MHL ARTICLE 81

and related matters

COLLECTED CASES
(Current through September 2020)

Mental Hygiene Legal Service
Second Judicial Department

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Case Summaries

I. RELATIONSHIP BETWEEN ARTICLE 81 & OTHER PROVISIONS OF LAW

A. MHL Article 78

Proceeding for the Appointment of a Guardian for Caitlin, 2017 NYLJ LEXIS 1043 (Sup. Ct. Kings Cty., 2019) (Lopez-Torres, Surr.)

Unlike guardianships created under MHL Article 81 where the powers granted to a guardian are narrowly tailored to afford the guardian no more power over an individual than is absolutely necessary under the circumstances, the creation of a 17-A guardianship results in a plenary guardianship that affords the guardian virtually complete power over an individual.

Will of Josephine Brucato, 7/17/09 N.Y.L.J. 28, (col. 3) (Surr Ct. Kings Cty.)(Surr. Johnson)

SCPA 1402 has not been amended to reflect the fact that committees and conservators have been replaced by guardians under Article 81 of the Mental Hygiene Law. Nonetheless, a guardian of a legatee has standing to petition to probate a will.

Matter of Dennis Diaz, NYLJ, 7/6/04, p. 21 (Sup. Ct, Queens Cty.)(Taylor, J.)

After an Article 81 hearing, a disabled man was found to be in need of a guardian of the person and property. He was found, among other things, to have the functional level of approximately a 5th grader and specifically to be in need of assistance in handling his own finances. Before a guardian could be bonded and qualified, he retained counsel and entered into a contract of sale to purchase a tavern with his own funds. Under pre-Art 81 law, contracts entered into by persons adjudicated incompetent and who have committees or conservators are presumptively void. Contracts with persons who do not have committees or conservators but are of unsound mind and unable to appreciate the consequences of their own actions were considered voidable. Article 81 does not result in a finding of incompetence but rather only findings of specific functional limitations and guardianship powers tailored to be the least restrictive form of intervention. This AIP was found to lack the ability to handle his own finances so here, the Court does void and revoke the contract.

Matter of D.S. , NYLJ, 10/31/01, (Sup. Ct., Suff. Cty.) (Berler, J.)

Although CPLR 1201 refers to service of legal papers on incompetents and conservatees and it should also be construed to include incapacitated persons for whom Art. 81 guardians have been appointed.

Matter of Stephen D., 190 Misc2d 760, 739 N.Y.S.2d 913 (Surr. Ct., Bronx Cty. 2000) (Hotzman, Surr.)

Where MHL Art 77 conservator dies after date of repeal of MHL Art.77, court can fill the vacancy by appointing an Art. 81 guardian and it is at the discretion of the court whether to hold a hearing under MHL §81.38.

Matter of Lois "F" (Ruth "F"), 209 A.D.2d 856; 618 N.Y.S.2d 920 (3d Dept., 1994)

Where committee was properly appointed under MHL Art. 78, appointment survived repeal of Article 78 and enactment of MHL Article 81. Legislature plainly intended to give full force and effect to prior determinations.

Matter of Beritely (Luberoff), NYLJ, 12/8/95, p. 25 col. 1 (Sup. Ct., Suff. Cty.)(Luciano, J.)

Conservator sought to convert MHL Art. 78 conservatorship into guardianship. Court found petition deficient for not describing functional level of man, who had bi-polar disorder. Court evaluator's testimony and report, however, proved guardian was needed. Court named co-guardians for property and allowed AIP's elderly mother to resign as co-conservator and become co-guardian of personal needs.

Matter of Shea (Buckner), 157 Misc.2d 23, 595 N.Y.S. 2d 862 (Surr. Ct., NY Cty., 1993)

Art. 81 empowers courts to grant broader powers to guardians than Art. 77 and 78 authorized for conservators and committees.

B. SCPA 17-A and SCPA 17 (and other matters involving minors)

"Guardianship: A Civil Rights Perspective", Sheila Shea and Carol Pressman, NYSBA Journal, February 2018, pp. 19-25.

This article is a comprehensive analysis of the history and purpose of guardianship as it relates to the rights of individuals to control their own personal and property choices in the context of both MHL Article 81 and SCPA 17-A.

Guardianship of KL pursuant to SCPA Article 17-A , 2017 NYLJ LEXIS 1695 (July 3, 2017 at p. 25, col. 3)(Surr. Ct., Richmond Cty.)(Surr. Gigante)

After noting that, unlike MHL Article 81, SCPA 17-A does not provide for a narrowly tailored guardianship, the Surrogate denied the petition seeking 17-A guardianship over a young woman who, though intellectually compromised, was functioning well as both an

individual and as a mother, with the assistance of other family members.

Should We Be Talking? Beginning a Dialogue on Guardianship for the Developmentally Disabled in New York, Rose Mary Bailey and Charis B. Nick-Torok, 75 Alb. L. Rev. 807.

Excellent discussion of the differences and similarities between the two forms of guardianship and the arguments for and against merging them or importing aspects of Article 81 into 17-A.

In a series of decisions, all related to the same individual, various Surrogate's grapple with the issue whether a 17-A guardian may engage in gift giving in furtherance of Medicaid/tax planning with different conclusions. See, **Matter of Schulze**, NYJL, 9/3/96 pg. 1, col. 1 (Surr. Ct. NY Cty. 1996)(Surr. Preminger)(Court allows 17-A guardians to make gifts for estate tax planning purposes under same test that applies to Art 81 guardians. In this case, it allowed the gift giving since it would not leave the ward with an estate so depleted that she could not cover the cost of her own care and further her immediate family, which was wealthy in its own right pledged to provide for her care should there be a change in circumstances; **Matter of Schulze**, 23 Misc. 3d 215, 869 NYS 2d 896 (Surr. Ct., NY Cty. 2008)(Surr. Roth) (There is no express provision in SCPA Art. 17-A empowering a 17-A guardian to make gifts as contrasted with such an express grant of power to MHL Art. 81 guardians under MHL 81.21. The court holds 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 ad maximization of gifts to charities are among the objectives that have ben recognized as supporting guardians' exercise of such authority to make such gifts.) ; **Matter of Joyce G. S.**, 30 Misc. 3d 765; 913 NYS 2d 910 (Surr. Ct., Bronx Cty., 2010) (Surr. Holzman); (Surrogate Holzman expressly rejected Surrogate Glen's holding in **Matter of John J.H.** In doing so, Surrogate Holzman held that "under the law as it presently exists, it has the power to invoke the equitable doctrine of substituted judgment to approve gifts or tax saving transactions on behalf of article 17-A wards. The court explained that in enacting the SCPA, the Legislature afforded the Surrogate's Court full equity jurisdiction as to any action, proceeding or other matter over which jurisdiction is or may be conferred" (see SCPA 201[2]), and provided that the proceedings enumerated in the SCPA are not exclusive (see SCPA 202). The Legislature further provided that after the appointment of a 17-A guardian, the Surrogate's court "may entertain and adjudicate such steps and proceedings...as may be deemed necessary or proper for the welfare of such mentally retarded or developmentally disabled person" (see SCPA 1758). Accordingly, Surrogate Holzman concluded that there appears to be no reason why the Surrogate's Court cannot utilize the common law or the criterial set forth in MHL § 81.21 (d) to approve a gift on behalf of an article 17-A ward.

Matter of Barbara Kobloth, Sup Ct, Westchester Cty, Unpublished Decision and Order, Index # 10236/10 (July 7, 2010) (Di Bella, J.) and Matter of Phillip Morris, Sup Ct, Westchester Cty, Unpublished Decision and Order, Index # 10236/10 (July 7, 2010) (Di Bella, J.)

These are companion cases each involving an individual described as profoundly mentally retarded and unable to read or write or manage any property. Each case was brought by the Consumer

Advisory Board by Order to Show Cause ("OSC") seeking appointment of an Article 81 guardian and for the establishment of a Supplemental Needs Trust ("SNT"). In each case the court declined to sign the OSC stating: " ... the Legislature has enacted a statutory scheme, Surrogate Court Procedure Act ["SCPA"] 1750 *et seq.*, specifically designed to meet the needs of the mentally retarded and developmentally disabled. An application for the appointment of a guardian of the property and establishment of an [SNT] is more properly commenced in Surrogate's Court under Article 1750 of the [SCPA]"

Matter of Yvette A., 27 Misc.3d 945; 898 N.Y.S.2d 420 (Surr. Ct. NY Cty., 2010)(Surr. Webber)

A father who had not had any contact with his severely mentally retarded Willowbrook class daughter for over 16 years sought to be appointed as her 17-A guardian. MHLS, NYLPI, NYCLU and the guardian ad litem opposed his appointment and NYLPI and NYCLU requested that the matter be referred to Supreme Court for an Article 81 proceeding. The father was unclear about her condition and prognosis and had no plan in mind for her continued care. The objectants raised concerns about his motives and commitment to his daughter in light of his past history and were concerned about his suggestion that he would want to remove her from the only group home she had been in for the past 33 years and possibly sue them in relation to their past care of his daughter.. The Surrogate declined to transfer the case to Supreme Court reasoning that Art 81 and SCPA are not alternatives for one another and stating: "although Article 17- A does not specifically provide for the tailoring of a guardian's powers or for the reporting requirements similar to Article 81, the court's authority to impose terms and restrictions that best meet the need of the ward is implicit in the provisions of §1758 of the SCPA, ..." (emphasis added). The Court therefore concluded that it did have the authority, both at the inception of a 17-A decree and upon modification of an original decree, to tailor the order to meet the needs of the ward. The court thus decreed that the father could be appointed but included very detailed reporting requirement similar to those in Article 81 and further decreed that the CAB should continue its oversight of the ward.

Matter of John J.H., 27 Misc. 3d 705; 896 N.Y.S.2d 662 (NY Cty, 2010) (Surr. Glen)

Parents of a 22 year old autistic man with artistic talent petitioned under SCPA 17-A to become his guardians with, inter alia, the specific power to sell his artwork and to make charitable gifts on his behalf from the proceeds. The court, while acknowledging that the parents' objective was laudable, indicated that it was constrained by both the language of 17-A and its common law roots, to order a plenary guardianship over the property and that it could neither tailor the guardianship to the proposed ward's particular needs nor issue gift giving powers to the proposed guardians. The court explained that there was a presumption against applying "substituted judgement" in a 17-A guardianship where the assumption is that the ward never had capacity to formulate a judgment of his own. The Surrogate calls for reform of 17-A to a more nuanced and protective system of guardianship for persons with developmental disabilities. In the end, the petitioners withdrew their 17-A petition and re-filed under Article 81. **But see, Matter of Joyce G. S., 30 Misc3d 765; 913 N.Y.S. 2d 910 (Surr. Ct., Bronx Cty., 2010) (Surr. Holzman)**

Matter of Chaim A.K., 26 Misc.3d 837; 855 N.Y.S.2d 582 (Surr. Ct., NY Cty., 2009) (Surr. Glenn)

Court denied an application by parents for !7-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 along 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. Ths opinion is especially well written and thoughtful and discusses the difference between the two types of guardianship and when each is most appropriate.

Matter of Mueller, 25 Misc.3d 164; 887 N.Y.S.2d 768 (Surr. Ct. Dutchess Cty)(Surr. Pagones)

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 Schulze, 23 Misc. 3d 215; 869 N.Y.S. 2d 896 (Surr. Ct., NY Cty., 2008)(Surr. Roth)

Article 81 was designed to replace Conservatorships (Article 77) and Committees (Article 78) with a more flexible and less intrusive system for protecting the rights of incapacitated persons. Accordingly, when Article 81 was enacted, Articles 77 and 78 were repealed. By contrast, Article 81 did not purport to repeal Article 17A. Moreover, the legislative history of Art 81 does not suggest that its enactment was intended to withdraw or alter any aspect of the protections and authority accorded by Article 17A.

Matter of Farah P., 11/7/08 NYLJ 27, col 1, Family Ct , Kings Cty., 2008)

In a proceeding under Art 10 or 10 A of the Family Court Act, where a child over the age of 18 is, by reason of mental illness or a developmental disability, incapable of understanding the proceedings, assisting counsel and protecting his rights, a guardian ad litem must be appointed for the young adult pursuant to CPLR 1201 and 1202. While a law guardian may substitute his judgement for a minor, once the child reaches his or her 18th birthday, the law guardian functions merely as the attorney for the young adult and may not substitute his judgement.

Matter of Addo, 2001 NY MISC LEXIS 1349, 218 NYLJ 64 (Sup.Ct., Bronx Cty 1997)

Parents petitioned under Article 81 for guardianship of their disabled son and further sought to make withdrawal from the infant's funds to pay for the infant's necessities and for other extraordinary expenses; including, but not limited to the purchase of a house, the payment of an annual salary to

the mother for care giver services rendered to the infant, and withdrawal of an amount to provide medical insurance for petitioners and their family. In analyzing the requests, the court held that the purpose of Article 81 was to create a guardianship law to meet the needs of elderly persons but that nothing in the statute precludes its use for the young. It noted that Article 81 is silent with respect to the parental obligations and responsibilities of the parents to provide support for the incapacitated child. The court looked to CPLR Article 12 caselaw to find that parents with the ability to do so are obligated to support a child, even if the child has an estate of his or her own. Stating that [p]etitioners could have chosen to seek the relief they requested either under MHL Article 81 or CPLR Article 12 ..... As regards to an infant, neither the obligations of parental support nor the protective mantle of the court is swept aside or in any way diminished by the election of Article 81, as the vehicle for the appointment of a guardian and the application for withdrawals from the infant's account. The provisions of Article 81 and of CPLR Article 12 must be brought into logical harmony where an infant becomes the subject of an Article 81 proceeding, since the child's right to parental support is not thereby forfeited, nor as a result is public policy to protect the welfare of children cast aside.

Ianazzi v. Seckin, NYLJ, 12/9/02 (Sup. Ct., Kings Cty.)(Pesche,J)

Although not the issue in this case, this is an example of a case in which there is an Art 81 guardian for a minor.

Matter of Guardianship of B., 190 Misc. 2d 581;738 N.Y.S. 2d 528 (Sup. Ct., Tompkins Cty. 2002)(Peckham, A.J.)

There would be no rational basis, and, therefore, a denial of equal protection of the laws for saying that the ability of a guardian for a mentally retarded person to consent to medical treatment of the ward should differ if the guardian is appointed under Article 81 rather than Art 17-A. Therefore an Art. 81 guardian can consent to a tubal ligation for an IP.

Matter of Forcella, 188 Misc. 2d 135; 726 N.Y.S. 2d 243 (Sup. Ct., Suff Cty. 2001) (See also, NYLJ story concerning Matter of Forcella and Matter of Rooney, NYLJ, May 24, 2001, p.1)

"Article 81 does not expressly preclude it application to infants suffering from disabilities. Nevertheless, in its formulation there appears to have been a consensus that Article 81 was intended for proceedings involving adults, not infants." Court reasons that infants are provided for in SCPA 17 and disabled infants are provided for in SCPA 17-A.

Matter of Cruz, 2001 Slip Op. 400083U; 2001 NY Misc LEXIS 546 (Sup. Ct., NY Cty.) (Lebedeff, J.); See also, NYLJ 7/26/01 p. 1. col. 5 (NYLJ story).

Where child, disabled by a birth trauma had profoundly disability expected to continue through adulthood, court find that Article 81 is appropriate for minors stating: "There is. . . language in the

statute which supports it application to minors and no language that precludes such application."

Matter of La Vecchia, 170 Misc. 2d 211; 650 N.Y.S. 2d 955 (Sup. Ct., Rockland Cty., 1996)

Article 81 applies to disabled adults, not minors **(SCPA Art. 17)** or mentally retarded/developmentally disabled adults **(SCPA 17-A)**.

Contrast

In re: DOE, 181 Misc. 2d 787; 696 N.Y.S. 2d 384 (Sup. Ct., Nassau Cty., 1999)

Art. 81 applies to persons of any age, and does not necessarily exclude minors.

Matter of Marmol (Pineda), 168 Misc. 2d 845; 640 N.Y.S. 2d 969 (Sup. Ct., NY Cty., 1996)

Art. 81 may be utilized in lieu of **CPLR Article 12** to authorize appointment of guardian for incapacitated infant to withdraw funds from infant's personal injury settlement. Funds may be used to pay for "unusual circumstances" necessitated by child's disability irrespective of parents' ability to pay for them, and for expenses reasonably necessary for infant's maintenance, if justified by financial circumstances of family.

Matter of Daniel K. Le and Young, 168 Misc. 2d 384; 637 N.Y.S. 2d 614 (Sup. Ct., Queens Cty., 1995)

Court appoints guardian for 10 year old boy.

C. Guardian *ad litem*

(i) Generally

Forest & Gardens Apt. Co. v. Goldberg, 2017 NYLJ LEXIS 1454 (Civ. Ct., City of NY, Queens Cty. Jun.7, 2017 at 40 (Lansden, J.)

In a holdover proceeding, a Guardian ad Litem ("GAL") entered into a stipulation for an apparently incapacitated tenant to vacate an apartment. Subsequently, according to plan, an Article 81 guardian was appointed and, inter alia, moved to vacate the stip on the grounds that the GAL had inadvisably waived defenses to the proceeding and, among other things had also failed to meet some of his obligations to the tenant, as set forth in a 2007 Advisory Notice of the Civil Court defining a GAL's duties to include, inter alia, meeting with the ward and developing a relocation plan to assist the ward in fulfilling the terms of the settlement. The Court, vacating the stip, reasoned, among other things, that a litigant appearing by a GAL, is an unrepresented litigant, whether or not the GAL is also an attorney, that the role of a GAL is not that of an attorney, and that a GAL lacks the authority to forfeit a ward's property rights without the ward's consent, even when he acts in the

ward's best interest.

<u>Tower Insurance Co. of NY v. Estate of Decosta</u>, 113 AD3d 572; 979 N.Y.S. 324 (1st Dept. 2014)

The Appellate Division upheld a trial court's denial of a GAL without prejudice to petition for an Article 81 guardian. The court held that affidavits from counsel and family members describing an elderly man having difficulties managing a multiple dwelling, which did not allege that he was incapable of defending his rights, was insufficient to establish the need for a GAL, particularly where affidavits from his physicians contradicted that position.

<u>Fiduciary Trust Co., Intl. v Mehta</u>, 40 Misc.3d 1227(A) (Civ. Ct., NYCL/T)(Kraus., J.)

Months after entry of a judgment and issuance of a warrant of eviction, the housing court denied the tenant's attorney's motion for the appointment of a GAL to facilitate the tenant's move from the subject apartment, noting that such was not the function of a GAL appointed pursuant to CPLR Article 12. However, the Court stayed execution of the warrant so as to afford counsel, or the tenant, an opportunity to seek the appointment of an Article 81 guardian in Supreme Court.

<u>Riverside Park Community v. Stubbs</u>, 39 Misc3d 1219(A), 972 N.Y.S.2d 146 (Sup. Ct., NY Cty., 2013)(Kraus, JHC)

Citing CPLR 1201, the court vacated a default judgment in a landlord tenant proceeding and appointed a GAL to protect a disabled tenant's interests holding that when a party's defacto incapacity is perceived, an interested person, including the petitioner or the court, should apply for the appointment of a guardian ad litem to ensure the effectiveness of proceedings that are adverse to the party who is incapable of adequately prosecuting or defending his or her rights because if this is not done, neither a default judgement nor any other proceedings that prejudice the defendant will be effective.

<u>James v. State of New York</u>, 2013 U. S. Dist. LEXIS 64579 (EDNY)(2013) (Pohorelsky, M.J.)

Plaintiff, who had been adjudicated incapacitated in an Article 81 proceeding in State court filed a *pro se* complaint in Federal court challenging the State court proceedings, including the results of unsuccessful appeals taken through the state court system that had failed to establish her theory that the guardianship was part of a conspiracy to deprive her of certain property. She filed the matter in Federal Court *pro se* because her Article 81 guardians declined to prosecute the case on her behalf. The Federal Court held that: (1) this was in effect another appeal of the state court determinations and as such is prohibited by the Rooker-Feldman doctrine; (2) it was not obliged to appoint a *guardian ad litem* for her in Federal court since there was no substantial claim that could be brought in Federal Court which lacked subject- matter jurisdiction; and, (3) because she already had been adjudicated incapacitated and a guardian had been appointed, and there was no evidence that this guardian was violating any duty toward her, the plaintiff may not initiate or prosecute a civil action

on her own. The Court added that if she wished to challenge the actions of her guardian as violative of their duty toward her, she could still do so in the State court.

<u>NYC Housing Auth (Amsterdam Houses) v Richardson</u>, 27 Misc. 3d 1204A; 910 N.Y.S.2d 406 (Civ. Ct, NY Cty., 2010) (Lebovitz, J.)

In a holdover eviction proceeding, the Court denied the respondent's claim that his GAL had been ineffective because the GAL had failed to advise him to submit written opposition to the Housing Authority's motion for summary judgment. In holding that the GAL had adequately protected the respondent's interests, the Court noted that it had appointed a GAL for the respondent because he complained of a physical disability rather than an inability to understand the nature and consequences of summary judgment, and that the respondent had appeared in Court together with his GAL, and had received the opportunity to be heard and discuss the merits of his position. The Court added that a GAL in Housing Court, appointed when an individual is incapable of defending his own interests in a legal proceeding, differs from both a guardian appointed under MHL Article 81, which requires a judicial determination of incompetence, and from a guardian appointed under SCPA Article 17-A, which requires a judicial certification that an individual is incapable of managing him or herself and/or his affairs by reason of mental retardation or developmental disability.

