Adults - 2010 Update
(Course #WIL0432)**

March 8, 2010

[*Please circle the appropriate answers]

- 1) In general, the quality of the training was:
Excellent Very Good Good Fair Poor
- 2) The course training materials were:
Excellent Very Good Good Fair Poor
- 3) The Instructor's presentation of the subject was:
Excellent Very Good Good Fair Poor
- 4) How many Law Institute trainings/workshops have you attended?
First time 2-4 4-6 6-8 8+
- 5) How long have you been working in the field covered in this training?
Beginner 1-3 years 4-6 years 7 years or more
- 6) Would you take another training course given by the Law Institute?
Yes No (Why? _____)
- 7) How would you rate the training location and facilities?
Excellent Very Good Good Fair Poor
- 8) What is your background?
Law Social Work Other: _____
- 9) If your background is in law, what type:
Private (elder law) Law Firm (elder law) Private (Other _____.)
Paralegal (Other _____.)

Please turn over



Training Evaluation (continued)

10) What other benefit program training classes would be of interest to you?

11) How did you hear about this particular training?

mailing co-worker our website other _____

12) Additional Comments / Suggestions: _____

13) If you would like to be placed on our mailing list to receive training announcements, please complete the following:

Name (*PLEASE PRINT!*): _____

Title: _____

Organization: _____

Address: _____ Rm/Apt/Suite# _____

City: _____ State: _____ Zipcode: _____

Telephone: (_____) _____ Fax: (_____) _____

Email: _____

Continuing Legal Education (CLE) Credit Request:

(Only attorneys may apply)

This will verify that I have attended the “**Legal Aspects of Protective Services for Adults - 2010 Update**” workshop sponsored by the Sadin Institute on Law & Public Policy and request CLE credit for attending this training on March 8, 2010.

Name (*PLEASE PRINT!*) _____

Title _____

Organization/Firm: _____

Address: _____ Floor/Rm/Suite/Apt: _____

City: _____ State _____ Zipcode: _____

Tel # (_____) _____ Fax # (_____) _____

Signature: _____ Date: ____/____/____

Attendance records will be kept on file in our offices. A letter verifying your attendance will be issued upon written request to The Sadin Institute on Law & Public Policy, Brookdale Center for Healthy Aging & Longevity, 425 East 25th Street, NY, NY 10010. For the workshop named above, you will receive the following transitional/non-transitional CLE credit(s): **2.0 credits in Areas of Professional Practice**