<u>Estate of Macinnes</u>, 4/6/2009 NYLJ 36, (col. 3) Surr. Ct., Queens Cty. (Surr. Nahman)

The Surrogate declined to find the beneficiary of an estate to be an incapacitated person under a disability pursuant to SCPA 103 and therefore declined to appoint a GAL . Reasoning that a although a ward's desires are relevant, they are not determinative and a GAL may substitute his judgment for that of the ward's if the GAL determines that it is in the ward's best interest. The Surrogate thus concluded that appointment of a GAL curtails the ward's autonomy and since the proposed ward had not consented to anyone stepping in to make decisions for him, whose services he may be obligated to pay for, that curtailment of his freedom must be sufficiently justified. The Surrogate found that the individual in question was idiosyncratic but not lacking in understanding of the purpose of the proceeding such that he could not adequately protect his own rights. He had retained counsel, has cooperated with his counsel and has filed Objections to the Petition. He appeared before the Court, demonstrated that he understood the purpose of the pending proceeding, and sufficiently voiced his opposition thereto. The Surrogate then referenced Rule 1.14 (b) of the Rules of Professional Conduct (effective April 1, 2009), quoting: "when a lawyer reasonably believes that his client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian."

<u>Matter of Farah P.</u>, 11/7/08 NYLJ 27, col 1, Family Ct , Kings Cty., 2008)

In a proceeding under Art 10 or 10 A of the Family Court Act, where a child over the age of 18 is,

by reason of mental illness or a developmental disability, incapable of understanding the proceedings, assisting counsel and protecting his rights, a guardian ad litem must be appointed for the young adult pursuant to CPLR 1201 and 1202. While a law guardian may substitute his judgement for a minor, once the child reaches his or her 18th birthday, the law guardian functions merely as the attorney for the young adult and may not substitute his judgement.

Blatch v. Martinez, NYLJ 10/21/08 (SDNY 2008) (Swain, J.)

The settlement in this case permanently bars the NYC Housing Authority from proceeding with a tenancy termination proceeding unless an incompetent resident is represented by a guardian ad litem paid by the NYCHA. The settlement also obligates the NYCHA to advise the court in any proceeding against residential tenants in housing court of any information that the Housing Authority may have that suggests that the tenant MAY be incompetent.

NYC Housing Authority v. Jackson, 13 Misc. 3d 141A; 831 N.Y.S. 2d 360 (App. Term, 2nd Dept., 2006), aff'd, 48 AD3d 818; 2008 N.Y. App. Div. LEXIS 1746 (2nd Dept., 2008)

Appellate Term reversed the denial of a guardian's motion to vacate a stipulation of settlement entered into by a GAL in a holdover proceeding before the guardian had been appointed for the tenant. The Appellate Term stated that the guardian's motion should have been granted because the GAL had entered into the stipulation inadvisably and had waived arguably meritorious defenses available to its ward, the tenant. The court cited its continuing obligation to oversee the work of the GAL and also settlements involving those who are unable to defend themselves.

BML Realty Group v. Jack Samuels, 15 Misc. 3d 30; 833 N.Y.S. 2d 348 (Appellate Term, First Dept., 2007)

GAL was appointed for a blind and mentally ill tenant who was the subject of an eviction proceeding (nuisance holdover). GAL did not meet with the tenant or visit the apartment. Although GAL was aware that APS was imminently filing a petition under Article 81, he nevertheless stipulated to tenant's eviction and judgment in favor of the landlord. The tenant moved to have the stipulation vacated and the trial court denied the motion. The tenant appealed from the order denying the motion to vacate. Appellate Term, citing its authority to supervise the GAL, out of its obligation to defend those unable to defend themselves, reversed and remanded and vacated the stipulation of final judgment.

Estate of Murray, 14 Misc. 3d 591; 824 N.Y.S. 2d 864 (Surr. Ct., Erie Cty. 2006)

Although many Surrogate's Courts in this State, as a policy, have been interpreting SCPA 401, 402 and 403 to mean that a validly appointed attorney-in-fact may not appear on behalf of a disabled individual in an estate administration proceeding because the statutes do not enumerate them in the list of parties who may appear, the court revisited, and changed that policy in light of the public policy behind Article 81 that there be liberal use and recognition of the efficacy of powers of

attorney. The court stated that a formal plan for handling the incapacitated person's property interests validly established by her should not be lightly set aside or disregarded by the courts.

Estate of Lucy Lovito, 2006 N.Y. Misc. LEXIS 5206; 236 NYLJ 70 (Surr Ct,Westchester Cty) (Surr. Scarpino)

When seeking appointment of a Guardian Ad Litem ("GAL") the issue to be adjudicated is not whether the proposed ward is mentally incompetent, but whether he is a 'person under disability' within the meaning of SCPA 103(40) for whom a GAL must be appointed under SCPA 403[2]. A 'person under disability' includes an 'incapacitated person', which is defined as '[a]ny person who for any cause is incapable adequately to protect his or her rights ... (SCPA 103[25]). The fact that a party has appeared by an attorney-in-fact or retained counsel is not dispositive of this issue. Appointment of a GAL is not governed by either CPLR Article 12 or MHL Article 81. Instead, the issue is governed by SCPA 403(2), which provides that any 'person under disability' who does not appear by his guardian, committee or conservator pursuant to SCPA 402 shall appear by a GAL, unless certain circumstances set forth in SCPA 403(3) are present.

Beach Haven Apartments, Assoc. LLC v . Riggs, NYLJ, July 20, 2005, p.20 col. 1 (Civ Ct, Kings Cty) (Finkelstein, J.)

Motion to appoint GAL in eviction proceeding denied because there was no proof of proper service upon the proposed respondent. The Court states in the context of this decision that lack of service would be especially serious because the appointment of a GAL carries with it a loss of liberty merely "by the imposition of a stranger in the proposed ward's life."

Taylor v. Martorella, 192 Misc. 2d 214; 745 N.Y.S. 2d 901(Sup. Ct., Kings Cty. 2002)

An Article 81 was found not to be equivalent to a guardian ad litem for the purposes of establishing venue pursuant to CPLR 503 (b). Court holds that under CPLR Art. 12, a GAL's only function is to protect the interests of the party in a particular action or proceeding. where as an Art 81 guardian acts in an array of legal proceedings as fiduciaries who can sue and be sued in their respective representative capacities and made parties to a case. Since a Guardian ad Litem is not a real party in interest, his or her residence can not control the choice of venue.

124 MacDougal St. Assoc. v. Hurd, NYLJ, 2/2/00, p. 25 (Civ. Ct., NYCL/T)(Scheckowitz, J.)

Default judgment was entered against mentally ill tenant, who had no Art. 81 guardian and no GAL. Balancing needs of her neighbors to be free of nuisance against need to protect her civil rights, default judgment and warrant of eviction were vacated due to respondent's inability to defend herself in the earlier proceedings.

Matter of Saks, NYLJ, 9/15/97, p. 25, col.1 (Sup. Ct., Nassau Cty.)(Rossetti, J.)

While marshaling his mother's assets, guardian (son) discovered that most were in out-of-state banks

and that his estranged brother, a Michigan resident, had access to them under power-of-attorney. Because of bad relationship between guardian and his brother, court appointed an independent guardian *ad litem* to investigate funds and any possible wrongdoing. Once guardian *ad litem* found potential misappropriation of over $400,000 of the funds, court issued order authorizing Article 81 guardian to commence proceedings in Michigan to set address invalid transfers by his brother. Court also ordered Article 81 guardian to pay guardian *ad litem* with funds from guardianship account.

T.W. by Enk v. Brophy, 124 F.3d 893 (7th Cir., 1997)

FRCP Rule 17(c) distinguishes between guardian or other "duly-appointed representative," on the one hand--in short, a general representative--and a guardian ad litem or a next friend, on the other hand--a special representative. If general representative has conflict of interest (for example because he is named as the defendant in the child's suit), or fails without reason to sue or defend (as the case may be), child may, with court's permission, sue by another next friend, or court may appoint a guardian ad litem for child.

Querubin Parras v. Anna Ricciardi, 185 Misc. 2d 209; 710 N.Y.S. 2d 792 (City Court, City of NY 2000)

Plaintiff landlord did not have to commence Art. 81 proceeding before suing elderly, possibly incapacitated woman, so long as she was properly served at nursing home. Court can appoint GAL if needed.

Kings 28 Assoc. v. Raff, 167 Misc. 2d 351; 636 N.Y.S. 2d 257 (Civ. Ct., Cty. of NY, 1995)

Housing court judge can appoint GAL to protect tenants rights without going through full Art. 81 proceeding.

a. Compensation of GAL

Albroon v. Gurwin, 2012 NY Slip Op 31534U; 2012 N.Y. Misc. LEXIS 2735 (Sup. Ct. Nass. Cty, 2012) (Mahon, J.)

Citing the "interests of justice and fairness" and the court's heavy obligation to protect a litigant who may be incapacitated but who has not yet been so adjudicated, the Court declined to vacate its earlier order directing defendant to establish an escrow account to pay a GAL who was appointed to determine the need to apply for an Art. 81 guardian for a possibly incapacitated person despite defendant's argument that plaintiff should not bear the cost of plaintiff's counsel's failure to first obtain an Article 81 guardian before commencing this tort claim proceeding.

(ii) Does not have authority to consent to settlement of behalf of Ward

Christopher C. v. Bonnie C., 40Misc3d 859; 968 N.Y.S. 2d 855 (Sup. Ct., Suff. Cty., 2013) (Leis, J.)

This divorce action instituted by the husband, was transferred to the Model Integrated Guardianship Part from a matrimonial part. During the course of the matrimonial proceeding, it became apparent that the wife was having difficulty processing issues and assisting her attorney, and the judge suggested that an Article 81 Guardianship proceeding be initiated. An Article 81 petition was filed by the wife's brother who sought to become the guardian. The Justice in the Model guardianship part conducted a guardianship hearing at which the wife readily acknowledged her history of depression, anxiety and detoxification from pain medications and that she needed a guardian because her anxiety and inability to function during periods of stress made it difficult for her to assist her matrimonial attorney and to weigh the relative merits of either negotiating a settlement or going to trial. After the hearing, the Court, on consent, appointed a guardian. The guardian was given, inter alia, the power to participate in the divorce proceeding and to decide whether to negotiate a settlement or proceed to trial. The court noted that this authority to accept a settlement could only be given to a plenary Article 81 guardian and could not have been given to a guardian ad litem in a matrimonial proceeding.

1234 Broadway LLC v. Feng Chai Lin, 25 Misc. 3d 476; 883 N.Y.S. 2d 864 (Civ. Ct., NY Cty 2009) (Lebovits, J.)

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 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 judgement to compel the ward to vacate the premises over the ward's objection. The court focused on the 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 tellingly near the end of the decision: "The Housing Court appoints GAL's to assist incapacitated adults, not to live the ward's lives for them".

Cheney v. Wells, 23 Misc. 3d 161; 877 N.Y.S. 2d 605 (Surr Ct., NY Cty. 2008)(Surr. Glenn)

Counsel for a defendant in a civil action sought to withdraw from representation, asserting an inability to communicate with her client and an inability to carry out her employment effectively as required by DR 2-110. This was the fourth such counsel who sought to withdraw for the same reason. The court opined that this defendant was likely incapable of managing the litigation and unable to appreciate the consequences of that incapacity, which included the loss of her home and over 3 million dollars, and that a proceeding under MHL Art 81 should be held to determine whether she was in need of a limited property guardian to manage the litigation on her behalf. The

court granted the fourth counsel's motion to withdraw contingent upon her commencement of an Art 81 proceeding, In dicta, the court ruled out appointing a GAL as an alternative to the Art 81 proceeding, citing to caselaw holding that a GAL does not have authority to settle a lawsuit on behalf of the ward.

Matter of Latanza, 14 Misc.3d 476; 824 N.Y.S.2d 705 (Sup. Ct., Nassau Cty 2006) (O'Connell, J.)

In this NON-Article 81 proceeding, a daughter petitioned to be appointed Guardian ad Litem for her mother to prosecute a tort claim on her mother's behalf and to protect her interests in that litigation. The mother, who had no property other than the subject matter of a tort claim suit, had previously executed a Health Care Proxy, Living Will and valid durable power of attorney appointing her daughter with full powers. Acknowledging that a Guardian ad Litem lacks authority to both apply for court approval of a settlement and receive and disperse the settlement proceeds, the court nevertheless held that the appointment of a guardian ad litem, at least where the person alleged to be incapacitated has no appreciable assets other than the pending or potential lawsuit, was appropriate. The court reasoned that a proceeding under Article 81 involves expenses that would likely be imposed upon a petitioner when they cannot be recouped from an AIP who has no assets. Thus, requiring a proceeding under MHL Article 81 where there were no assets would have the potential to act as a disincentive and thus deny an incapacitated person the protection the court is obligated to provide.

Matter of Sills, 32 A.D.3d 1157; 821 N.Y.S.2d 313 (4th Dept. 2006)

The Appellate Division describes as "well settled" the principle that "a guardian ad litem is not authorized to apply to the court for approval of a proposed settlement of [the claim of an adult adjudicated incompetent] ... Instead the right to apply for court approval of a proposed settlement and to receive the settlement proceeds is granted to a guardian appointed in accordance with Mental Hygiene Law Article 81."

Matter of Lainez, 11 Misc. 3d 1092A; 819 N.Y.S. 2d 851 (Sup. Ct. Kings Cty. 2006)(Johnson, J.)

An incapacitated person was in a permanent vegetative state allegedly as a result of medical malpractice. The attorney prosecuting the medical malpractice case sought to have a GAL appointed instead of seeking an Article 81 guardian, asserting that appointment of a GAL was more efficient in that it was more quickly accomplished and consumed fewer judicial and legal resources. The court found that appointment of a GAL in lieu of an Article 81 Guardian was not in the best interests of the incapacitated person because, due to her total disability she was in need of a plenary guardian for all of her affairs and further, because the GAL would not, by law, have the power to settle the lawsuit. The court opined that the GAL's limitations would discourage settlement, drag the resolution of the case on for years and deprive the incapacitate person of a potential financial settlement that could allow for her to be placed in a facility that would provide better care for her.

The court stated: "The simpler procedure for obtaining a [GAL] was not created for the purpose of testing the waters first to determine the feasibility of a monetary recovery and then, if a recovery is achieved, commencing proceedings for an Article 81 guardian. The type of guardians sought should be based on the best interests of the incompetent, not the convenience, economy or ease of the appointment.

Matter of Bernice B., 176 Misc.2d 550; 672 N.Y.S. 2d 994 (Surr. Ct., NY Cty., 1998)

GAL cannot bind ward to settlement against her wishes in absence of formal adjudication under Article 81. See, also, Matter of Bernice B., 179 Misc.2d 149; 683 N.Y.S.2d 713 (Surr. Ct., NY Cty., 1998).

Estate of Wilcox, NYLJ, 12/2/99, p. 37 (Surr. Ct., Nassau Cty.)(Radigan J.)

Court directs GAL in probate proceeding to consider commencing proceeding for Article 81 guardian who can establish SNT or pooled trust with inherited funds.

Tuderov v. Collazo, 215 A.D.2d 750, 627 N.Y.S.2d 419 (2nd Dept., 1995)

GAL can be appointed without finding of overall incapacity under Art 81, but GAL cannot agree to settlement or receive proceeds of settlement.

(iii) Does have authority to consent to settlement on behalf of Ward

East 10th Street LLC v. Garcia, 37 Misc3d 1224A; 964 N.Y.S. 2d 58 (Civ. Ct., Cty. of NY 2012) (Krause, J.)

Respondent in a landlord tenant proceeding moved for removal of her GAL and for the court to void the Stipulation that the GAL had recommended on her behalf. The Court denied the motion reasoning that the GAL had carried out his fiduciary duty because he'd made a home visit, discussed the proposed settlement options at length with Respondent, investigated the allegations in the petition and Respondent's asserted defenses, and then after due consideration and presenting all the facts to the court endorsed the proposed settlement. The court further reasoned that even if a Respondent does not consent to a Stipulation, a GAL may still recommend that a Court accept it and the court may do so if it is in the best interests of the ward. The GAL must make an objective evaluation of the circumstances and take such action as will advance what he perceives to be the best interests of the ward. The court, citing authority , held : ".... the best wishes of the ward are relevant but not determinative." The role of the GAL was not to follow whatever wishes the ward expressed, but rather to make an independent investigation, into the facts and circumstances, including but not limited to the ward's wishes, and then make a recommendation to the court to accept a proposal that the GAL believed was in the ward's best interests.

Perri v. John Doe et al, 2010 U.S. Dist. LEXIS 22655 (EDNY 2010)

New York State law provides for appointments of general (as opposed to ad litem) guardians under MHL §81, SCPA 17-A and NY CPLR §1202. These laws and procedures can be employed through Fed. R. Civ. P. 17(b); however, the Federal Court system lacks the panoply of government agencies and non-profit groups involved in appointments of guardians that exist in state court. Although NY CPLR 1207 (which is incorporated here by Fed. R. Civ. P. 17(b)) requires settlement to be made only by general guardians appointed pursuant to Article 81, rather than guardians ad litem, the Federal Court is not obligated to apply this rule.

Arthur Management Co. v. Arthur Zuck, 19 Misc.3d 260; 849 N.Y.S.2d 763 (Civ. Ct., Kings Cty, 2008) (Kraus, J.)

In this summary holdover proceeding in Housing Court, a GAL was appointed by the court based upon the court's observations that respondent was not able to adequately protect his own rights. The parties ultimately entered into a stipulation which was allocuted and approved by the court. Shortly thereafter, an interim Article 81 guardian was appointed with power to defend or maintain any civil proceedings. The interim guardian soon brought a motion to vacate the settlement recommended by the GAL. While the court held that there is authority to vacate a stipulation of settlement where it appears that a party has "inadvertently, unadvisably or improvidently entered into an agreement which will take the case out of the due and ordinary course of proceeding in the action and works to his prejudice, "the court refuse to vacate the stipulation in this case, finding that it is the court, not the GAL that ultimately decides whether to accept the settlement, that the Administrative Judge of Civil Court has promulgated guidelines for the court to follow that establish the minimum steps that a GAL must take before the court can accept the GAL's recommendation to settle and that those guidelines had been followed in this case by the GAL and the Court.

Neilson v. Colgate Palmolive Co., 993 F. Supp. 225 (SDNY 1998)

Federal court rejects NY rule that GAL cannot approve terms of settlement and that only Art. 81 guardians can do that- Federal court approves settlement endorsed by GAL alone, even though Art. 81 was still pending.

D. Powers of attorney/health care agents/trustees

Matter of Rachel Z. (Jack Z. - Anna B.), 181 AD3d 805 (2nd Dept., 2020)

The Appellate Division affirmed the Supreme Court's revocation of the AIP's POA and HCP appointing her daughter as her agent, noting that the existing instruments were not sufficient and reliable resources to protect the AIP because they were executed at a time when she was incapacitated, and because the daughter was not acting in the AIP's best interests.

Matter of S.B. (E.K.), _Misc.3d_; 2019 NY Slip Op 29368 (Sup. Ct., Chenumg Cty.)(2019)
(earlier related decisions: Matter of S.B. [E.K.], 60 Misc.3d 735 [Sup. Ct., Chemung Cty.][2018], reversed, Matter of Elizabeth T.T. [Suzanne Y.Y. - Elizabeth Z.Z.], 177 AD3d 20 [3rd Dept., 2019])

The Supreme Court had appointed as the AIP's Article 81 attorney the attorney who previously drafted and executed a power of attorney in which the AIP designated her daughter, E.I. as her attorney-in- fact. The AIP's other daughter, S.B., subsequently filed a proceeding, inter alia, seeking to invalidate the POA, alleging that E.I. had isolated the AIP, that the POA was the product of undue influence, and that E.I. had otherwise breached her fiduciary duties. The court denied the attorney's motion to intervene in that proceeding, noting that his presence as a party was not necessary for it to determine the validity of the POA. The court expressed concern that the attorney needed direction as to whether he could properly rely on the attorney-in-fact to guide his strategy in defending the AIP against the guardianship. Citing N.Y.C.R.R. 1200.0, Rule 1.14(a) (which requires an attorney representing an individual with diminished capacity to maintain a conventional relationship with the client as far as reasonably possible), and MHL § 81.10 (which states that the role of counsel is to ensure that the AIP's point of view is presented to the court), the court reminded the attorney that insofar as the AIP had consistently expressed her opposition to the guardianship, he could make decisions and pursue a litigation strategy that honored that perspective without reliance on decisions made by the AIP's attorney-in-fact. Further citing to cases where the court must determine whether counsel retained by the AIP was chosen freely and independently, the court noted that although the subject attorney had not been retained by the attorney-in-fact, he had given the court the impression that he had either relied on her, or planned to rely on her, to control his strategy as the AIP's advocate. The court admonished that this would essentially allow the attorney-in-fact, who allegedly isolated the AIP from S.B., exerted undue influence in the creation of the POA, and breached her fiduciary duty to the AIP, to impermissibly direct the AIP's counsel. Ultimately, however, the court disqualified the attorney because he would be called as a witness to attest to the circumstances regarding the creation and execution of the contested POA.

Matter of Cox,47 Misc.3d 1211(A); 15 N.Y.S.3d 711 (Sup. Ct., Kings Cty. 2015) (King, JSC)

Supreme Court vacated a Power of Attorney and Health Care Proxy that had been long held by the one of the AIP's daughters, citing breach of fiduciary duty consisting of her failure to keep accurate records of her expenditures on behalf of her mother and also co-mingling her own funds with those of her mother. Her failure to properly account was of concern to some of her other siblings who were accusing her of theft of the mother's resources. Evidence showed that this daughter was paying for the short fall from her own funds to assure that her mother, now suffering late stage dementia, received proper care while her brothers lived in the mothers home rent free. This daughter was also best equipped through her own professional experience as a nurse and manager of a visiting nurse service to understand and provide for her mother's needs. The Court revoked the Power of Attorney and Health Care Proxy for breach of fiduciary duty and appointed the same daughter as Guardian, thereby obligating her to report to the court.

Matter of Carl Willner (F.G.), 45 Misc. 3d 1222(A); 2014 NY Slip Op 51675(U) (Sup. Ct., Bronx Cty. 2014) (Hunter, J.S.C.)

An Article 81 proceeding was commenced by the nursing home in which a 94 year old woman resided. During the related bedside hearing, it was discovered that the AIP had made a questionable payment of $50,000 to the nursing home after she had been found to lack capacity to do so by the nursing home's own psychiatrist. It was also discovered that the nursing home had commenced a civil action seeking payment from the AIP, also after she was found by the psychiatrist to lack capacity. The Court, noting its outrage at the behavior of the nursing home, and the AIP's health care agent/attorney in fact (the AIP's former attorney - whose assistance the AIP refused, and who had not had face to face contact with the AIP in over two years), parties "who have all unabashedly demonstrated . . . that they are only interested in getting paid," invalidated the HCP and POA and appointed an independent guardian. The Court empowered the guardian, *inter alia*, to defend the IP's interest in the civil action brought by the nursing home; to investigate whether she had been the victim of financial exploitation; and, with prior court approval, to refer the matter to the Offices of the District Attorney and/or Attorney General.

Matter of I.B.R, 40 Misc3d 464; 965 N.Y.S. 2d 860 (Sup. Ct., Dutchess Cty., 2013) (Pagones, J.)

Court declined to order appointment of a limited guardianship to petitioner, who lived outside the United States and was already the AIP's attorney-in-fact handling his financial affairs. Petitioner was applying for the limited guardianship solely because one of the banks with which he had to do business would not accept the power of attorney. The court held that guardianship is a remedy of last resort and the AIP had already made arrangements for his incapacity by executing the power of attorney and all financial institutions except for one were honoring it. The court also expressed concern that since the petitioner lived in Canada the court could not exercise jurisdiction over him for enforcement purposes without complying with procedures set forth in various international conventions and treaties and thus his appointment would create practical problems and increase the cost of enforcement. Further there was a co-guardian who could incur liability for any acts or omissions by the foreign guardian.

Matter of Schwarz, 33 Misc3d 1203A; 938 N.Y.S.2d 230 (Sup. Ct., Kings Cty., 2011)

The Supreme Court declined to revoke the advance directives of a 57 year old rabbi, bedridden by multiple sclerosis that had recently been exacerbated by diabetes and leukemia, which were in favor of the AIP's sister, with whom the AIP resided in a room of her home which was comparable to a room at a skilled nursing facility. Noting that the advance directives allowed for the management of the AIP's activities of daily living, his personal needs, his finances and property, and was consistent with the statutory goal of effectuating the least restrictive form of intervention, the Court invalidated a subsequent power of attorney in favor of the petitioner, the AIP's brother, which the petitioner had recently obtained from the AIP, while he was incapacitated, under false pretenses. Finally, the Court, noting that the petitioner had commenced the proceeding in bad faith "to settle

scores and address unresolved issues among siblings rather than advance the best interest of the AIP," held the petitioner responsible for the Court Evaluator's fees.

Matter of Walter K.H. 31 Misc.3d 1233A; 930 N.Y.S. 2d 177 (Sup. Ct., Erie Cty., 2011)

The Supreme Court revoked a Power of Attorney in which the AIP, while competent, had designated her adult daughter to serve as attorney-in-fact, due to the daughter's self-dealing and breach of her fiduciary duty, but declined to revoke the Health Care Proxy in which the AIP designated her daughter to also serve as her health care agent, due to the petitioner-son's failure to prove that his sister was unavailable or unwilling to act, or that her actions or inactions rose to the level of incompetence or bad faith. However, due to the fighting between the AIP's children, the Court declined to appoint the petitioner-son, and instead appointed an independent third-party, to serve as full guardian of the IP's property, and limited guardian of her person.

Matter of C.C., 27 Misc. 3d 1215A; 910 N.Y.S.2d 761 (Sup. Ct. Bronx Cty., 2010)(Hunter, J)

Once the Court had appointed a guardian, the IP could no longer give the same individual who had been appointed her guardian her POA and HCP and the then guardian was at that point required to serve only under the terms of the order.

Matter of Anthony Rose, 26 Misc. 3d 1213A; 907 N.Y.S. 2d 104 (Sup. Ct. Dutchess Cty, 2010) (Pagones, J.)

Upon motion by counsel for AIP, petition was dismissed under CPLR 3211(a) (7) because, although the petition made out a *prima facia* case that the AIP was incapacitated, on its face the petition also established that he had a valid Power of Attorney and Health Care Proxy that had not been revoked and the agents he had appointed thereunder possessed sufficient authority to meet his needs.

Matter of Kufeld, 23 Misc3d 1131A; 889 N.Y.S.2d 882 (Sup. Ct.. Bronx Cty., 2009) (Roman, J.)

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 of that the agent appointed by those instruments had abused her authority.

S.S. v. R.S., 24 Misc.3d 567; 877 N.Y.S.2d 860(Sup. Ct. Nassau Cty., 2009) (Murphy, J.)

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 heath care decisions and a related petition pursuant to PHL 2992(1, 3) voiding a heath 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 Heath Care Proxy instrument, were to be removed from life support, thus they were unable to establish that the heath care agent, his wife, was acting contrary to his stated wishes. Since the Heath Care Proxy was held valid, the court found that there was no need for the appointment of special guardian.

Matter of May Far C., 61 A.D.3d 680; 877 N.Y.S.2d 367 (2nd Dept., 2009)

Order and Judgement of the trial court appointing a temporary guardian was reversed and remitted upon a finding that the trial court had improvidently exercised its discretion in appointing a guardian. The court held that the evidence adduced at the hearing had established that the AIP had effectuated a plan for the management of her affairs and possessed sufficient resources to protect her well being, thus obviating the need for a guardian. The Court further found that although the evidence demonstrated that the AIP was incapacitated at the time of the hearing, there was no evidence that she had been incapacitated when she granted her daughter Power of Attorney and further there was no evidence that the chosen Attorney-in-Fact had engaged in any impropriety with respect to the care of the AIP or her assets.

Estate of Slade, NYLJ, Jan. 18, 2007, p. 31, col 7 (Surr. Ct., New York County) (Surr. Glenn)

Court holds that although EPTL § 5-1.1-A(c)(3) does not specifically list an attorney-in-fact among the fiduciaries that may exercise the right of election, the Court allowed an attorney-in-fact to do so because the interests of the attorney-in-fact and principal were aligned. This ruling is consistent with the trend of increased use of a durable power of attorney as a means to avoid the need for an Article 81 guardian.

Matter of Daniel TT., 39A.D.3d 94; 830 N.Y.S.2d 827 (3rd Dept. 2007)

Summary judgment dismissing a petition for guardianship was reversed on appeal. Although the AIP had issued a Power of Attorney, health care proxy and other advanced directives in the past to one of his daughters, his other daughter, the petitioner, had, in the petition challenged the validity of those instruments, alleging that the AIP already lacked capacity when he issued the advanced directives, that the directives were issued under duress, and that the daughter who held the powers was failing to carry out her fiduciary duties to the AIP. Moreover, the Court Evaluator's report, and an affirmation submitted by the AIP's long time personal attorney raised similar questions which lead the Court Evaluator to move for permission to review the AIPs medical/psychiatric records and to have him examined. Therefore, the Appellate Division held that it was error for the trial judge to summarily dismiss the petition before the petitioner and Court Evaluator had the benefit of discovery and a hearing to establish that the AIP did not, in fact, have valid and sufficient alternative resources that obviated the need for guardianship.

Matter of Estate of Raymond A. Teufel, 15 Misc.3d 1109A ; 839 N.Y.S.2d 437 (Surr. Ct., Erie Cty., 2006) (Surr. Howe)

SCPA 220(1) provides that any bequest to an incapacitated individual be paid to the guardian of such person. A bequest was made to a woman who, at the time of the probate proceeding, was 90 years old and suffering from severe Alzheimer's disease. She did not have a guardian, having years earlier executed a valid power of attorney thereby obviating the need for a guardian. Citing to Matter of Murray which she had recently authored, this Surrogate reiterated that there was no need to appoint a guardian in light of the public policy behind Article 81 that there be liberal use and recognition of the efficacy of powers of attorney. The court stated that a formal plan for handling the incapacitated person's property interests validly established by her should not be lightly set aside or disregarded by the courts.

Estate of Murray, 14 Misc.3d 591; 824 N.Y.S.2d 864 (Surr. Ct., Erie Cty. 2006)

Although many Surrogate's Courts in this State, as a policy, have been interpreting SCPA 401, 402 and 403 to mean that a validly appointed attorney-in-fact may not appear on behalf of a disabled individual in an estate administration proceeding because the statutes do not enumerate them in the list of parties who may appear, the court revisited, and changed that policy in light of the public policy behind Article 81 that there be liberal use and recognition of the efficacy of powers of attorney. The court stated that a formal plan for handling the incapacitated person's property interests validly established by her should not be lightly set aside or disregarded by the courts.

Matter of Lando, 11 Misc. 3d 866; 809 N.Y.S.2d 901 (Surr Ct, Rockland Cty 2006) (Surr. Berliner)

Attorney-in-fact was permitted to exercise right of election and there was no need to wait for appointment of an Article 81 guardian to accomplish same.

In the Matter of The Application of Joseph Meisels (Grand Rabbi Moses Teitlebum), 10 Misc. 3d 659; 807 N. Y. S. 2d 268 (Sup. Ct. Kings Cty., 2005) (Leventhal, J.)

An Article 81 petition was brought for guardianship over the Grand Rabbi of The Satmar sect. He had previously appointed one of his sons and his longtime personal secretary as HCP and POA and indicated in the HCP and POA that if there ever should be a guardianship proceeding, that these would be the individuals whom he would want to be appointed. The initial pleadings did not allege that there was anything defective about his previous appointments made several years earlier. After respondent moved to dismiss the petition on the grounds that the existence of the HCP and POA negated the need for a guardianship, petitioners only then alleged that the Rabbi has been incompetent at the time he granted the HCP and POA. The court, after reviewing the affirmations in support of this allegation found insufficient proof that he lacked capacity to grant the HCP and POA at the time he made the appointments.

<u>Borenstein v. Simonson</u>, 8 Misc.3d 481; 797 N.Y.S.2d 818 (Sup. Ct. Queens Cty, 2005) (Ritholtz, J.)

Health Care Proxy executed while AIP was competent did not provide instructions to agent for dealing with artificial nutrition and hydration as required by PHL 2981(4) and 2982. AIP was on an NG tube when her physicians sought authorization to insert a PEG. The Health Care Agent refused to authorize the PEG and AIPs sister petitioned for a special guardian to make the hydration/nutrition decisions. Petitioner also sought to void the HCP on the grounds that the agent was not acting in the AIPs best interest or alternatively to declare that the agent was without power to make decisions about hydration/ nutrition and to enjoin the Health care agent from interfering with health care decisions about hydration and nutrition. Court declares that agent is without power to make hydration/nutrition decisions but finds no basis for voiding the HCP. Case has excellent discussion of the law of health care proxies and also on the Jewish Law on the subject of withdrawing or withholding life sustaining treatment.

<u>Matter of Mougiannis v. North Shore - Long Island Jewish Heath Systems, Inc.</u>, NYLJ, 5/19/04, p. 19 (Sup. Ct., Nassau Cty., LaMarca, J.) 25 A.D.3d 230; 806 N.Y.S.2d 623 (2nd Dept. 2005)

Health Care Agent is entitled under Public Health Law §2982(3) to medical information necessary to make a decision about the principal's health and providing such records to the Health Care agent does not violate HIPAA. *An unarticulated conclusion that may be drawn from this decision is that to obtain these records, one need not be an Art 81 guardian with the specific authority to obtain the records.*

<u>Matter of Julia C.</u>, NYLJ, Vol 49, pg. 20, 3/15/04 (County Ct., Nassau Cty) (Asarch, J.)

Court denies motion for summary judgment made by heath care agent/attorney-in-fact (AIPS daughter) seeking dismissal of an Article 81 petition brought by the son. The motion for SJ was made on the theory that the AIP made her own prior arrangements for the management of her care when she was competent by appointing the POA and HCP to make all decisions for her thus obviating the need for a guardian. Court denied motion for SJ finds that issues of fact exist because (1) there were issues as to the validity of the signature on the HCP; (2) neither the HCP or POA, either alone or combined, authorized the agent carte blanche to select place of abode for the AIP; even where the AIP had checked Box "O" on the POA form indicating "all other matters" (3) the son and daughter, as co- POA's, could not agree as to the place of abode and (4) The extent of the AIP's actual limitations was not known. The court states:

> The fact that a health care proxy exists does not, in itself, always obviate the need for a guardianship. Public Health Law 2992. The scope of Article 81 of Mental Hygiene Law and Article 29-c of the Public Health Law do not overlap with respect to making decisions regarding the social environment and other such aspects of the life of the incapacitated person and choosing her place of abode....

In the Matter of Isadora R., 5 A.D.3d 494; 773 N.Y.S.2d 96 (2nd Dept., 2004)

The nonparty, attorney-in-fact and health care proxy for AIP appealed from an order and judgment appointing a guardian which also vacated the POA and HCP. Appellate Division reverses finding that the evidence established that the AIP had "effectuated a plan for the management of her affairs and possessed sufficient resources to protect her well being" and that there was no evidence that the appellant, a longtime friend of the AIP's and the AIP's chosen attorney-in-fact and health care proxy had mishandled the AIP's property or that the AIP's health and well-being were harmed by any actions taken by the appellant sufficient to justify revoking the power of attorney and health care proxy in favor of a court-appointed guardian.

Matter of Nora McL.C., 308 A.D.2d 445, 764 N.Y.S.2d 128 (2nd Dept., 2003)

App. Div. affirms trial court's appointment of third party guardian of the person and property where niece who held POA and HCP evidenced "self dealing" by transferring AIP's stock and other assets into her own name.

Article: "Beware the Abuses of Powers of Attorney" by Leona Beane -NYLJ Aug 23, 2002

In the Matter of Rose S. (Anonymous), Martin G. S. (Anonymous), etc., appellant-respondent; Ellyn J. S. (Anonymous), et al., respondents-appellants., 293 A.D.2d 619; 741 N.Y.S.2d 84 (2nd Dept., 2002)

Supreme Court hearing Article 81 petition found to have erred in declaring that a health care proxy executed by AIP was valid. Appellate Division, Second Department, reasons that although every adult is presumed competent to appoint a health care agent and thus the burden of proving mental incompetence is generally upon the party asserting it, where there is medical evidence of mental illness or a mental defect, such as Alzheimer's disease, the burden shifts to the opposing party to prove by clear and convincing evidence that the person executing the document in question possessed the requisite mental capacity. **But see, Matter of Richard Rosenberg, NYLJ 8/18/03, p. 25 (Surr. Riordan)** interpreting and seemingly contradicting Rose S.

Matter of Mary "J.", 290 A.D.2d 847; 736 N.Y.S.2d 542 (3rd Dept., 2001)

Appellate Division held that where hearing court found that AIP had executed durable power of attorney and health care proxy while she suffered from dementia, it had properly voided the instruments and appointed a guardian.

Matter of Ruby Slater, 305 A.D.2d 690; 759 N.Y.S.2d 885; *appeal dismissed*

Court vacates power of attorney and will where AIP, who was totally dependant upon home health aides, executed these documents in favor of them and court finds that they were executed as a result of undue influence. Subsequently, App. Div. dismissed appeal brought by the nominated executrix

because they said that the executrix is not aggrieved by the order and lacks standing to appeal.

Matter of Stein, 2001 NY Slip Op 40314U; 2001 N.Y. Misc. LEXIS 573 (Sup. Ct., NY Cty. 2001)

IP had both a guardian of the person and a Health Care agent. Each role was fulfilled by a different person. The Health Care agent asserted that all decision involving the care of the elderly IP were "health related", including whether the IP should live at home with a home health aide or surrender her apartment and enter a nursing home. Court finds that such decision was within the realm of the personal needs guardian and not the Health care agent, stating..."the guardian would be limited to inconsequential actions and finding so would completely eviscerate the responsibility of the personal needs guardian.

Matter of Lauro, 2001 NY Slip Op 40109U; 2001 N.Y. Misc. LEXIS 491 (Sup. Ct., Onondaga Cty. 2001)(Wells, J.)

Court denies a petition for guardianship where there was already an SNT in existence serving the same function stating: "Article 81 is designed to promote the use of the "least restrictive form of intervention" (MHL 81.01) ...Guardianship.. no matter how noble, is still a deprivation of a person rights."

Matter of Albert S., 286 A.D.2d 684; 730 N.Y.S.2d 128 (2nd Dept., 2001)

Where AIP had living will, durable Power of Attorney, and where trust fund was being established for his benefit, Appellate Division found that there was no need for a guardian of the person or property, which should be only a "last resort" when there are not other resources and that it was particularly improper for Supreme Court to have appointed guardian of person with powers that modified the terms of the "living will" by prohibiting the health care agents from acting under the healthcare proxy to hasten his death by withholding life support.

Haymes v. Brook Hospital, 287 A.D.2d 486; 731 N.Y.S.2d 215 (2nd Dept., 2001)

There is no such thing in New York as a “living will.”

Matter of Kunkis, 162 Misc.2d 672; 618 N.Y.S.2d 488 (Surr. Ct., NY Cty., 1994)

Where son holding power of attorney renounces inheritance on behalf of mother, grantor of the power, and son stood to benefit from renunciation in that his share would become larger, son may not renounce without court approval and appointment of GAL. This, in effect, placed burdens upon holder of power that make his role more similar to guardian, and provide better protection for IP.

Matter of Crump, 230 A.D.2d 850; 646 N.Y.S.2d 825 (2nd Dept., 1996)

Where AIP had effectuated plan for management of her affairs by appointing power-of-attorney on her own, and she possessed sufficient resources to protect her well being, appointment of guardian of her property was improper.

Matter of Lowe, 180 Misc.2d 404, 688 N.Y.S.2d 389 (Sup. Ct., Queens Cty., 1990)

Petition brought by wife of AIP seeking her appointment as temporary guardian where she was already her husband's attorney-in-fact and health care agent. Petitioner sought authority to appoint successor health care agent under health care proxy. Petition is dismissed, since it has not been shown that there is present need for appointment; rather, what has been shown is that there may be need for guardian to make health care decisions for husband in event that his wife is for some reason unable to act under health care proxy, and absence of any evidence which would give court reason to believe that the wife's inability to act under proxy is imminent, or even likely to occur at any point in time, underscores speculative nature of petition. Accordingly, and in furtherance of policy of only appointing a guardian as a last resort, court did not appoint a guardian since there has been no evidence that petitioner's husband is likely to suffer harm because of his inability to select an alternate health care agent.

Matter of Maher (Maher), 207 A.D.2d 133; 621 N.Y.S.2d 617 (2nd Dept., 1994), *lv to app denied* 86 N.Y.2d 703, 631 N.Y.S.2d 607 (1995), *reconsid denied*, 86 N.Y.2d 886; 635 N.Y.S.2d 951 (1995)

No guardian needed where AIP had granted power-of-attorney to his colleague, an attorney, and had added his wife as a signatory on certain of his bank accounts.

Matter of O' Hear (Rodriguez), 219 A.D.2d 720; 631 N.Y.S.2d 743 (2nd Dept., 1995)

No guardian was required where AIP had granted power-of-attorney, health care proxy and will to relative and hearing court found that person holding power had not engaged in any impropriety with respect to his care of AIP or her assets.

Matter of Anonymous, R.A., NYLJ, 9/ 28/93, p. 27, col. 2 (Surrogate's Ct., Nassau Cty., 1993)

Elderly and infirm AIP residing with granddaughter who was attorney-in-fact and who managed individual's affairs under power of attorney did not require a guardian.

Matter of Presbyterian Hospital in the City of New York (Helen Early), 1993 N.Y. Misc. LEXIS 627; NYLJ, 7/2/93, p. 22, col. 2 (Sup. Ct., NY Cty.)(Sax, J.)

Despite blindness and other physical infirmities, individual had prepared an efficient system to assist her personally and financially and did not require guardian.

Matter of Rochester General Hospital (Levin), 158 Misc.2d 522; 601 N.Y.S.2d 375 (Sup. Ct., Monroe Cty., 1993)

Guardian appointed where individual's son was "either unable or unwilling to exercise the authority granted to him under the power-of-attorney," and hearing court "entertained serious doubts as to his ability to make future decisions pursuant to the [individual's] health care proxy."

Matter of Wingate (Kern), 165 Misc.2d 108; 627 N.Y.S2.d 257 (Sup. Ct., Suffolk Cty., 1995)

Court appointing guardian may formally declare void a pre-existing simple power-of- attorney.

E. Testamentary capacity/Revocation of Wills

Estate of Robert A. Frank, NYLJ, 7/23/19, at p. 28, col. 2 (Surr. Ct., Richmond Cty.), (Surr. Titone)

In a contested probate proceeding, the Surrogate's court denied a motion for summary judgment made by the beneficiary/proponent of the decedent's will, finding triable issues of fact on the issues of testamentary capacity and undue influence where the beneficiary/will proponent was appointed the decedent's temporary Article 81 guardian less than 30 days prior to the execution of the purported will, and where the drafter of the will was a partner in the law firm of the beneficiary/will proponent.

Matter of Militana, 2018 NYLJ LEXIS 2646 (Sup Ct. Nassau Cty.) (Diamond, J.)

The Court denies an application by a property guardian to transfer the IP's assets to a revocable trust, reasoning that the terms of the proposed trust are inconsistent with the IP's testamentary wishes and would invalidate and revoke the her Last Will and Testament in violation of MHL 81.29.

Matter of Gluckman, ____Misc3d___; 2017 N.Y. Misc. LEXIS 2615 (Surr. Ct. NY Cty2017)(Surr. Meila)

In a matter involving the reformation of a trust to grant certain testamentary powers to the beneficiary of that trust, the Surrogate, relying upon MHL §§ 81.29 (a) and (b), reasoned that a previous finding that the beneficiary is in need of an Article 81 guardian is not tantamount to a finding that she lacks testamentary power.

Matter of Curtis, 40 Misc3d 1233 (A) ; 975 N.Y.S. 2d 708 (Surr. Ct., Dutchess Cty 2013)(Pagones, J.)

The Surrogate dismissed the objections to the probate of the decedent's will in which the decedent named her live-in home health aide as her primary beneficiary, noting that, although the decedent was found to be an incapacitated person in a proceeding brought under MHL Article 81, she

nevertheless possessed testamentary capacity. The Surrogate further held that the objectant had failed to sustain her burden of proving that the will was the product of undue influence, noting that the facts that aide had become a "motherly-figure" to the decedent and that the aide spent a lot of time with her, was not sufficient.

Matter of Roberts, 34 Misc3d 1213A; 946 N.Y.S. 2d 69 (Surr. Ct., NY Cty., 2011) (Anderson, J.)

The Surrogate Court denied so much of a motion for summary judgment by the decedent's niece as sought to dismiss the objections of the decedent's relatives to the probate of a 2003 will and a 2004 codicil thereto, based on their claim that these testamentary instruments, in which the decedent bequested an increasingly larger share of her estate to her niece, and a smaller share to relatives and friends, was procured by undue influence. The Court held that based on the conflicting documents submitted (which included hospital records from 2000 and 2004 showing that the decedent suffered bouts of paranoia, dementia and confusion, an Article 81 petition which did not result in the appointment of a guardian for the decedent, a psychiatrist's affirmation, the court evaluator's report and the 1404 testimony of attesting witnesses), even though the decedent may have had the requisite capacity to execute a will, triable issues of fact existed with respect to whether the instruments were the product of the niece's undue influence.

Estate of Joseph Schmeid, 2/23/10 NYLJ 43 (col. 1) Surr. Ct. Queens Cty. (Surr. Nahman)

A Will executed by an individual who had been found to be in need of a guardian was admitted to probate upon a finding that the individual possessed testamentary capacity.

Estate of Mary Cugini, 7/29/2009, NYLJ, 36 (col.3) Surr. Ct., Richmond Cty. (Surr. Gigante)

The court denied a motion by the proponent of a will to quash certain HIPAA releases executed by the Public Administrator for the decedent's medical/psychiatric records. The motion asserted that there was no need for the inquiry and therefore for the medical information because decedent had already been found to be in need of a guardian. The court denied the motion, reasoning that "[p]roof of the elements required to establish incapacity for the purpose of appointment of a guardian under the Mental Hygiene Law differs from those required to demonstrate testamentary incapacity thus the findings of capacity in the Art 81 proceeding do not collaterally estop objectants [to the probate of the will] from litigating the issue of decedent's testamentary capacity ."

Matter of Elkan, 22 Misc.3d 1125A; 880 N.Y.S.2d 872 (Surr. Ct. Bronx Cty. 2009) (Surr. Holtzman)

In a will contest, the court found that the testator lacked testamentary capacity to draw the will. The Surrogate looked, *inter alia* to the testimony of the examining psychiatrist and the Court Evaluator in the Article 81 proceeding held prior to the decedent's death to establish lack of testamentary capacity.

Article: The Article 81 Guardian and the Personal Representative, by Colleen Carew and John Reddy, Jr., NYLJ 8/20/08

Good article addressing a 2008 amendment to MHL 81.34 and new section MHL 81.44 concerning the division of responsibilities with respect to an IP's estate between an Art 81 guardian and the personal representative of a deceased IP . Also discussed is the newly enacted prohibition in MHL 81.29 against pre-death probating of a will during the pendency of an Art 81 proceeding.

Estate of Anne C. Gallagher, 2007 NY Misc LEXIS 7639; 238 NYLJ 83 (Sur. Ct. Kings Cty.)(Surr. Torres)

A finding that an individual needs a guardian is not inconsistent with a claim that the same individual possesses testamentary capacity. Accordingly, the Surrogate denied a motion to dismiss a probate petition made by objectants on the grounds of judicial estoppel.

Matter of Khazaneh, 15 Misc. 3d 515; 834 N.Y.S. 2d 616(Surr. Ct., NY Cty. 2006) (Surr. Glen)

In this probate proceeding, the Surrogate was called upon to examine whether a testator lacked testamentary capacity because he did not know the exact value of his holdings. The Surrogate looked to Article 81 and focused on its emphasis on "task specific functional ability", and found that the testator, who clearly had the cognitive ability, possessed sufficient capacity to make his Will. In so finding, the Surrogate made the following insightful comment: "Throughout most of our legal history, judges and litigants have utilized unitary concepts like "competent" or "incompetent," "sane" or "insane." Notwithstanding this apparently simple framework, the genius of the common law presaged a more "functional" notion of capacity as legal standards or tests for capacity evolved differently in different areas of law. (fn omitted) It is only relatively recently, however, that the law has explicitly embraced the more nuanced view of modern psychology and psychiatry which recognizes that an individual may be perfectly "competent" in one area, and "incompetent" in another. Our legislature adopted this functional approach to determining capacity when it enacted Article 81 of the Mental Hygiene Law in the early 1990's."

In the Matter of Joseph S., 25 A.D.3d 804; 808 N.Y.S.2d 426, (2nd Dept 2006)

It was improper for the trial court to invalidate the AIP's will in the order appointing guardian because the petition for guardianship did not seek that relief at any point in the proceeding and appellant, the executor of the AIP's will had not had an opportunity to be heard. The Appellate Division held this in contrast to its annulment of the AIP's marriage to his nurse because the nurse wife was present in the Art 81 proceeding with counsel and did have an opportunity to be heard.

Estate of Rosa Socolow, NYLJ, p. 24, 9/1/04, (Surr Preminger)(NY Cty)

In a proceeding in Supreme Court, Article 81 co-guardians were removed for breach of fiduciary

duty upon the finding that they exerted undue influence upon the IP and were self-dealing in that they pressured the IP to name them as beneficiaries in her will. The Supreme Court judge explicitly stated that the issue in that case was the breach of fiduciary duty and not the validity of the will although she acknowledged that invalidating the will was an incidental result. After the IP died, the will was contested in Surrogates Court. Surrogates Court refused to apply collateral estoppel to find the will invalid stating first that the validity of the will was not the issue in the first proceeding and therefore not fully and fairly litigated previously. The court also found that under MHL 81.29 (b) the appointment of an Art 81 guardian is not conclusive evidence that a person lacks capacity to make a will and that there was no specific finding by the Art 81 court that the IP lacked the specific capacity to make a will. See, Article in NYLJ, Oct. 20, 2004, Pg. 3, *Surrogate's Practice and Proceedings; Pre-Death Probate - Does New York Allow It?*, by Charles F. Gibbs and Colleen F. Carew.

Estate of Emilio Pellegrino, 7/13/04, p. 32 (Surr. Czygier) (Surr. Ct., Suff. Cty.)

Codicil to will was executed about one months after an Article 81 proceeding had ben filed and about one week after the Article 81 decision was rendered finding the testator to be in need of a guardian of the property due to functional limitations brought about as a result of a stroke. Surrogate looks to the totality of the circumstances and not just the finding of the Art 81 court and finds that the testator lacked testamentary capacity at the time of the making of the codicil.

Matter of Estate of Rose McCloskey, 307 A.D.2d 737; 763 N.Y.S.2d 187 (4th Dept 2003)

An AIP executed a will while there was an Article 81 proceeding pending. At the time her attorney determined that despite the fact that an Art 81 petition had been filed, the AIP/testator possessed testamentary capacity and allowed her to execute a will. The Court held that although the AIP testator may have been forgetful and cantankerous, the objectants failed to meet the burden of proving that she: (1) understood the nature and consequences of executing a will; (2) knew the nature and extent of the property she was disposing of; and (3) knew those who would be considered the natural objects of her bounty and her relations with them. Also the court stated in other words that the AIP/testator "did not suffer from an insane delusion which directly affected her decision not to leave anything to the [parties objecting to the probate of the will]"

Matter of Will of Colby, 240 A.D.2d 338; 660 N.Y.S.2d 3 (1st Dept., 1997)

Finding of incapacity under Article 81 is based upon different factors from those involved in finding of **testamentary capacity**.

F. Matrimonial Matters

Matter of Seidner, 1997 N.Y. Misc. LEXIS 762; NYLJ, Oct. 8, 1997, p. 25, col.3, Vol 218 (Sup. Ct. Nass. Cty. 1997)((Rosetti, J)

Court refused to order guardianship over the AIP, petitioner's husband, who had been rendered homeless and thus lived in his car, by the terms of an order of another court in a pending matrimonial proceeding. The court noted that "Article 81 was not meant to be used to adjust differences between squabbling spouses'" and "while the [AIP] may not have been as normal as his wife would have liked", the court was convinced that he had been making conscious and rational decisions as to the manner in which he chose to live or was constrained to live due to his court imposed financial situation. The court further noted that if this AIP's situation warranted a Guardian, then, indeed, "every homeless person would require such an appointment."

Christopher C. v. Bonnie C., 40 Misc3d 859; 968 N.Y.S 2d 855 (Sup. Ct., Suff. Cty.) (Leis, J.)

This divorce action instituted by the husband, was transferred to the Model Integrated Guardianship Part from a matrimonial part. During the course of the matrimonial proceeding, it became apparent that the wife was having difficulty processing issues and assisting her attorney, and the judge suggested that an Article 81 Guardianship proceeding be initiated. An Article 81 petition was filed by the wife's brother who sought to become the guardian. The Justice in the Model guardianship part conducted a guardianship hearing at which the wife readily acknowledged her history of depression, anxiety and detoxification from pain medications and that she needed a guardian because her anxiety and inability to function during periods of stress made it difficult for her to assist her matrimonial attorney and to weigh the relative merits of either negotiating a settlement or going to trial. After the hearing, the Court, on consent, appointed a guardian. The guardian was given, inter alia, the power to participate in the divorce proceeding and to decide whether to negotiate a settlement or proceed to trial. The court noted that this authority to accept a settlement could only be given to a plenary Article 81 guardian and could not have been given to a guardian ad litem in a matrimonial proceeding.

Matter of Donald L.L., 82 A.D.3d 72; 916 N.Y.S. 2d 451; 2011 NY Slip Op 943 (4th Dept., 2011)

Guardian brought an action against the AIP's husband, seeking to enforce a stipulation of settlement entered in an Article 81 proceeding which divided the couple's property in a manner similar to equitable distribution but expressly declined to dissolve the marriage. The husband cross-moved to vacate the stipulation of settlement, arguing that the guardianship court should not have granted equitable distribution without having conducted a hearing on the couple's economic issues. The Appellate Division disagreed, holding that the economic issues were resolved by the stipulation, which was the product of extensive negotiations conducted after full disclosure. The court continued that the trial court had properly refused to apply the equitable distribution law (Domestic Relations Law § 236 [B]) in view of the couple's declination to dissolve their marriage.

Matter of Cheryl H., 7/21/10, NYLJ 26 (col.3)(Sup. Ct. Nass. Cty.)(Diamond, J.)

An acrimonious matrimonial action with a custody component involving an autistic son, evolved into an Article 81 guardianship proceeding when the son became 22 years old. While a custody battle, the father sought to enforce his visitation rights and his right to be informed about significant developments with his son. The mother consistently restricted them, arguing that the father did not properly supervise the son. She refused him access in violation of assorted court orders directing such access to the son. When the son was 22 years old, the mother petitioned for and was granted Article 81 personal needs guardianship over her son. The order appointing her directed her to provide reports to the father and the court, established a detailed visitation schedule, and specifically found that there was no need for supervised visits for the father. Despite such order, for the next 14 months the mother continued to deny the father access, failed and refused to file court ordered reports concerning her son, and, in fact, was held in contempt and fined for each visit she refused to allow. She also refused to cooperate with a court appointed parent coordinator. She continued to refuse visits and pay fines. She also had no telephone service at home and did not respond to efforts by the parent coordinator to contact her, which she attributed to a lack of money to pay phone bills. The father eventually moved to have her removed as guardian and to be appointed as successor guardian in her stead. Despite the court noting her loving and supportive attention to her son, the court nevertheless removed her as guardian and transferred guardianship to the father, noting that the father did not pose a threat to his son, that it was in the son's best interest to have a relationship with his father, that the father was willing to allow liberal contact between the mother and son, and, that the court could no longer tolerate the mother's defiance of court orders.

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

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 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. See, Article: NYLJ, 1/25/10 - Trusts and Estates "John D.: Appointing Monitor Not in Keeping With Legislative Intent of Article 81" -- arguing that this decision is: "not in keeping with the legislative intent of Article 81 of the Mental Hygiene Law, and is the first step onto the slippery slope of invasion of the personal property rights of an Alleged Incapacitated Person wrought solely in an attempt to assist in the enforcement of a distributive award granted to an ex-spouse."

Acito v Acito, 23 Misc.3d 832; 874 N.Y.S.2d 367 (Sup. Ct. Bronx Cty. 2009) (Gesmer, J.)

Where an order appointing a guardian provided, among other things, that the guardian was empowered to prosecute a divorce proceeding on behalf of the IP and settle it subject to the further

approval of the court that had ordered the guardianship, and the IP died after the matrimonial court had so ordered the divorce settlement but before the court that had issued the guardianship could approve it, the divorce could not be finalized because to do so would have had the effect of retroactively expanding the authority of the guardian.

Matter of Elisabeth S.Z., 56 AD3d 792; 871 N.Y.S.2d 165 (2nd Dept 2008)

Guardian moved against the IP's husband for tax free financial support for the IP. The trial court granted the motion without conducting an evidentiary hearing to ascertain her actual support needs or the impact of the support payments on her eligibility for Medicaid. Further, the order contained no findings of fact or conclusions of law nor did it provide any explanation of its decision to award the support. The Appellate Division reversed the financial award and remanded to the trial court for a hearing on those issues and an order specifying findings. It does not appear from this decision that there was a matrimonial proceeding pending.

Matter of A.S., 15 Misc.3d 1126A; 841 N.Y.S. 2d 217 (Sup. Ct., Westchester Cty. 2007) (Rosato, J.)

Marriage between an 89 year old woman with dementia who was found incapable of understanding the nature, effect, and consequences of the marriage to her 57 year old chauffeur was annulled in the context of an Article 81 proceeding on the grounds of want of understanding (DRL Sec.140(c) and Sec 7 (2)) and fraud (DRL Sec. 140 (e) and Sec 7 (4) where the purported husband fully participated in and presented evidence on the issue of the validity of the marriage.

In re Irving Wechsler, 3 A.D.3d 424; 771 N.Y.S.2d 117 (1st Dept., 2004)

Guardian may not commence divorce action on behalf of ward. Although the guardian does have the power to maintain a civil proceeding, that grant of power does not include filing for divorce because whether to pursue a divorce is too personal a decision.

DeFrance v. DeFrance, 273 A.D.2d 468, 710 N.Y.S.2d 612, (2nd Dept.)

Guardian, who was also wife, sought to force sale of AIP's separate property and have court order proceeds divided equally between AIP and self, on the theory of equitable distribution. Court holds that absent matrimonial proceeding, AIP's funds cannot be divided upon theory of equitable distribution in Art. 81 proceeding.

G. Habeas corpus

People (ex rel Hilary A. Best) v. Driscoll, 2007 N.Y. Misc. LEXIS 3398; 237 NYLJ 87 (Sup. Ct., Queens Cty. 2007) (Thomas. J.)

A Writ of Habeas Corpus under CPLR Art 70 is not the proper vehicle to contest or modify the

guardianship; efforts to discharge or modify should be made pursuant to MHL 81.36.

Matter of Brevorka (Whittle), 227 A.D.2d 969, 643 N.Y.S.2d 861 (4th Dept., 1996)

Writ is appropriate to bring forward possibly incapacitated elderly woman and to determine her capacity. Art. 81 proceeding can be filed later, after she is brought forward.

Matter of Nixon (Corey), 1996 N.Y. Misc. LEXIS 626， NYLJ, 6/4/96, p. 25, col. 1 (Sup. Ct., Suffolk Cty.)(Luciano, J.)

Where AIP had been secreted, an essential obstacle to commencement of Art. 81 proceeding was petitioner's inability to locate and serve AIP. Court concludes that remedy may be found by combining Art. 81 proceeding with a *sua sponte* habeas corpus proceeding in which party secreting AIP is directed to produce AIP before Court, in order to allow an inquiry as to whether she is being unlawfully restrained, detained or confined.

H. MHL Art 79 (Guardianship for Veterans)

Matter of Zhou Ping Li, 2005 N.Y. Misc. LEXIS 3592; 234 N.Y.L.J. 85 (Sup. Ct. Kings Cty., 2005) (Pesce, J.)

A guardian for an IP seeks court approval for a settlement entered into with DSS for moneys owed to DSS for substantial sums it provided for the IP's care. The IP is a recipient of substantial VA benefits. The DVA moves to intervene and to oppose the settlement. Some aspects of the proposed settlement involve the disposition of both accumulated and future VA benefits ; other aspects of the settlement involve transfer of real property acquired without using VA benefits. The Court finds that under MHL §79.39(a) the DVA is a proper party in interest with respect to the terms of the settlement that involve the disposition of VA benefits only. The Court also finds that no part of MHL Article 79 prohibits lawful Medicaid and estate planning conducted on behalf of a disabled veteran and that therefore there was no prohibition against the requested transfers merely because the IP is a recipient of VA benefits. After analyzing the legitimacy of each of the proposed transfers, the Court approved the proposed settlement which involved, among other things the placement of the IP's income, including his VA benefits into a supplemental needs trust.

In re Guardianship (Formerly Committee) for the benefit of W.J., 9 Misc.3d 657; 802 N.Y.S.2d 897 (Sup.Ct., Rensselaer County 2005) (Ceresia, J.)

A corporate committee was appointed in 1961 for a ward who was receiving VA benefits. In 2005 it moved to be compensated under MHL Art 81 claiming that the work it was doing was in the nature of trustee work and that it should therefore be compensated under SCPA 2309, as set forth in Art 81. The VA and counsel for the ward opposed, claiming that the fiduciary appointment was made pursuant to MHL Art 79 governing veterans and not Art 78 which was repealed in 1992 when Art

81 was enacted in its place. The corporate committee argues in the alternative that if it is to be compensated under Art 79, that it be compensated for "extraordinary services". The court finds that: (1) under the 2004 amendments, Art 81 no longer makes reference to SCPA 2809 as a method for calculating guardians' compensation and that each compensation determination is based upon the specific facts of each case; (2) that the original proceeding was commenced by the VA and under the Civil Practice Act and that CPA §§ 1384-k which governed compensation at that time is now part of MHL Art 79; (3) that MHL Art 79 is still in effect and supercedes other guardianship sections that may be inconsistent and that therefore, this guardianship is governed by MHL Art 79. The Court further found that "the long duration of the guardianship and/or the size of the estate, in and of themselves, were not "extraordinary service" nor was the fact that the services involved "on-going property management responsibilities [in a] highly regulated financial industry [with] a high standard of professional conduct and significant reporting requirements."

I. Collections Matters

Matter of Gerken, NYLJ, 9/06/19, at p. 21, col. 12 (Sup. Ct., Bronx Cty.), (Johnson, J)

Proceeding was brought by a nursing home to address the outstanding residential debt of the AIP. The Court Evaluator advised the court that the AIP had the capacity to enter a new power of attorney (a prior one designating her brother as attorney in fact could not be located). After the AIP executed a new POA, however, the nursing home refused to withdraw the petition. Although the court did not find that the nursing home's commencement of the proceeding was inappropriate or ill-advised insofar as the nursing home was entitled to be paid for the services it provided, the court held that the nursing home's refusal to withdraw the petition after the AIP had executed the new POA constituted frivolous conduct. Consequently, the court held the nursing home responsible for the fees generated by the AIP's counsel subsequent to the execution of the POA.

Matter of Carl Willner (F.G.), 45 Misc. 3d 1222(A); 5 N.Y.S.3d 331 (Sup. Ct., Bronx Cty., 2014)(Hunter, J.S.C.)

An Article 81 proceeding was commenced by the nursing home in which a 94 year old woman resided. During the related bedside hearing, it was discovered that the AIP had made a questionable payment of $50,000 to the nursing home after she had been found to lack capacity to do so by the nursing home's own psychiatrist. It was also discovered that the nursing home had commenced a civil action seeking payment from the AIP, also after she was found by the psychiatrist to lack capacity. The Court, noting its outrage at the behavior of the nursing home, and the AIP's health care agent/attorney in fact (the AIP's former attorney - whose assistance the AIP refused, and who had not had face to face contact with the AIP in over two years), parties "who have all unabashedly demonstrated . . . that they are only interested in getting paid," invalidated the HCP and POA and appointed an independent guardian. The Court empowered the guardian, *inter alia*, to defend the IP's interest in the civil action brought by the nursing home; to investigate whether she had been the victim of financial exploitation; and, with prior court approval, to refer the matter to the Offices of

the District Attorney and/or Attorney General.

Matter of Shannon, 25 NY3d 345; 34 N.E.3d 351 (Ct. of App.)(2015)

At the time of her death, in addition to the unpaid administrative expenses of the guardianship, the IP had an outstanding debt to Medicaid and another debt to the nursing home for the balance owed it over and above its Medicaid reimbursement. At the time of her death, her guardian held assets insufficient to pay both debts in their entirety. The guardian petitioned the court to settle its final account and sought instructions as to how to deal with the unpaid Medicaid and nursing home bills. The trial court directed the guardian to pay DSS. The nursing home appealed and the Appellate Division reversed, holding that the nursing home should be paid because its debt accrued before the Medicaid lien and the guardian was empowered to pay it pursuant to MHL 81.44(d) as it was not constrained by that section to pay only the administrative expenses of the guardianship. The dissent at the Appellate Division opined that if all the funds are turned over to the estate, the DSS debt would, by statute, be a preferred claim. The Court of Appeals reversed the Appellate Division, not based on the dissent's argument about preferred claim status but, rather, because the Legislative history of MHL 81.44 (d) is clear that the Legislature intended that a guardian lose all authority over an IPs assets at the time of death except to the extent of holding back only sufficient funds to pay the administrative expenses of the guardianship.

Matter of G. S., 17 Misc.3d 303; 841 N.Y.S. 2d 428 (Sup. Ct., New York Cty., 2007) (Hunter, J.)

Proceeding was brought by nursing home because AIP's son and attorney-in-fact had paid only a portion of the outstanding nursing home bill from the proceeds of the sale of the AIP's home. The nursing home's theory was that the power of attorney should be voided because the son was breaching his fiduciary duty. The Court held that he had established that he had used his mother's funds responsibly and soley for her benefit and stated "The purpose for which this guardianship proceeding was brought, to wit, for the nursing home to be paid for its care of [the AIP], was not the legislature's intended purpose when Article 81 of the MHL was enacted in 1993." The fees of the court evaluator and petitioner's counsel were assessed against the petitioner nursing home.

Matter of S.K., 13 Misc.3d 1045; 827 N.Y.S.2d 554 (Sup. Ct. Bronx Cty., 2006) (Hunter, J.)

AIP had functional limitations but also had sufficient and valid advanced directives in place as alternative resources. The nursing home where the AIP resided brought an Article 81 proceeding solely for the purpose of collecting it's bill because the AIP's wife, who held the POA, was not paying because she believed the Long Term Care policy should payout. The Court stated: **"The purpose for which this guardianship proceeding was brought, to wit, for the nursing home to be paid for its care of the [AIP] was not the Legislature's intended purpose when Article 81 of the MHL was enacted in 1993.**" The Court imposed all costs of the proceeding upon the petitioner.

J. Assisted Outpatient Treatment (Kendra's Law)

31175 LLC v. Shapiro, 2008 N.Y. Misc. LEXIS 7513; 241 NYLJ 11 (Sup. Ct. NY Cty.) (Schneider, J.)

In a nuisance holdover proceeding involving a mentally and physically disabled 71 year old man, the court dismissed the co-op's petition because it found that the evidence established that respondent had a diligent guardian who was attentive to his needs and circumstances and who has responded responsibly to the complaints and concerns of the coop. Respondent was also now subject to an Assisted Outpatient Treatment order and was under considerable supervision.

Matter of William C., 64 A.D.3d 277; 880 N.Y.S.2d 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.

K. Comparison to CPLR Art. 12 Infant Compromise

Alyssa H. v. Robinson's Ambulance & Oxygen Services, Inc., et al ., 34 Misc3d 1204A; 2011 N.Y. Misc. LEXIS 6385 (Sup, Ct. Nassau Cty. 2011) (Asarch, J.)

A motion was brought by the parents of a 19 year old young woman who had funds being held in an infant compromise CPLR Art 12 account resulting from a personal injury action. Under the terms of this account the bank could release the funds to the young woman when she turned 18. The parents sought to extend the period during which the funds would be inaccessible to their daughter to age 25 because of concerns about her lack of maturity and behavior they believed would lead her to squander the funds. The court denied the motion finding that it was an attempt to do an "end-run around Mental Hygiene Law Article 81" that had the effect of depriving the young woman of the protections of Article 81 and that absent a find under Art 81 that she lacked the capacity to mange her funds, she was free to "use her funds as desired -- foolishly, capriciously, impulsively or otherwise." The court reasoned: "To use the context of a CPLR. Article 12 motion to, in effect, have the bank serve as a de facto Guardian for the Property Management of an presumptively capable and competent adult is not what the New York State Legislature envisioned and is not something that this Court is inclined to do." The court denied the motion but left in effect for a period of 15 days, a TRO that had been previously issued upon the filing of the motion, which would have enabled the movants to file an Article 81 petition.

Article, Compromise of Infant's Cases, Thomas A. Moore and Matthew Gaier, 2/2/2010, NYLJ (col. 1)

Informative article comparing the relative advantages of using Art 81, Art SCPA 17-A and CPLR Art 12 Infant Compromise addressing the degree of flexibility in investing and control over the funds.

II. FUNCTIONAL LIMITATIONS/ALTERNATIVE RESOURCES/BEST INTERESTS OF IP

Matter of Rachel Z. (Jack Z. - Anna B.), 181 AD3d 805 (2nd Dept., 2020)

The Appellate Division affirmed the Supreme Court's revocation of the AIP's POA and HCP appointing her daughter as her agent, noting that the existing instruments were not sufficient and reliable resources to protect the AIP because they were executed at a time when she was incapacitated, and because the daughter was not acting in the AIP's best interests.

Matter of Robert F., Sup. Ct., Kings Cty. Unpublished Decision/Order (Index # 0033140/2019)(Nov. 2, 2019)(Anzalone, J.)(Copy available through MHLS 2nd Department, Special Litigation and Appeals Unit)

The court dismissed a petition seeking guardianship over a mentally ill man whose money was held in a trust, and who accepted supports at his residential placement, noting that mental illness, standing alone, is an insufficient basis upon which to base a determination of incapacity.

Matter of Cynthia W., _Misc.3d_, 2019 NYLJ LEXIS 4537 (Sup. Ct., NY Cty., 2019)

The petitioner, an attorney, commenced a proceeding seeking the appointment of a personal needs and property management guardian for his wealthy 86 year-old mother, Cynthia. Before commencement of this proceeding, Cynthia's husband filed a family offense proceeding against the petitioner. After a hearing in that proceeding, a Family Court referee found that the petitioner engaged in menacing and aggravated harassment, and issued an Order of Protection in favor of Cynthia and her husband, which remained in effect at the time of the guardianship hearing. The guardianship court now held that the petitioner failed to present evidence of Cynthia's incapacity, and that Cynthia B.'s advance directives adequately protected her and constituted the least restrictive form of intervention. The court noted that most of the petitioner's testimony was based on his disdain of Cynthia's husband and her husband's children, and highlighted his suspicious procedural delay tactics, and his improper conduct during the proceedings. The court denied the petition and dismissed the proceeding for lack of merit, determining that it was brought in bad faith. The court also directed the petitioner to pay the fees of the court-appointed attorney and court evaluator.

Matter of Linda H.A. (Belluci), _AD3d _; 2019 NY Slip Op 05656, 2 (2nd Dept., 2019)

The Appellate Division affirmed the trial court's determination of incapacity based on evidence that the AIP: (1) had expressed delusional beliefs; (2) had been evicted from her apartment due to abusive and disruptive behavior toward other tenants; (3) had, post-eviction, been living in a train station or in the boiler room of a building, among other places; (4) had a history of failing to comply with medical treatment; (5) was unable to articulate a plan for obtaining housing upon her discharge from the hospital; and (6) refused assistance with her housing issues.

Matter of Arline J. (James J.--Gerilynn F.), _AD3d _; 2019 NY Slip Op 05532 (2nd Dept., 2019)

A woman and her late husband established a trust of which they were co-trustees. After the death of her husband, the woman transferred real property that had been in the trust to herself. When the woman's stepson (the trust remainderman) petitioned for the appointment of a guardian for her, she agreed to become a Person in Need of Guardian ("PING"), with no finding of incapacity. Thereafter, the stepson petitioned for the woman's removal as trustee arguing, inter alia, that she was unfit to serve as she was a PING. The Appellate Division affirmed the trial court's denial of the stepson's removal petition, noting, inter alia, that the guardianship order had been entered upon the woman's consent based upon evidence that she had functional limitations that rendered her unable to manage certain aspects of her affairs; that the stepson consented to this order, and did not at that time seek her removal as trustee; and that the stepson failed to demonstrate that subsequent to the issuance of the guardianship order, the woman's condition had worsened and that she had become incapacitated.

Matter of Banks (Richard A.), _Misc.3d_, 2019 NY Slip Op 29121, 1 (Sup. Ct., NY Cty., 2019)

The mere use or even abuse of drugs or alcohol by itself does not generally constitute a functional limitation by clear and convincing evidence under Article 81. Similarly, proof of mental illness alone does not does not establish incapacity.

Matter of Judith T. (Rosalie D.T.), _Misc.3d_, 2017 N.Y. Misc LEXIS 5095*; 2017 NY Slip Op 27421 (Cty. Ct., Nassau Cty.,) (Knobel, A.C.C.J.)

The court denied the petition brought by the daughter of the AIP, a highly intelligent retired schoolteacher who desired to move to Manhattan and volunteer at the American Museum of Natural History. In so doing, the court noted that the petitioner failed to establish by clear and convincing evidence that the AIP did not adequately understand and appreciate the nature of the physical limitations caused by the stroke she had eight years earlier, and that she was unable to provide for her personal and financial needs. The court noted that the AIP understandably desires to have a productive, useful and happy life, and to not be held back her physical disabilities, or the fears and wishes of her daughters, or the husband that she was then seeking to divorce. The court ordered the petitioner to pay the AIP's counsel fees, but ordered that the petitioner and the AIP each pay one half of the court evaluator's fee.

Matter of Bonnie O., ____Misc3d____; 2016 N.Y. Misc. LEXIS 4462 (Sup. Ct. Dutchess Cty.) (Pagones, J.)

Upon finding that guardianship was not warranted because the AIP, a 90 year old woman, had made sufficient alternative arrangements to assist her in her areas of need, including issuing a Power of Attorney and Health Care Proxy to one of her two daughters, relying on friends, and hiring paid professionals and caregivers to help in her own home, the Court dismissed the guardianship petition and ordered Petitioner, the AIPs other daughter, to return certain property to the AIP. Upon additional findings that Petitioner had sufficient funds to absorb her own legal fees, and a further finding that while not "wholly frivolous" the petition had been motivated by "avarice, possible financial gain and distrust of her sister's ability to manage their mother's finances", the Court ordered petitioner to pay MHLS as the Court Evaluator and also, upon submission of an affirmation of services, the fees of an attorney who has been appointed initially to represent the AIP. The Court declined to order Petitioner to pay the fees of an attorney subsequently retained by the AIP in as much as MHL 81.10 does not provide for payment to privately retained counsel.

Matter of Carol L., ___AD3d___; 2016 N.Y. App. Div. LEXIS 1186

Order appointing guardian reversed on appeal because evidence presented by hospital failed to establish by clear and convincing evidence that the AIP was unable to provide for her personal and financial needs and that she failed to comprehend and the appreciate the consequences of such inability. (N.B. There are no facts provided in this decision)

Matter of Deborah P., 133 AD3d 602; 18 N.Y.S.3d 710 (2nd Dept 2015)

Upon a motion to terminate a guardianship, despite vague testimony by the guardian that the IP was delusional and unable to function, where the evidence showed that the IP managed her own checking account, paid bills relating to her apartment with her social security disability income, was taking steps to challenge a Medicaid lien, held a Master's degree and was consistently interviewing for a job, it was error to find that she was incapacitated and in need of a guardian.

Matter of Edward S., 130 AD3d 1043; 14 N.Y.S. 3d 159 (2nd Dept 2015)

Second Department reverses order appointing guardian holding that the record below did not support a finding of incapacity by clear and convincing evidence in light of testimony by petitioner's medical expert that the AIP did not evidence dementia and was capable of impressive functioning.

Matter of Mae R., 123AD3d 1034; 999 N.Y.S. 2d 166 (2nd Dept. 2014)

Appellate Division held that clear and convincing evidence of incapacity existed where a 91 year old woman, who relied heavily upon daily assistance from others, executed a Power of Attorney, Health Care Proxy and Will in favor of a neighbor who had procured the attorney who had drafted those documents. The court found significant that the AIP had stated to the Court Evaluator that she had

no recollection of executing such instruments and that she wished to leave her estate to her family. The Appellate Division also considered important evidence that the AIP had stated to some of the witnesses that the neighbor "makes me say things I don't mean and then I forget."

Matter of Deborah A.L., 124 AD3d 1402; 1 N.Y.S.3d 701 (4th Dept 2015)

The Appellate Division 4th Department remanded a petition for guardianship for further proceedings because the trial court had determined that the AIP was in need of a guardian without first considering whether the AIP had available resources that were adequate to protect her personal and property interests, specifically, a Power of Attorney and Health Care Proxy.

Matter of Claire M.P. a/k/a/ Clair Gabriel P., 32317/2013, NYLJ 1202666386688 at *1 (Sup. SUF.) (Leis, J.)

The AIP, an 81 year old woman with some short term memory deficits, lived with one of her three daughters who has held her power of attorney for approximately the last 10 years. The AIP was generous in gift giving to all of her 3 daughters and their children and fully participated in discussing these gifts with all her daughters, as well as with her attorney. The AIP was estranged from her two sons for many years and had specifically disinherited them in her Will. Petitioner, one of the estranged sons, sought guardianship on the theory that the daughter holding the POA was violating her fiduciary duty by allowing her mother to make these generous gifts. The court, in denying the petition found that the AIP, despite her short term memory deficits which might otherwise have justified appointment of a guardian absent advanced directives, was aware of the extent of her gift giving and making a deliberate choice as to how to spend her money and that the daughter was specifically allowing her to have this autonomy. In strong language the court also note that a guardianship proceeding can be costly, embarrassing and upsetting and that the AIP, having executed advanced directives, had a legitimate expectation that they would be honored.

Matter of E.J.F., 41 Misc3d 1229(A); 983 N.Y.S.2d 202 (Sup. Ct., Dutchess Cty. 2013) (Pagones, J.)

Man who suffered with daily seizures and short and long term memory deficits objected to having his sister appointed as his guardian. The court found that although he is capable of taking care of his basic activities of daily living, he relied upon his sister to prepare his meals, shop for him, do his laundry, transport him, take him to medical appointments, manage his 13-14 daily medications three times a day. Moreover, his employer would not turnover his disability benefits to him as they deemed him incapable of signing the necessary paperwork. The court found there was clear and convincing evidence that he was unable to provide for his personal and property needs and was in need of a guardian of both person and property.

Matter of James D., 39 Misc. 3d 634; 960 N.Y.S.2d 627(Sup. Ct. Suff. Cty. 2013) (Leis, J.)

Only after a court has determined that a guardianship is necessary may the court permit an AIP to

consent to guardianship or make a finding of incapacity.

Matter of Theresa I. (Antonio I.), Sup Ct, Westchester Cty, Unpublished Decision and Order, Index # 14237/11 (Jan. 5, 2012) (Di Bella, J.)

Court dismisses proceedings upon finding the petitioner failed to prove by clear and convincing evidence that her 78 year old father was unable to provide for the management of his property. In so doing, the court noted that although the AIP may be "older, slower at understanding things and stubborn," "he continues to do what he has always done, or makes arrangements when he is unable to do so." The Court added that it appears that the petitioner's concerns derive more from her disagreement with her father's choices regarding the management of his rental properties rather than from any inability on his part to make choices.

Matter of Ella C., 34 Misc3d 1203A; 943 N.Y.S. 2d 791(Sup. Ct,. Kings Cty. 2011) (Barros, J.)

The AIP, an accomplished and well educated 72 year old woman who had raised 4 children, whose recent behavior represented a marked departure from her general predisposition prior to an accident that had resulted in several mini strokes, was found to be in need of a guardian of the person and property based upon the following findings: (1) Her income producing real estate holdings had fallen into serious utility and tax arrears, were uninsured and in a state of disrepair and were not producing income. Stench was emanating from the apartments she was allowing one of her daughters to use as a "cat sanctuary" and her own apartment was cluttered with objects and debris. Repairs that had been started had been inexplicably abandoned. She had no comprehensive understanding of her assets, the extent of her estate, and most significantly no insight into her inability to manage her financial affairs. She lacked appreciation of the negative consequences of her susceptibility, to wit-losing all the assets she and her husband worked a lifetime to amass; (2) she was extremely susceptible to undue influence and had elevated various people into positions of trust whom she allowed to abuse her trust and steal her assets and, in haste and without the benefit of counsel, she issued decision-making powers to a daughter whose own judgement was questionable and who turned her mother against her other siblings and (3) she disinherited and filed family offense petitions against her previously trusted children whom she summarily excluded from her life. The court noted that had the AIP's property interests been simpler, a guardian might never have been needed and a less restrictive form of intervention might have sufficed but that her situation was complicated by holding two multiple dwellings in New York City, navigating the maintenance of these buildings, structuring payment schedules for utility and tax arrears, credit accounts, a pension, and proceeds from a substantial wrongful death action for her husband.

Matter of Anthony Rose, 26 Misc. 3d 1213A; 907 N.Y.S. 2d 104 (Sup.Ct. Dutchess Cty., 2010) (Pagones, J.)

Upon motion by counsel for AIP, petition was dismissed under CPLR 3211(a) (7) because, although the petition made out a *prima facia* case that the AIP was incapacitated, on its face the petition also established that he had a valid Power of Attorney and Health Care Proxy that had not been revoked

and the agents he had appointed thereunder possessed sufficient authority to meet his needs.

Application of Hodges, 1/14/2010, NYLJ 35 (col.4) (Surr. Ct. NY Cty)(Surr Webber)

Application under Article 81 for guardianship was resolved by creation of SNT to receive and mange an inheritance for the AIPS brother in lieu of guardianship. Although the Surrogate did not explain its decision in terms of least restrictive alternative or alternative resources, it is a good example of a creative solution that conforms to both concepts.

Matter of Moulinos, 2009 N.Y. Misc. LEXIS 2412; 241 N.Y.L.J. 60 (Sup. Ct. Queens Cty.) (Thomas, J.)

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 m seeing her adult children.

Matter of Kurt T., 64 A.D.3d 819; 881 N.Y.S.2d 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.

Matter of Kufeld, 23 Misc.3d 1131A; 889 N.Y.S. 2d 882(Sup. Ct.. Bronx Cty., 2009) (Roman, J.)

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 of that the agent appointed by those instruments had abused her authority.

Matter of May Far C., 61 A.D.3d 680; 877 N.Y.S.2d 367 (2nd Dept., 2009)

Order and Judgement of the trial court appointing a temporary guardian was reversed and remitted upon a finding that the trial court had improvidently exercised its discretion in appointing a guardian. The court held that the evidence adduced at the hearing had established that the AIP had effectuated a plan for the management of her affairs and possessed sufficient resources to protect her well being, thus obviating the need for a guardian. The Court further found that although the evidence demonstrated that the AIP was incapacitated at the time of the hearing, there was no evidence that she had been incapacitated when she granted her daughter Power of Attorney and further there was

no evidence that the chosen Attorney-in-Fact had engaged in any impropriety with respect to the care of the AIP or her assets.

Matter of Eugenia M., 20 Misc.3d 1110A; 867 N.Y.S.2d 373 (Sup. Ct. Kings Cty. 2008) (Barros, J.)

AIP was a 95 year old woman who lived alone. She performed her own shopping, cooking, banking, and bill paying and used public transportation to come to the courthouse on her own. She was slightly hard of hearing, had an unsteady gate which she compensated for by leaning on a shopping cart, her hygiene was described as adequate and she took sponge baths instead of tub-baths or showers because her tub was in need of repairs. When she refused to allow the landlord into her apartment to make repairs to her floorboards, bathroom ceiling and tub that she did not want to be, in her estimation, overcharged for, the landlord reported her to APS which determined that she was in need of protective services. The court found that the only functional limitation established by the petitioner at the hearing was that the AIP had an unsteady gait and that ***rather than establishing that the AIP lacked appreciation of the nature and consequences of her limitations petitioner had actually established that the AIP had accommodated to her limitations***. The court declined to find the required risk in the petitioner's "speculation" about "hypothetical future .... events " including that the AIP might trip on the floor boards that she has successfully been navigating for over a year or that she might be the subject of an eviction proceeding and fall through the cracks of the system, due to potential negligence of the petitioner.

Matter of Khazaneh, 15 Misc. 3d 515; 834 N.Y.S. 2d 616 (Surr. Ct., NY Cty., 2006) (Surr. Glen)

In this probate proceeding, the Surrogate was called upon to examine whether a testator lacked testamentary capacity because he did not know the exact value of his holdings. The Surrogate looked to Article 81 and focused on its emphasis on "task specific functional ability," and found that the testator, who clearly had the cognitive ability, possessed sufficient capacity to make his Will. In so finding, the Surrogate made the following insightful comment:
" Throughout most of our legal history, judges and litigants have utilized unitary concepts like 'competent' or 'incompetent,' 'sane' or 'insane.' Notwithstanding this apparently simple framework, the genius of the common law presaged a more "functional" notion of capacity as legal standards or tests for capacity evolved differently in different areas of law. (fn omitted) It is only relatively recently, however, that the law has explicitly embraced the more nuanced view of modern psychology and psychiatry which recognizes that an individual may be perfectly "competent" in one area, and "incompetent" in another. Our legislature adopted this functional approach to determining capacity when it enacted Article 81 of the Mental Hygiene Law in the early 1990's."

Matter of E.H., 13 Misc.3d 1233A; 831 N.Y.S.2d 352 (Sup.Ct., Bronx Cty., 2006) (Hunter, J.)

IP was found to be in need of personal and property guardian where she: could perform most of her activities of daily living but she needs prompting in order to do so, such as bathing daily; she often

refused to eat and her meals had to be brought to her hospital room because she refused to eat in the dining hall; she was considered belligerent and angry and had been assaultive with the staff at the hospital; she wanted to return to her apartment in the community, but refused any assistance including devices to aide her with her hearing impairment; the hospital has made efforts to provide care for her if she returns to her apartment in the community, such as Assisted Outpatient Treatment, intensive care management, and APS, but all had declined to work with her because she was non-compliant with her medications and because there was a lack of support in the community; and, because she had been placed on financial management through APS after she faced eviction for failure to pay her rent.

Matter of Williams, 12 Misc.3d 1191A; 824 N.Y.S.2d 770 (Sup. Ct., Kings Cty., 2006)(Belen, J.)

The court found clear and convincing evidence that appointment of a guardian was needed to protect a "strong willed and fiercely independent [90 year old] woman with sharp intelligence and great charm" whose physical limitations rendered her without "the strength, vigor, and physical capacity to handle her assets, her apartment and herself" due to her chronic pulmonary disease, hyperthyroidism, difficulty seeing and making herself understood and inability to walk more than short distances, even with the aid of a walker." She had been found by a psychiatrist to be alert and oriented and without signs of psychiatric illness or dementia and listened attentively and testified cogently during the hearing. She had pieced together a functioning household for herself with an informal network of people from her church and her family whose assistance allowed her to live in her own apartment but they lacked the legal standing and the close personal bonds to protect her from certain opportunistic individuals who had taken advantage of her. Although "her judgment ha[d] been questionable in some of her past dealings and her recent history [was] rife with incidents where her good and trusting nature had been abused", the court declined to make a finding of mental incapacity but rather found that due to the ravages of age and physical incapacity she had become reliant upon the good will and aid of others to perform the functions of everyday life, "had become extremely vulnerable to abuse and predatory behavior" and thus was at risk and did not fully comprehend the degree and consequences of such risk.

Matter of A.C., 12 Misc. 3d 1190A; 824 N.Y.S.2d 767 (Sup. Ct., Bronx Cty., 2006) (Hunter, J.)

Where 87 years old AIP had significant physical limitations and "mild to moderate cognitive impairment" and required a great deal of assistance, but was receiving that assistance from a home health aide, had appointed her niece as heath care agent, had drafted a Last Will and Testament and had not yet given a Power of Attorney to her but still had the capacity and willingness to do so and was aware of the extent of her assets, the Court denied the guardianship application finding that the AIP had sufficient alternative resources.

Matter of Ardelia R., 28 A.D.3d 485; 812 N.Y.S.2d 140 (2nd Dept., 2006)

AIP was properly found to be incapacitated. She was 82-years old, found in her home by APS

without running water, food, electricity, or heat, malodorous and frail. She was unable to cook, and was known to wander away from her home. She had forgotten where she banked and did not know her sources of income. Although she owned a home and possessed approximately $115,000 in savings, she was delinquent on her utility bills. Based on these facts, the hearing record established by clear and convincing evidence that AIP lacked the understanding or appreciation of the nature and consequences of her functional limitations. Thus, the Supreme Court's finding that she was an incapacitated person requiring a guardian was proper notwithstanding the lack of medical testimony regarding her medical condition.

In the Matter of Joseph S., 25 A.D.3d 804; 808 N.Y.S.2d 426 (2nd Dept. 2006)

Although AIP had not been diagnosed as suffering from any particular psychiatric diagnosis and was sometimes alert and lucid, the Appellate Division upheld a finding of incapacity because he was "at best only somewhat functional and coherent". Court recites that AIP was of advanced age, extremely hard of hearing, suffering from short term memory loss and severe arthritis, he has been hospitalized several times in two years, and he could no longer care for himself alone or his property as relevant findings. Court would not consider the AIP's home health aide, whom he married, as a viable alternative resource, citing as relevant that she was 43 years his junior, that prior to the marriage she had isolated him from his family and friends, and that the trail courts annulment of the marriage was being upheld.

In the Matter of The Application of Joseph Meisels (Grand Rabbi Moses Teitelbaum); 10 Misc.3d 659; 807 N.Y.S. 2d 268 (Sup. Ct. Kings Cty., 2005)(Leventhal, J.)

An Article 81 petition was brought for guardianship over the Grand Rabbi of the Satmar sect. He had previously appointed one of his sons and his longtime personal secretary as HCP and POA. The petition alleged that the Rabbi was disoriented, in need of round the clock assistance and was in poor health but there was no allegation that he was not receiving the care he needed. The court allowed the petitioner to submit additional affirmations and considered them as if the pleading had been amended to include them. In fact, the Court visited the Rabbi at home and noted that he has a butler who sleeps in his room, an intercom system linked to his room, a personal secretary, a personal paramedic, a chauffeur and cook and other staff to meet his needs. The judge spoke to the Rabbi who told him that he was satisfied with his care. Since there were no allegations that he was at risk due to his limitations, and since the facts clearly established that he was in fact not at risk and that all his need were met, the court concluded that there was no showing of a need to commence a guardianship proceeding and dismissed the petition.

Matter of J.G., NYLJ, August 19, 2005 (Sup. Ct., Bronx Cty.) (Hunter, J.)

Where there was no testimony that the AIP was incapacitated or in anyway lacked functional skills, but AIP consented to the guardianship because he wanted assistance with his upcoming eviction and his finances, Court, citing the deprivation of liberty associated with a guardianship directed the petitioner to instead contact Adult Protective Services to assist him. See, also, Article - *"Helping the Elderly Incapacitated Client,"* NYLJ, August 19, 2005, p.2., Vol 234.

Matter of Margaret K., 17 A.D.3d 466; 729 N.Y.S. 2d 350 (2nd Dept., 2005)

Appellate Division uphold order granting guardianship. The petitioner established by clear and convincing evidence that the appellant, Margaret K., is likely to suffer harm because she is unable to provide for her personal needs and property management, or to adequately understand and appreciate the nature and consequences of such inability. Accordingly, the Supreme Court properly appointed a guardian for the appellant's personal needs and property management.

Matter of Shirley I. Nimon, 15 A.D.3d 978; 789 N.Y.S.2d 596 (4th Dept., 2005)

During original guardianship proceeding, the trial court appointed both daughters as guardians and directed that the IP live in nursing home near each daughter for half the year. The Appellate Court here overrules trial court's decision, labeling it as an improvident exercise of but not an abuse of discretion, finding that for an Alzheimer's patient such as this IP, relocating every 6 months is disorienting and not in the IP's best interests.

Matter of Dennis Diaz, NYLJ, 7/6/04, p. 21 (Sup. Ct., Queens Cty.)(Taylor, J.)

After an Article 81 hearing, a disabled man was found to be in need of a guardian of the person and property. He was found, among other things, to have the functional level of approximately a 5th grader and specifically to be in need of assistance in handling his own finances. Before a guardian could be bonded and qualified, he retained counsel and entered into a contract of sale to purchase a tavern with his own funds. Under pre-Art 81 law, contracts entered into by persons adjudicated incompetent and who have committees or conservators are presumptively void. Contracts with persons who do not have committees or conservators but are of unsound mind and unable to appreciate the consequences of their own actions were considered voidable. Article 81 does not result in a finding of incompetence but rather only findings of specific functional limitations and guardianship powers tailored to be the least restrictive form of intervention. This AIP was found to lack the ability to handle his own finances so here, the Court does void and revoke the contract.

Matter of Rosa B., 1 A.D.3d 355;767 N.Y.S. 2d 33 (2nd Dept. 2003)

The Appellate Division re-emphasized that the rules of evidence apply in an Article 81 proceedings but that a court, for good cause, may waive the rules in an uncontested proceeding. Specifically, the physician patient privilege applies and the AIP does not waive it by contesting the application for guardianship if he does not specifically put his *medical condition* at issue. In his case, even though it was a jury trial, the court found that the violation of the privilege was harmless error since there was sufficient independent evidence of functional incapacity based upon non-medical evidence.

In the Matter of Joseph A. (Anonymous) a/k/a Joseph B.A., 304 A.D.2d 660, 757 N.Y.S.2d 481 (2nd Dept. 2003)

Appellate Division reverses order on the law without costs, denied petition and dismisses

proceedings upon finding that "petitioner failed to prove by clear and convincing evidence that the appellant was unable to provide for the management of his property and did not appreciate the consequences of such inability." (no facts discussed in opinion.)

Matter of David C., 742 N.Y.S.2d 336; 294 A.D.2d 433 (2nd Dept., 2002)

Appellate Division reverses order appointing guardian, holding that "a precarious housing situation and meager financial resources do not, without more, constitute proof of incapacity such that a guardian is warranted under Mental Hygiene Law §81.02."

Matter of Hoffman (Zeller), 288 A.D.2d 892, 732 N.Y.S. 2d 394 (4th Dept., 2001)

Appellate Division reverses and remits for hearing where Supreme Court did not hold a hearing and therefore the Appellate Division had no record upon which to determine whether there was clear and convincing evidence of incapacity.

Matter of Lauro, NYLJ, 2001 NY Slip Op. 40109U; 2001 NY Misc. LEXIS 491 (Sup. Ct., Onondaga Cty. 2001) (Wells, J)

Where AIP was eccentric, but happy, living in a habitable but cluttered apartment, had no debts or other financial problems, and was visited by a social worker with whom she had a pleasant relationship, there was no clear and convincing evidence that AIP was functionally impaired within the meaning of Article 81.

In the Matter of the Commissioner of Social Services, Orange County, Daisey R. (Anonymous), 275 A.D.2d 713, 713 N.Y.S.2d 204 (2nd Dept., 2000)

Appellant, and others, challenged an order and judgment granting petition of county social services commissioner for the appointment of a guardian. The appellant was a woman with mild retardation who suffered from respiratory insufficiency, congestive heart failure, and morbid obesity. The trial court found that respondent had established, by clear and convincing evidence, that the appellant was incapacitated within the meaning of Article 81. Clear and convincing evidence established that appellant was not able to understand and appreciate the nature and consequences of her inabilities, and that she was likely to suffer harm due to her imitations and her inability to appreciate the consequences. The Appellate Division affirmed.

Matter of Grinker (Rose), 77 N.Y.2d 703; 570 N.Y.S.2d 448 (1991)(*superceded by statute*)

Mental illness, without more, held insufficient basis to appoint conservator with power to place AIP in nursing home. To deny such personal liberty, there must also be clear and convincing evidence that the illness has rendered person substantially impaired in ability to function and conduct own affairs. No substantial impairment of ability to function found where mentally ill artist was aware of her financial problems and had applied for and was awaiting overdue public assistance grant but

refused to sell her artwork to raise money to pay her bills.

Matter of Harney (Seth), 248 A.D.2d 182; 670 N.Y.S.2d 17 (1st Dept., 1998); *app. dism'ssd,* 93 N.Y.2d 845; 688 N.Y.S.2d 490 (1999)

Guardianship properly granted where AIP was unable to attend to daily needs alone and was uncooperative and abusive to home care workers.

In re Karen P., 254 A.D.2d 530; 678 N.Y.S.2d 802 (3rd Dept., 1998)

AIP with progressively deteriorating Huntington's disease who: (1) frequently dropped lighted cigarettes on furniture and rugs throughout her apartment, (2) was unable or unwilling to clean home, (3) has caused two kitchen fires, (4) had exhausted her bank accounts, (5) was about to lose her apartment, and (6) had only $100 in weekly income from a divorce settlement, refused to apply for any type of government benefits, insisting that she was seeking, and would obtain, gainful employment. Court found that respondent's inability to recognize extent and nature of her limitations and inability to comprehend scope and urgency of her situation or to realistically evaluate and address difficulties she faces rendered her functionally limited and in need of guardian.

Matter of Hammons (Ehmke), 164 Misc.2d 609; 625 N.Y.S.2d 408 (Sup. Ct., Queens Cty., 1995); *aff'd* 237 A.D.2d 439 (2nd Dept., 1997)

Family of three intelligent, mentally competent adults (two frail parents and adult daughter) unable to function in that they were living in unsafe and unsanitary conditions including: filth, fly infestation, without funds for heat except for space heater deemed a fire hazard, with numerous structural repairs needed, with thousands of dollars of unpaid bills and home at risk of foreclosure, but refused assistance-deemed functionally limited and in need of guardian.

Erlich v. Oxenhorn (Matter of Lula XX), 224 A.D.2d 742; 637 N.Y.S.2d 234 (3rd Dept., 1996), *app. dismissed*, 88 N.Y.2d 842; 644 N.Y.S.2d 683 (1996)

Totally dependant, medically frail, obese woman, unable to turn herself over without 2 aides or breathe without a ventilator and tracheotomy, without family or responsible friend and for whom no home health agency would continue to provide services was at risk because she refused to consider nursing home or other alternative-held functionally impaired and in need of guardian.

Matter of Rimler (Richman), 164 Misc.2d 403, 625 N.Y.S.2d 443 aff'd, 224 A.D.2d 625; 639 N.Y.S 390 (2nd Dept., 1996), *lv. to app. denied*, 88 N.Y.2d 805; 646 N.Y.S.2d 985 (1996)

Guardianship granted. Bedridden 37-year old morbidly obese woman was, among other things, unable to walk without assistance and required help with toileting, bathing, and getting in and out of bed. Numerous home care agencies had refused to provide her with necessary care due to her repeated verbal abuse, her refusal to allow such care, and deplorable living conditions in her

apartment, such as vermin and roach infestation. Court found that appellant needed a guardian of the person because she was likely to suffer harm because she was incapable of adequately understanding and appreciating nature and consequences of her disabilities, as reflected in her self-defeating behaviors. With respect to ability to manage property, court finds her history of living in deplorable conditions, failure to pay for services rendered, and failure to pay rent, despite her continued receipt of social security checks which remained uncashed to be evidence of her need for a property guardian.

Matter of Marguerite VV, 226 A.D.2d 786; 640 N.Y.S2d 311 (3rd Dept., 1996)

Guardianship with power to place AIP in nursing home granted. Bedridden AIP who required 24-hour-a-day supervision, was unable to ambulate, transfer self from bed to chair, or dress self as a result of physical problems, and was incontinent and unable to keep herself clean, continually refused medical tests and other forms of treatment. Necessary services to enable respondent to live at home could not be provided because of AIP's abusive behavior to home care workers and respondent's refusal to retain a physician. Placement with respondent's family and friend was not possible given lack of meaningful relationship between respondent and her family and frailty of her only friend who could not adequately care for her.

Matter of Maher, 207 A.D.2d 133; 621 N.Y.S.2d 617 (2nd Dept., 1994)

No functional limitation found where AIP, who was himself an attorney, had become aphasic and partially paralyzed as result of a stroke. Court finds clear and convincing evidence establishing that AIP suffered from certain functional limitations in speaking and writing, but that he was not likely to suffer harm because he was capable of adequately understanding and appreciating nature and consequences of his disabilities as evidenced by his granting a power-of-attorney to colleague, and by his adding his wife as a signatory on certain of his bank accounts.

Matter of Lambrigger, NYLJ, 5/31/94, p. 37, col. 1 (Sup. Ct., Suffolk Cty.)(Luciano, J.)

Court denies petition for guardianship of AIP, who had suffered massive stroke that left her with severe physical disabilities, holding that mental and physical disabilities are not co-extensive, noting that AIP has not lost any cognitive abilities and is fully competent to make her own decisions, including with matters such as property management. However, court did appoint special guardian to help the AIP "manifest and give effect to her own decisions." The special guardian was granted no substituted judgment power and was not authorized to make any decision without consulting with and explaining the transaction to AIP, who was to lose no rights to conduct her own affairs as a result of the order.

In Re: DOE, 181 Misc.2d 787; 696 N.Y.S.2d 384 (Sup. Ct., Nassau Cty., 1999)

Irresponsible and immature 18-year-old with short attention span and rebellious attitude, who abused drugs and alcohol, and who had unrealistic sense of entitlement found not functionally limited within

meaning of Art. 81. Court holds Art. 81 is not a method for parents to extend their control over rebellious children, nor is it to be used as estate planning tool by their parents seeking to divest themselves of assets to avoid estate taxes.

Matter of Ruth B. Ginsberg, 200 A.D.2d 571; 606 N.Y.S.2d 302 (2nd Dept., 1994)

Conservator proper where elderly woman was mentally weak and susceptible to influence of others, particularly her grandsons to whom she has given over $700,000 for "medical treatment." Her execution of an irrevocable trust did not negate need for conservator because trust does not provide same safeguards as conservator, such as accounting requirement.

Matter of Hammons (Perreau), NYLJ, 7/7/95, p. 29, col. 3 (Sup. Ct., NY Cty.)(Goodman, J.)

Guardianship denied where 90-year-old AIP who was otherwise able to meet needs for food and shelter agreed to accept help from city to care for his eyes and keep his apartment clean. Court finds that necessary services could be provided by PSA whether or not there was a guardian.

Matter of Koch, NYLJ, 11/29/99, p. 25, col. 3 (Sup. Ct., Queens Cty.)(Kassoff, J)

Hospital petitioned for guardian of diabetic, leg amputee, who had been transferred from nursing home because of infection. When he no longer required acute care, his insurer refused to pay for any more care. Due to his age he was not eligible for Medicaid. He refused to leave hospital even after it offered to help him make arrangements. Dismissing petition, court said patient was stubborn, difficult and a management problem for the hospital, but not incapacitated and that Art. 81 was not appropriate forum for hospital to redress its predicament.

Matter of Edith Leiva (Quarter), 170 Misc.2d 361; 650 N.Y.S.2d 949 (Sup. Ct., NY Cty., 1996)

Guardianship denied for 20-year-old AIP who resided with his parents, where petitioner grandmother alleged emotional and physical abuse by parents and parents refusal to allow AIP to visit with her, constant criticism of him by alcoholic father, household was in constant turmoil, the AIP's emotional and educational upbringing had been neglected and delayed and he was entirely dependent on his parents. Court states that AIP is not likely to suffer harm in that he is able to provide for personal needs and property management, is able to work, and fact that he lives with his parents is irrelevant.

Matter of Peterson, NYLJ, 1/15/97, p. 26, col. 4 (Sup. Ct., NY Cty., 1996) (Gans, J.)

Court denies petition for guardianship over the person/property of 75-year-old AIP subsequent to eviction for non-payment of rent, first from city apartment and then from emergency housing in welfare hotel. Despite having mild memory deficits, delusions, and paranoia, he was not incapacitated as eviction for non-payment of rent by itself is not evidence of incapacity, particularly given the hotel's high daily cost and the fact that AIP described it "as a hellhole, inhabited by

prostitutes and junkies." AIP's housing problems indicate lack of affordable decent senior housing, not incapacity or mental illness on his part. AIP appreciates consequences of his disability by working with VA, social services, and friends to help manage his property and provide for his personal needs.

Matter of Seidner, NYLJ, 10/8/97, p.25, col. 1 (Sup. Ct., Nassau Cty.) (Rossetti, J.)

Court denies petition, filed by wife during bitter divorce action seeking appointment of guardian, where 62-year-old respondent husband was presently living in his car or with his sister because he could not afford other housing after Family Court ordered all of his income turned over to his wife for maintenance of marital residence. Having found that AIP "continues to make conscious and rational decisions as to the manner in which he chooses (or, perhaps, is constrained) to live," the court also commented that "Article 81 is not and was never intended to be a vehicle for squabbling spouses...," and "... if [the AIP's] situation warranted a guardian, then every homeless person would require such an appointment."

Matter of Donald Loury (Loury), 1993 N.Y. Misc. LEXIS 633; NYLJ, 9/23/93, p. 26, col. 2 (Surr. Ct., Kings Cty. 1993)(Surr. Leone)

AIP was found locked in apartment into which he refused entry, requiring family to drill locks. He was found dressed in dirty clothes, unshaven, holding a bible surrounded by trash bags, debris, numerous containers of a liquid appearing to be urine. There was a strong smell of feces present. There was no running water in building. AIP owned several investment properties which were all in disrepair and in default of real estate taxes. Court concludes that AIP's present functional level and functional limitations impair his ability to provide for his personal needs and to manage his property; that he cannot adequately understand and appreciate the nature and consequences of such inability; and that he is likely to suffer harm because of such inability and lack of understanding.

Matter of Sobol (Tait), NYLJ, 5/31/94 31, 1994, p. 28, col. 1 (Sup. Ct., NY Cty., 1994)

Mentally ill homeless woman who had arranged for manager of single-room-occupancy hotel residence to negotiate her Social Security checks and pay rent from proceeds found not to be incapacitated within meaning of Art 81.

Matter of Flowers, 197 A.D.2d 515; 602 N.Y.S.2d 194 (2nd Dept., 1993)

Court affirmed decision in an Article 77 proceeding appointing a conservator for a 69-year-old man. Held that clear and convincing evidence existed of substantial impairment of AIP's ability to manage his property because he failed to pay his real estate taxes for many years and would not acknowledge impending threat of foreclosure, as well as refusing to take any steps or accept help to stop foreclosure and help him keep his property.

III. EFFECT OF GUARDIANSHIP ON RIGHTS OF AIP

A. Transfer to Nursing Home/Change of Abode

Matter of Beatrice R.H., 140 AD3d 875 . LEXIS (2nd Dept. 2016)

Appeal by IP's son from an order denying his motion to direct the independent guardian to change his mother's place of abode from an SNF in NYC where she was then residing to her former residence on Long Island, or in the alternative, to an SNF on Long Island. The IP's daughter opposed that motion. The Appellate Division upheld the trial court's denial of the motion on the following grounds: (a) the guardian represented that given the extreme discord between the IP's adult children, there would be safety and care issues adverse to the IP's best interests to try to maintain her in the community in her former home which is now owned by her petitioner son, (b) that the structure of an SNF has helped to shield her from the acrimony between her children; and, (c) that given her dementia, a change of environment to an SNF on Long Island would likely destabilize her and cause her further deterioration.

Matter of Ethyl P.B., 45 Misc.3d 1227(A); 2012 N.Y. Misc. LEXIS 6669 (Sup. Ct., Broome Cty. 2012) (Guy, ASCJ)

The AIP, a 90 year old woman suffering with progressive, short term memory loss, who acknowledged her need for assistance, expressed a preference for a community living arrangement with professional and home care assistance near her son that she had previously enjoyed as compared to a memory unit in an assisted living facility near her daughter where her daughter had placed her and she was then living. The court, noting her undisputed functional limitations and need for a guardian, and acknowledging the loving and caring relationship between the AIP and both of her adult children, ultimately appointed her son. Significantly, the court noted that although neither living situation was "risk free", the community living option did present greater risk to the AIP. The court, in a carefully nuanced decision, found that despite the somewhat greater risk, the AIP's health and safety would be adequately addressed by the community living option, that this was her "clear and consistently stated preference", that her son's plan did not expose the AIP to "undue or uncomprehending risk" and that therefore, on balance, appointment of her son would be more consistent with the objectives of Article 81. Finally, the Court directed that the daughter have access to all medical information and that her brother communicate with her regarding the AIP's care.

Matter of Gloria N., 55 A.D.3d 309; 865 N.Y.S.2d 49 (1st Dept. 2008)

Placement in a nursing home is not the least restrictive alternative form of intervention. Where the IP was not given notice or an opportunity to be heard on the issue, the court's *sua sponte* order granting the guardian that power deprived respondent of her right to due process and the order granting such power was reversed.

Matter of Grinker (Rose), 77 N.Y.2d 703; 570 N.Y.S.2d 448 (1991)(superceded by statute)

Mental illness without more held insufficient basis to appoint conservator with power to place person in nursing home. To deny such personal liberty, there must also be clear and convincing evidence that the illness has rendered person substantially impaired in ability to function and conduct own affairs.

Matter of Application of St. Luke's Hospital Center (Marie H.),159 Misc.2d 932; 607 N.Y.S.2d 574 (Sup. Ct., NY Cty., 1993), *modified and remanded*, 215 A.D2.d 337; 627 N.Y.S.2d 357 (1st Dept., 1996), *aff'd*, 226 A.D.2d 106; 640 N.Y.S.2d 73, *aff'd*, 89 N.Y.2d 889, 653 N.Y.S.2d 257 (1996)

Valuable discussion of impact upon AIP's liberty where guardian has power to transfer AIP to nursing home or to make major medical or dental treatment decisions without AIP's consent.

Erlich v. Oxenhorn (Matter of Lula XX), 224 A.D.2d 742; 637 N.Y.S.2d 234 (3rd Dept., 1996), *app. dismissed*, 88 N.Y.2d 842; 644 N.Y.S.2d 683 (1996)

Guardian granted power to place AIP in nursing home where AIP was totally dependant, medically frail, obese woman, unable to turn herself over without 2 aides or breathe without a ventilator and tracheotomy, without family or responsible friend and for whom no home health agency would continue to provide services.

Matter of Gambuti (Bowser), 242 A.D.2d 431; 662 N.Y.S.2d 757 (1st Dept., 1997)

Art. 81 does not permit special guardian to involuntarily commit AIP to nursing home. Protective arrangements and transactions as contemplated by Art. 81 are far less intrusive and therefore mechanism for appointment of special guardian under section 81.16 (b) inadequately addresses liberty concerns of AIPs in context of involuntary commitment. Appointment of full guardian is required for nursing home placement.

Contrast

Matter of Grace PP, 245 A.D.2d 824; 666 N.Y.S.2d 793 (3rd Dept., 1997), *lv. to app.denied,* 92 N.Y.2d 807; 678 N.Y.S.2d 593 (1998)

Temporary guardian was appointed, with specific limited powers of placement of the AIP in a nursing home.

Matter of Jospe (Grala), NYLJ, 1/30/95, p. 30, col. 2 (Sup. Ct., Suffolk Cty.)(Luciano,J.)

Court granted hospital's petition seeking appointment of guardian for elderly female AIP, who suffered from dementia, memory loss, and cardiac problems. Court found that she required a guardian because her "desire to return home without apparent regard for her inability to care for herself demonstrates her lack of understanding and appreciation of her functional limitations... and she will surely suffer harm." Even if home health aides could be arranged, she could not safely return home because she had no close family or other responsible person to serve as a back-up. Noting that guardian could not be back-up, guardian was given the power to place her in a nursing home but also given the responsibility to explore any alternative arrangements acceptable to social services that would permit the AIP to safely reside in her home.

Matter of Hammons (Ehmke), 164 Misc.2d 609; 625 N.Y.S2.d 408 (Sup. Ct., Queens Cty., 1995); *aff'd* 237 A.D.2d 439 (2nd Dept., 1997)

Court denies guardian authority to place AIPs in nursing home and instead orders guardian to secure much needed assistance to enable AIPs to continue to live in own home.

B. Consent to psychiatric hospitalization and treatment

Matter of Robert F., Sup. Ct., Kings Cty. Unpublished Decision/Order(Index # 0033140/2019)(Nov. 2, 2019)(Anzalone, J.)(Copy available through MHLS 2nd Department, Special Litigation and Appeals Unit)

The court dismissed the petition, noting that to the extent that the petitioner was seeking a guardianship in order to change the AIP's psychotropic medication, this was impermissible insofar as an Article 81 guardian may not be authorized to administer psychotropic medication over his/her ward's objection.

Matter of Gloria N., 55 A.D. 3d 309; 865 N.YS.2d 49 (1st Dept., 2008)

Order was reversed where the guardian was empowered to cause the IP to be evaluated for admission to a mental hygiene facility.

In the Matter of Rhodanna C.B., 36 A.D.3d 106; 823 N.Y.S.2d 497 (2nd Dept 2006)

Appointment of a guardian with the authority to consent in perpetuity to the administration of psychotropic medication to the ward, over the ward's objection and without any further judicial review or approval, is inconsistent with the due process requirements of Rivers v. Katz,(67 N.Y.2d 485).

Matter of Hill, (unpublished), Sup. Ct. Orange County (DeRosa, J) Index# 2004-3317

Court denied application for guardianship where the primary purpose of the guardianship was to compel involuntary psychiatric hospitalization and supervised living for a woman who was a mentally ill drug addict who engaged in illegal activity. The Court found that the AIP had only SSI for which the Dept of Social Services was already Representative Payee, the criminal and correctional system would deal with her criminal behavior and the AIP's psychiatric treatment needs were governed by the provisions of the Mental Hygiene Law. The Court stated: To allow such relief, a guardian would be given the power to determine a mentally ill substance abusers place of residence without adhering to the stricter requirements of involuntary admission to a psychiatric facility under the Mental Hygiene law or indeed to any guidelines for choosing a persons place of abode. Such an expanded use of Article 81 was not contemplated or envisioned by the Legislature.

Matter of New York Presbyterian Hospital, Westchester Div. (JHL), 181 Misc.2d 142; 693 N.Y.S.2d 405 (Sup. Ct., Westchester Cty., 1999) appeal dismissed, 276 A.D.2d 558 (2nd Dept., 2000)

Guardian may not waive IP's right to Rivers hearing. IP retains right to hearing to challenge effort to medicate over objection. Appeal dismissed on technical grounds.

Matter of Beth Israel Medical Center (Farbstein), 163 Misc.2d 26; 619 N.Y.S.2d 239 (Sup. Ct., NY Cty., 1994)

Guardian for personal needs of IP with power to consent to or refuse routine and major medical treatment without IP's consent, cannot admit IP to hospital against wishes to receive psychiatric evaluation and administration of psychotropic medication. "Article 81 does not supersede Article 9."

Matter of Berg, NYLJ, 12/11/98, p. 25 (Sup. Ct., Rockland Cty.)(Weiner, J.)

Court denies petitioner power to consent to administration of psychotropic medication over objection of AIP who was patient in hospital infirmary and also psychiatric outpatient.

Matter of Gordon, 162 Misc.2d 697; 619 N.Y.S2.d 235 (Sup. Ct., Rockland Cty. 1994)

Petitioner's request for power to compel AIP to receive psychiatric treatment and administration of antipsychotic drugs without person's consent is denied. A guardian cannot compel person to obtain psychiatric treatment and medication against will.

Matter of Gertrude K. (Shari K.), 177 Misc.2d 25; 675 N.Y.S.2d 790 (Sup. Ct., Rockland Cty., 1998)

Petitioner's application for authority, with unlimited duration, to consent to ECT for AIP denied.

Hospital must apply for court authorization.

Contrast

Matter of Diurno (Conticchio), 182 Misc.2d 205; 696 N.Y.S.2d 769 (Sup. Ct., Nassau Cty., 1999)

Guardian granted power to authorize antipsychotic drugs, with proviso that guardian take into account IP's wishes to extent person had capacity to make an informed treatment decision.

C. Voiding questionable marriages and other contracts

Matter of Dandridge (Aldo D.), 120 AD3d 1411; 933 N.Y.S.2d 125 (2nd Dept. 2014)

During the pendency of a guardianship proceeding, the AIP's caretaker took him out of state and married him. Despite clear evidence of his incapacity introduced at trial, including evidence that he has no recollection of marrying, on appeal by the non-party purported wife, the Appellate Division remanded the matter to the trial court because AIP's counsel had never been amended to seek such relief and the purported wife argued that she therefore lacked notice that voiding of the marriage would be a possible consequence of the guardianship proceeding.

Matter of Doar (L.S.), 39 Misc. 3d 1242A; 975 N.Y.S. 365 (Sup. Ct., Kings Cty. 2013) (Barrow, J.)

Upon a petition brought by APS, the court appoints JASA as guardian of the person and property of an 83 year-old WWII veteran with dementia, who had recently revoked a POA issued to a longtime friend, and had married his 46 year-old former home health aide. The court empowered JASA to, inter alia, investigate the IP's financial affairs and bring any appropriate actions on behalf of the IP including a turnover proceeding and/or a motion to annul or void the marriage. The court, noting that "[s]adly this case is not an isolated incident of financial exploitation of the incapacitated," urges the community to develop and implement new strategies to protect its "most vulnerable adults," "seniors affected with dementia, in the twilight phase between capacity and incapacity" including a requirement that financial institutions, health care providers, licensed home care providers, banks, hospitals, doctors and designated agents report suspected abuse to APS and law enforcement.

K.A.L v R.P., 35 Misc. 3d 1211A; 2012 N.Y. Misc. LEXIS 1740 (Sup. Ct., Monroe Cty.)(Dollinger, J.)

Court grants surviving spouse's motion to dismiss the decedent's daughter's complaint seeking to annul the decedent's marriage, which took place as the decedent lay on his death bed, and "simultaneously" with the decedent's execution of a codicil to his will (at which time it was undisputed that the decedent was of sound mind and free from any constraint or undue influence).

In so doing, the Court noted, inter alia, that the plaintiff did not state a cause of action under MHL §81.29 (d) which permits a court to revoke a marriage contract, because not only had no guardian been appointed for the decedent (a prerequisite for such relief), there was never even any suggestion that the decedent was "insane or 'mentally incapable.'"

Matter of Schmeid, deceased, 88 A.D. 3d 803; 930 N.Y.S.2d 666 (2nd Dept. 2011)

In a contested probate proceeding, the former wife and nurse of an 97 year-old man, who had been declared incapacitated during the course of an Art. 81 proceeding as of a date prior to his marriage to appellant, appealed unsuccessfully from a decree of the Surrogate's Court denying her motion for permission to file objections to will admitted to probate. During the course of the Article 81 proceeding Supreme Court had directed the annulment of the decedent's marriage but did not revoke the Will. The Appellate Division reasoned that EPTL 5-1.4 creates a conclusive and unrebuttable presumption that any provisions in a will for the benefit of a former spouse are revoked by divorce or annulment and that it was enacted to prevent a testator's inadvertent disposition to a former spouse where the parties' marriage terminated by annulment or divorce and the former spouse is a beneficiary in a testamentary instrument which the testator neglects to revoke. Thus, it held that since petitioner's marriage to the decedent was annulled, absent an express provision in the propounded will to the contrary (see EPTL 5-1.4[a]), the bequest to the petitioner and her nomination as executor under the 2003 Will were properly deemed to be revoked and, therefore, the Surrogate's Court had properly denied petitioner's motion for permission to file objections to the 2003 Will since she did not have an interest in the decedent's estate as required by SCPA 1410.

J.P. Morgan Chase Bank Natl. Assoc. v Haedrich, 29 Misc.3d 1215A; 918 N.Y.S.2d 398 (Sup Ct., Nassau Cty. 2010) (Phelan, J.)

Guardian moved for an order vacating all judgments of foreclosure, mortgages, notes and consolidation agreements and for an order staying a foreclosure proceeding, arguing that the mortgages, executed in 1999 and 2003, respectively, were made at a time that Mr. and Mrs. Haedrich were incapacitated. In denying the motion, the court deemed "patently insufficient to demonstrate either that at the time these transactions occurred, Mr. and Mrs. Haedrich were incompetent or that the lender 'knew or was put on notice' of the purported incapacity," the following evidence presented by the guardian: (1) a 2010 letter from the couple's physician, stating that in 1990, Mrs. Haedrich suffered from a lung infection, and that Mr. Haedrich, who was first seen in 2004, "gave a history of Alzheimer's disease;" and (2) the alleged testimony of Mrs. Haedrich's psychiatrist, at the 2005 article 81 proceeding, that she then suffered from dementia.

Cambell v. Thomas, 73 AD3d 103; 897 N.Y.S.2d 460 (2nd Dept 2010)

The marriage of an elderly man suffering severe dementia to his caretaker was annulled for pursuant to DRL 140 (c). The annulment took place after he died, as permitted by that statute. Upon his death, his purported surviving "wife" sought to claim her right of election against his estate. A strict reading of EPTL 5-1.1A allows for the elective share to be paid unless the annulment was in effect

at the time of death. In this case, the marriage was not annulled until five years after the "husband's" death, giving the purported wife a technical right to her elective share. The Appellate Division, however, denied the purported spouse her elective share on the grounds that to do so would allow her to profit from her own fraud and further, to enlist the courts as an instrument in accomplishing her illegal objectives. The Court made the specific finding that this "wife" was well aware of the deceased's inability to consent to marriage, that she deliberately took advantage of his vulnerability and that she concealed the facts in an effort to coverup her wrong doing.

Matter of Doar, NYLJ, 1/7/10, 42 (col. 1)(Sup. Ct. Queens Cty, Index # 14560/08)(Thomas, J.), *aff'd*, 72 A.D.3d 827; 898 N.Y.S. 2d 465 (2nd Dept, 2010)

As part of the Art 81 proceeding, petitioner sought to establish that the AIP lacked capacity when she entered into a reverse mortgage and also that she has signed the agreement under duress. The court shifted the burden of proof to the lender to show that the lender has complied with its duty under the National Housing Act to fully counsel the borrower and to show that the lender knew that the borrower had capacity to enter in to the agreement., and, then, when the lender could not meet this burden , the court voided the reverse mortgage.

Matter of Arcay, Unpublished Decision and Order, Sup. Ct., Westchester Cty., Index # 200763/08 (Murphy, J.) Sept. 28, 2009

Court voided a marriage between an elderly IP with dementia and his home health aide, who had two prior fraud related felony convictions. The court found ample evidence that at the time of the purported marriage the IP lacked the capacity to enter into a marriage, including that the purported wife had removed him from the locked dementia ward in which he was residing on the day of the marriage ceremony and that notes in his medical records and the testimony of the Court Evaluator, APS caseworker and staff at the residential care center established his lack of orientation to time and place and his inability to perform activities of daily living independently.

Matter of H.R. (S.L.C.), 21 Misc.3d 1136A; 875 N.Y.S.2d 820 (Sup. Ct. Nass. Cty 2008) (Iannuci, J.)

The petition sought appointment of a guardian for personal and property needs of the AIP and a declaration that the AIP's marriage was null and void. The court found that the AIP, who was 90 years of age, hard of hearing, and suffering from an assortment of medical conditions as well as depression, severe short term memory loss and dementia, and granted the petition for guardianship. The court also voided the AIP's marriage to a woman 37 years his junior. The evidence showed that they had been married in Town Hall, had never lived together, she maintained her private residence, she never wore a wedding ring, and she had used his funds to purchase numerous expensive items for herself and her family. The AIP had no recollection of approving these purchases, did not know the extent of his assets and did not recall that he had appeared in court on this matter. The purported wife was named as a party to the proceeding and appeared *pro se*, waving counsel.

<u>Matter of Kaminester</u>, 17 Misc.3d 1117A (Sup. Ct. NY Cty 2007), *aff'd and* modified, <u>Kamimester v . Foldes</u>, 51 A.D.3d 528; 2008 NY App Div LEXIS 4315 (1st Dept.), *lv dismissed and denied* 11 N.Y.3d 781 (2008) ; *subsequent related case*, <u>Estate of Kaminster,</u> 10/23/09, N.Y.L.J. 36 (col.1)(Surr. Ct., NY Cty)(Surr. Glen)

After the death of the IP it was discovered by the Executrix of his estate that his live in girlfriend had secretly married him in Texas and transferred his property to her name in violation of a temporary restraining order that had been put into effect during the pendency of the Art 81 proceeding. These acts in violation of the temporary restraining order took place before the trial court had determined, following a hearing, whether the AIP required the appointment of a guardian. Upon the petition of the Executrix to the Court that had presided over the guardianship proceeding, the court "voided and revoked" the marriage and transactions and held the AIP's purported wife in civil and criminal contempt of court and ordered her to pay substantial fines. On appeal by the purported wife, the Appellate Division held that under the circumstances and upon the proof, the marriage had been properly annulled. In the subsequent case, arising in Surrogate's Court during the probate of the IP's Last Will, the Executrix sought a determination of the validity of the spousal right of election exercised by the purported spouse, arguing that her marriage to decedent had taken place 2 1/2 months after a Texas court had appointed a Temporary guardian, during the pendency of the NY Article 81 proceeding and 2 ½ months before the IP died. Moreover, in the earlier reported decision of Supreme Court, the court had found that there was a need for a guardian based on the IP's cognitive deficits and had posthumously declared the marriage revoked and voided due to his incapacity to marry. The purported wife argued that her property rights and marriage could not be defeated by the posthumous annulment because under DRL Sec. 7(2) a marriage involving a person incapable of consenting to it is "voidable", becoming null and void only as of the date of the annulment in contrast to MHL 81.29(d) permitting the Article 81 court to revoke a marriage "void ab initio," a distinction critical to the purported wife's property right. The Surrogate ultimately held , based upon both statutory and equitable theories, that the marriage had been "void ab initio," thus extinguishing the purported wife's property rights, including her spousal right of election.

<u>Matter of Lucille H.</u>, 39 A.D.3d 547; 833 N.Y.S. 2d 200 (2nd Dept., 2007)

Where the buyer of real estate was not a party to the Art. 81 proceeding and the Art 81 petition did not seek any specific relief as to voiding the conveyance, and the buyer had no notice or opportunity to be heard about the transaction, an order voiding the conveyance was reversed and remanded for hearing, at which the buyer would have an opportunity to be heard as to the capacity of the seller to enter into the contract.

<u>Matter of A.S.</u>, 15 Misc.3d 1126A;841 N.Y.S.2d 217(Sup. Ct. Westchester Cty., 2007) (Rosato, J.)

Marriage between an 89 year old woman with dementia who was found incapable of understanding the nature, effect and consequences of the marriage to her 57 year old chauffeur was annulled in the context of an Article 81 proceeding on the grounds of want of understanding (DRL Sec.140(c) and

Sec 7 (2)) and fraud (DRL Sec. 140 (e) and Sec 7 (4) where the purported husband fully participated in and presented evidence on the issue of the validity of the marriage.

In the Matter of Joseph S., 25 A.D.3d 804; 808 N.Y.S.2d 426 (2nd Dept 2006)

An annulment is an available remedy in an Article 81 proceeding where the evidence shows that the AIP is "incapable of understanding the nature, effect and consequences of the marriage." The remedy was available in this case even though it was not sought in the original petition because the at the close of the guardianship proceeding petitioner moved to amend the petition, the court advised the wife that it would consider the relief and the wife was participated through her own counsel. The fact that she was not formally made a party was not an impediment to the annulment under these circumstances because she received a full and fair opportunity to present evidence and actively litigated the issue.

Powers v. Pignarre, NYLJ, July 19, 2005, p. 18, (Sup Ct., NY Cty) (Drager ,J.)

Guardian of wealthy IP brings action to have IP's marriage annulled on grounds of lack of capacity DRL 7(2) and fraud and duress (DRL 7(4), Court annuls marriage for lack of capacity only. Very detailed discussion of circumstances in text of decision.

Matter of Dennis Diaz, NYLJ, 7/6/04, p. 21 (Sup. Ct., Queens Cty.)(Taylor, J.)

After an Article 81 hearing, a disabled man was found to be in need of a guardian of the person and property. He was found, among other things, to have the functional level of approximately a 5th grader and specifically to be in need of assistance in handling his own finances. Before a guardian could be bonded and qualified, he retained counsel and entered into a contract of sale to purchase a tavern with his own funds. Under pre-Art 81 law, contracts entered into by persons adjudicated incompetent and who have committees or conservators are presumptively void. Contracts with persons who do not have committees or conservators but are of unsound mind and unable to appreciate the consequences of their own actions were considered voidable. Article 81 does not result in a finding of incompetence but rather only findings of specific functional limitations and guardianship powers tailored to be the least restrictive form of intervention. This AIP was found to lack the ability to handle his own finances so here, the Court does void and revoke the contract.

Matter of Jayne Johnson, 172 Misc.2d 684; 658 N.Y.S.2d 780 (Sup. Ct., Suffolk Cty., 1997)

Marriage of 84-year-old incapacitated woman which occurred after commencement of Art. 81 proceeding but prior to appointment of guardian, is annulled by court hearing Art. 81 petition where proof was sufficient to establish that on marriage day woman was incapacitated and incapable of understanding nature, effect and consequences of marriage. Court bifurcated issues of marriage dissolution and economic rights and heard only dissolution issue.

Matter of Kustka, 163 Misc.2d 694; 622 N.Y.S.2d 208 (Sup. Ct., Queens Cty., 1994)

81-year-old IP marries housekeeper three months after death of his wife. New wife begins depleting IP's bank account and sending money to her family abroad. Court appoints independent property guardian after finding AIPs testimony on financial issues was confused but did not appoint personal guardians and did not annul marriage.

Tabak v. Garay, NYLJ, 9/18/95, p. 25 (Sup. Ct., Kings Cty.)(Rigler, J.)

85-year-old man had married defendant, and shortly thereafter a court found him incapacitated. Eight months after man died, his niece sought to annul the marriage. Court found this was matrimonial action that could proceed under Domestic Relations Law §140(c). It disqualified defendant's attorney because he had been appointed guardian for decedent and thus might be called as witness.

D. Use of AIP's funds

Matter of R.T. (D.C.), _Misc.3d_, 2019 N.Y. Misc. LEXIS 2480 (Sup. Ct., Broome, Cty.)(Guy, J.)
Upon an application by the AIP's children seeking a monetary judgment against his third wife, whom the children claimed had utilized marital funds for her own support, the court held that as the AIP's dementia escalated, the wife knew, or should have known, that she had a duty as a spouse to not spend his income in a manner inconsistent with his established pattern of support for her, him and them. The court found certain of the wife's transactions to be in breach of this duty and held that some expenditures were not made with AIP's implied consent. Therefore, the court awarded the AIP $27,175 to be paid by the wife.

Matter of Philip W. (Joseph W.), Sup. Ct, Queens Cty., Unpublished Decision and Order, Index # 4881/12 (Sept. 2, 2014) (Mayersohn, J.) (Copy available through MHLS 2nd Department, Special Litigation and Appeals Unit)

The Supreme Court denied an application by the guardian of a 53 year old mentally retarded man seeking the authority to make a gift of an estimated $80,000 of the IP's personal injury settlement in order to construct an extension onto the home shared by the IP's mother, sister and brother. The extension proposed would consist of a private bedroom and expanded living space that the IP would use during his visits to the home, which allegedly averaged seven weeks a year. OPWDD, the operator of the group home in which the IP permanently resides, and MHLS, the IP's attorney, opposed an outright gift, arguing that the IP's best interest necessitated that he be permitted to retain a security interest in the property during his lifetime. The family ultimately consented to a security interest which would terminate upon the IP's death (at which point medicaid could seek recovery from the IP's estate pursuant to Social Services Law §369[2][b][i] [See, DOH Medicated Reference Guide 680.1)]. The Court, first noting that the IP's daily needs are provided by his group home, that

he has no pressing necessary expenditures, and that the proposed construction would provide the IP with comfort during his visits to the family home, nevertheless noted that it is clearly not in the IP's best interest to provide a gift in which the family would reap the majority of the benefit with no protection to him. Consequently, the Court allowed the construction with the following provisos: (1) that the IP receive a security interest which would terminate upon his death; (2) that the guardian include in his annual report that exact number of days the IP stayed in the home; and (3) that the Court retained the power to levy a surcharge against the guardian should the IP's use be insufficient in any given year.

Matter of Shannon, 25 NY3d 345; 34 N.E. 3d 351 (Ct. of App.)(2015)

At the time of her death, in addition to the unpaid administrative expenses of the guardianship, the IP had an outstanding debt to Medicaid and another debt to the nursing home for the balance owed it over and above its Medicaid reimbursement. At the time of her death, her guardian held assets insufficient to pay both debts in their entirety. The guardian petitioned the court to settle its final account and sought instructions as to how to deal with the unpaid Medicaid and nursing home bills. The trial court directed the guardian to pay DSS. The nursing home appealed and the Appellate Division reversed, holding that the nursing home should be paid because its debt accrued before the Medicaid lien and the guardian was empowered to pay it pursuant to MHL 81.44(d) as it was not constrained by that section to pay only the administrative expenses of the guardianship. The dissent at the Appellate Division opined that if all the funds are turned over to the estate, the DSS debt would, by statute, be a preferred claim. The Court of Appeals reversed the Appellate Division, not based on the dissent's argument about preferred claim status but, rather, because the Legislative history of MHL 81.44 (d) is clear that the Legislature intended that a guardian lose all authority over an IPs assets at the time of death except to the extent of holding back only sufficient funds to pay the administrative expenses of the guardianship.

Matter of Sigal M. (Geoffrey M. - Jordana M.), 42 Misc.3d 379; 975 N.Y.S. 2d 634 (Cty. Ct., Nassau Cty. 2013)

The court denied the guardians'/parents' application to be reimbursed $33,348.64 from the AIP's guardianship account (containing her multimillion dollar personal injury recovery) representing monies they had expended on her bat mitzvah party. The court, noting that withdrawals from an infant's funds should be limited to the payment of necessities and education that could not ordinarily be provided by a parent or legal guardian, held that the bat mitzvah party, although culturally and religiously significant, was not a "necessity" which could not otherwise be provided by her parents. In addition, the court granted the parents' application to withdraw funds to pay for a family vacation to Israel to the extent that it sought to pay for the AIP's hotel accommodations and aide, the AIP's mother's airfare, and a wheelchair accessible van (upon proper proof). However, noting that the AIP's funds must remain available to her for her support and medical needs during her lifetime, and that her funds "are not community property for family use," the court denied the parents' application to the extent that it sought permission to withdraw funds to pay for the AIP's father's and siblings' airline tickets, hotel and other vacation expenses, and her parents' hotel room.

Matter of M. H., 33 Misc.3d 1205A; 938 NYS2d 227 (Sup. Ct., Bronx Cty., 2011)

The Supreme Court denied, without prejudice, a guardian's motion for an order transferring the IP's life-estate interest in real property to the IP's granddaughter, co-owner of the property, who had already entered into a contract for its sale without the court's permission, noting, inter alia, that the guardian had not demonstrated that the transfer was appropriate, and further noting that the court could permit the guardian to enter into a contract for the sale of the property without the need for a transfer.

Matter of "Jane Doe," An incapacitated person, 16 Misc. 3d 894; 842 N.Y.S. 2d 309 (Sup. Ct., Kings County, 2007)(Leventhal, J.)

Court imposed constructive trust on funds that had been transferred to AIP's spouse for Medicaid planning purposes after spouse failed or refused to abide by plan to use the funds for the AIP's benefit and directed the bank holding the funds to transfer the funds from the IP's spouse to the IP.

Matter of AT, 16 Misc3d 974; 842 N.Y. S.2d 687 (Sup Ct . Nassau Cty., 2007) (O'Connell, J.)

An elderly and infirm man petitioned for guardianship over his female companion of many years who contributed substantially to his support and with whom he lived. Although he was not appointed, an independent guardian was. This man moved to reargue and the guardian cross moved to have him evicted from the premises that he had shared with the IP who was now in a nursing home out of state. The man sought to have the guardian's powers modified to allow the guardian to give him permission to continue living in the home and to gift funds to him to provide for his support. The court stated that before approving any gifts or support the court must be satisfied by clear and convincing evidence that a competent reasonable person in the position of the IP would be likely to perform the act or acts under the same circumstances under the doctrine of substituted judgement codified in MHL 81.21 . The court also pointed out that this request should be made to the guardian and not the court directly and therefore, gave the applicant additional time to submit whatever he deemed appropriate to satisfy the statutory requirement by clear and convincing evidence and the guardian time to respond.

Matter of Michael Alfonso, NYLJ, 6/26/03, p. 28, col. 6 (Surr. Ct., West. Cty.)

Parents were permitted to use funds in SNT for profoundly disabled child to purchase family home. After stating that purchase of home with SNT funds is presumptively improper and subject to stringent review by court, court authorizes purchase on conditions that purchase price is fair, house is appropriate to meet child's needs, title to be 100% in child's name, carrying charges to be paid by parents except for major repairs, parents may not sell or alienate property without prior approval of court, money will be returned to SNT if sale not concluded, and named bank to be co-trustee.

Matter of William L., 253 A.D.2d 432; 676 N.Y.S.2d 625 (2nd Dept., 1998)

Petitioner denied reimbursement for expenditures he made on behalf of his father (AIP) from joint bank account created and funded by his mother in both his and her names. Petitioner claims that at least some money in account was his. Record indicated that assets used to fund account had been jointly owned by petitioner's mother and father.

Matter of Le Bovici (Menzel), NYLJ, 2/26/97, p.25, col. 3 (Sup. Ct., Queens Cty.)(Kassoff, J.)

Court denied guardian's motion to vacate and discharge mortgage on grounds of incapacity of elderly woman at time of transaction in 1994, approximately one year before guardian was appointed in 1995. Notary and title closer testified that she was responsive and coherent at closing with no "unusual" behavior. Despite other testimony that she was incapacitated as her mental status had been deteriorating since 1993, court denied motion as the title held by a bona fide purchaser for value (the bank), cannot be disturbed if there was no possible notice of the incompetency. As law presumes the competency of the individual, without more substantial evidence about the AIP's mental state at the time of the transaction itself, the "mere opinion" of a doctor about how long incapacity existed is insufficient to disturb the mortgage.

Matter of Marmol (Pineda), 168 Misc.2d 845; 640 N.Y.S.2d 969 (Sup. Ct., NY Cty., 1996)

Guardian, parent of incapacitated infant, may withdraw funds from infant's personal injury settlement to pay for "unusual circumstances" necessitated by child's disability irrespective of parents' ability to pay for them, and for expenses reasonably necessary for infant's maintenance justified by financial circumstances of family. This does not warrant alleviating petitioner from parental obligation regarding cost of routine dental and pediatric care, but funds may be used to cover extraordinary costs associated with various therapies, special education, neurological and orthopedic treatment occasioned by automobile accident in which her son was severely injured. Furthermore, since family plans to relocate to Dominican Republic where public transportation was not extensively developed and private means of transportation must be relied upon, guardian was empowered to withdraw $25,000 from infant's funds for purchase of an automobile to insure that infant can attend therapeutic sessions, and to purchase a suitable ranch-style house that has features beneficial to the child and can accommodate his physical limitations.

Matter of Nix, 177 Misc.2d 845; 676 N.Y.S.2d 915 (Surr. Ct., NY Cty., 1998)(useful 17-a case)

The guardian of a mentally retarded adult is authorized to make arrangements for direct deposit of government checks to ward's bank account. There is no loss of supervisory ability by the court since guardian will continue to make proper application for reimbursement of funds expended.

E. AIP's and Guardian's right to sue or be sued

(i) Effect of Guardianship on Running of Filing Deadlines

Mederos v. NYC Health and Hosp. Corp., 2017 N.Y. App. Div. LEXIS 7430 (1st Dept.) (2017)

CPLR 208 toll does not terminate upon the appointment of a guardian pursuant to MHL Article 81.

Matter of NY Found. for Senior Citizens v. Rhea, 2012 NYSlip Op 32902(U); 2012 N.Y. Misc. LEXIS 5529 (Sup. Ct., NY Cty., 2012)

In an Article 78 Proceeding wherein the petitioner, through her Articl 81 guardians, sought, inter alia, to have her section 8 housing subsidy reinstated, the Court, noting that the guardianship court had already determined that the petitioner needed a guardian, held that the insanity toll of CPLR 208, which remains in effect even if a guardian is appointed, applied, and that the proceeding, which was brought more than four months after the challenged agency determination, was timely.

(ii) Generally

Coleman v System Dialing, LLC., 2016 U.S. Dist. LEXIS 37096 (SDNY 2016)

Where an IP died during the pendency of a Federal lawsuit being prosecuted on his behalf by his Article 81 guardian, it was proper for the Federal Court to allow him to continue to prosecute the matter pursuant to an Order of Expanded Authority issued by State court, authorizing him to continue to act until the Surrogate issues Letters of Administration.

Matter of Thomas J., 130 AD3d 1030; 14 N.Y.S.3d 478 (2nd Dept 2015)

Without first obtaining leave from the court that had appointed a guardian for the respondent, NYCHA commenced a holdover proceeding against a tenant who had a guardian. The trial court dismissed the proceeding and denied NYCHA request to obtain leave *nunc pro tunc*. On appeal by NYCHA, the Second Department acknowledged that once a guardian has been appointed, generally litigation against the IP and his guardian should not proceed without permission of the guardianship court but held, however, that the guardianship court may grant such leave *nunc pro tunc*, and should have done so in this instance because the guardian had notice and had been appointed, for among other reasons, specifically to defend such a holdover proceeding, so there was no prejudice to the IP.

Martin v Ability Beyond Disability, 2014 N.Y. Misc LEXIS 5094; 2014 NY Slip Op 33021(U) (Sup. Ct., Westchester Cty. 2014) (Giacomo, J.S.C.)

The incapacitated person died, and was buried, without notice to his family, at a cemetery that was not of their choosing, necessitating their exhumation and reburial of the IP' body. Subsequently, the family commenced an action seeking monetary damages against both the facility in which the IP

resided, and his Article 81 guardian. The plaintiffs asserted two causes of action against the guardian. The plaintiffs' first cause of action was a common law negligence claim seeking monetary damages for loss of sepulcher. The plaintiffs' second cause of action was based upon their claim that they had suffered emotional damages due to the guardian's failure to comply with the provisions of Article 81 (by failing to notify them of the IP's death, failing to consult with them regarding the IP's care, failing to afford the IP the greatest amount of independence possible, failing to visit the IP, and by failing to file annual reports). The guardian moved to dismiss the complaint, arguing that litigation cannot be commenced against him, as guardian, without first seeking permission from the Court; that the plaintiffs lacked standing to assert claims based upon his alleged failure to comply with the provisions of Article 81; and that Article 81 provides guardians with immunity from any such claims. The Court denied that branch of the guardian's motion which sought to dismiss the first cause of action, noting that it would grant the plaintiffs permission to assert their potentially viable claim seeking damages for loss of sepulcher, *nunc pro tunc*. However, the Court granted that branch of the guardian's motion which sought to dismiss the plaintiffs' second cause of action seeking damages for the guardian's alleged failure to comply with the provisions of Article 81. In so doing, the Court noted that the plaintiffs did not possess standing to assert that cause of action insofar as the guardian owed no independent duty to them. The Court added that the available remedy was not an action seeking damages against the guardian, but rather a motion pursuant to MHL § 81.35 to remove him for misconduct. Moreover, any penalty for the guardian's alleged failure to file annual reports would be the reduction of his fees.

Mazzocchi v. Windsor Owners Corp., et al, 2014 U.S. Dist. LEXIS 20695 (SDNY 2014)

In a Federal housing discrimination proceeding, plaintiff asserted that he was suing on behalf of his allegedly mentally ill live-in girlfriend whose tenancy rights were at stake. He neither added her as co-plaintiff nor sought appointment in State court as her Article 81 guardian. The Court held that it could not address the threshold question whether her joinder as a necessary party was "feasible" as required by Rule FRCP 19 (a).

Bak v. Niagra Rehabilitation Center et al, 2014 U.S. Dist. LEXIS 9905 (WDNY)

Son of IP sued in Federal Court as a Rule 17 (c) (2) "next friend" alleging that placement of his mother by DSS into a nursing home over her objection was an unconstitutional seizure and denial of her liberty without due process. Respondents argued that the IP's son lacked standing because his mother already had a court appointed guardian. The court rejected that argument holding that the federal courts have the power to authorize someone other than a lawful representative to sue on behalf of an infant or incompetent where that representative is unable, unwilling or refuses to act or has interests which conflict with those of the infant or incompetent but found that no such circumstances were asserted nor exist.

Matter of Kornicki, 41 Misc3d 1207(A); 977 N.Y.S.2d 667 (Surr Ct. Nass. Cty 2013) (Surr. McCarty III)

The Surrogate, referencing a related Appellate Division decision, held it to be a frivolous argument that the decedent's spouse was not served in the spouse's probate proceeding when her Article 81 guardians had been served and had participated in the proceedings on her behalf.

James v. State of New York, 2013 U. S. Dist. LEXIS 64579 (EDNY)(2013) (Pohorelsky, M.J.)

Plaintiff, who had been adjudicated incapacitated in an Article 81 proceeding in State court filed a *pro se* complaint in Federal court challenging the State court proceedings, including the results of unsuccessful appeals taken through the state court system that had failed to establish her theory that the guardianship was part of a conspiracy to deprive her of certain property. She filed the matter in Federal Court *pro se* because her Article 81 guardians declined to prosecute the case on her behalf. The Federal Court held that: (1) this was in effect another appeal of the state court determinations and as such is prohibited by the Rooker-Feldman doctrine; (2) it was not obliged to appoint a *guardian ad litem* for her in Federal court since there was no substantial claim that could be brought in Federal Court which lacked subject- matter jurisdiction; and, (3) because she already had been adjudicated incapacitated and a guardian had been appointed, and there was no evidence that this guardian was violating any duty toward her, the plaintiff may not initiate or prosecute a civil action on her own. The Court added that if she wished to challenge the actions of her guardian as violative of their duty toward her, she could still do so in the State court.

Wright v Rickards, 94 AD3d 874; 942 N.Y.S. 2d 153 (2nd Dept., 2012)

In an action to recover damages for breach of contract, the Appellate Division affirmed the Supreme Court's order, inter alia, dismissing the complaint noting that the plaintiff had not sought permission from the guardianship court to sue the incapacitated person, or the guardian as the incapacitated person's representative.

Harvey v. Chemung County, 2012 US Dist LEXIS 29831 (WDNY 2012)

Where the IP's wife sought to sue on his behalf, her suit was dismissed because, among other reasons, she was not his guardian and did not have the right to assert claims on his behalf.

Juergens v. Juergens, 2008 NY Slip Op 30991U; 2008 N.Y. Misc. LEXIS 10629 (Sup. Ct. Nassau Cty. 2008) (Brandveen, J.S.C.)

Supreme Court granted attorney fees and sanctions against the plaintiff under 22 NYCRR 103.1.1 for bringing frivolous litigation. The plaintiff against whom the sanctions were assessed was the second wife of the IP who was presently engaged in a divorce proceeding against the IP. She filed

a Verified Complaint for, *inter alia*, a *prima facie* tort against the plaintiff and breach of duty to the IP against the IP's daughter who was his Article 81 guardian. The Complaint alleged that while the daughter was his Temporary Guardian she abused her position by misappropriating her father's assets in an unspecified way. The defendant daughter, who was by the time of this proceeding the full plenary guardian, argued that the plaintiff lacked standing because she was alleging harm to the IP not herself and that only the guardian was in a position to pursue a civil action on behalf of the IP, that the claim lacked specificity and that the allegation of *prima facie* tort fell because it lacked a showing of intention infliction of harm and sole motivation of malevolence by the defendant.

Matter of Cecelia Gullas, 2009 NY Slip Op 31653U; 2009 N.Y. Misc. LEXIS 5425 (Sup. Ct. NY Cty 2009) (Madden, J.)

The court denied a motion by a respondent in an eviction proceeding to have the proceeding dismissed for lack of jurisdiction. At the commencement of the proceeding, respondent had an Article 81 guardian and the guardian was not served with the initiatory papers. Eventually, prior to any conferences or hearings taking place, the guardian was served with all notices and litigation documents. Later, respondent successfully moved to have the guardianship terminated and the court in that proceeding made the finding that there was clear and convincing evidence that respondent's ability to provide for her needs was not impaired. Moreover, respondent had actual notice of the eviction proceeding, had an opportunity to be heard and eventually was heard despite her many attempts to delay the proceedings. Therefore the court in the eviction proceeding found the motion to dismiss for lack of jurisdiction to be without merit.

Steenbuck v. County of Suffolk, 63 A.D.3d 823; 880 N.Y.S 2d 359 (2nd Dept. 2009)

A young man suffered severe head trauma in a motorcycle accident. He was unable to converse and had no memory of the accident. His parents were appointed as guardians and were empowered to and did retain counsel for the IP. Counsel filed a personal injury suit on behalf of the IP against the County and after notice of claim was filed asserting that the county had been negligent for failing to install a traffic signal at the intersection, the county served a demand for an examination of the plaintiff pursuant to General Municipal Law Sec 50-h which makes submission to such an examination a condition precedent to bringing suit against a municipality. The court held that given the nature and extent of the plaintiff's injuries, as documented by his treating physician, and the appearance of his guardians at the examination, the plaintiffs failure to appear for the examination was not grounds for dismissal of the complaint.

Berrios v. NYC Housing Authority, 564 F3d 130 (2nd Cir. 2009)

A minor or incompetent person lacks the capacity to sue or be sued on his own therefore, Rule 17 (c) provides that he may sue or be sued through a legal fiduciary, or if he has none, a next friend or GAL. However, the fact that he must appear through another does not change the further rule that if his representative is not an attorney, the representative may not appear *pro se* on behalf of the

infant or incompetent and the representative must himself be represented by a licenced attorney to conduct the litigation.

Sasscer v. Lillian Barrios-Paoli et al., 2008 U.S. Dist. LEXIS 101541 (SDNY 2008)(Berman, USDJ)

Since an IP could not have sued her guardian without permission of the court that appointed the guardian, she also could not sue the attorney who had been retained on her behalf by the guardian with permission of that court.

Arthur Management Co. v. Arthur Zuck, 19 Misc.3d 260; 849 N.Y.S. 2d 763 (Civ. Ct., Kings Cty. 2008) (Kraus, J.)

In this summary holdover proceeding in Housing Court, a GAL was appointed by the court based upon the court's observations that respondent was not able to adequately protect his own rights. The parties ultimately entered into a stipulation which was allocuted and approved by the court. Shortly thereafter, an interim Article 81 guardian was appointed with power to defend or maintain any civil proceedings. The interim guardian soon brought a motion to vacate the settlement recommended by the GAL. While the court held that there is authority to vacate a stipulation of settlement where it appears that a party has "inadvertently, unadvisably or improvidently entered into an agreement which will take the case out of the due and ordinary course of proceeding in the action and works to his prejudice," the court refuse to vacate the stipulation in this case, finding that it is the court, not the GAL that ultimately decides whether to accept the settlement, that the Administrative Judge of Civil Court has promulgated guidelines for the court to follow that establish the minimum steps that a GAL must take before the court can accept the GAL's recommendation to settle and that those guidelines had been followed in this case by the GAL and the Court.

Depalois v. Doe, 16 Misc.3d 1133A; 851 N.Y.S.2d 57 (Civ. Ct., Kings Cty 2007) (Kraus, J.)

In this summary holdover proceeding, the court held that failure to obtain permission to sue a person adjudicated incompetent prior to the commencement of the suit is not a jurisdictional defect and can be cured by a *nunc pro tunc* order. Further, the failure to include the names of the guardians in the caption as parties and to identify them in the body of the pleading as parties was not considered fatal where the guardians were named in the predicate notices, were served with all pleadings and notices, were referenced in the body of the pleadings and clearly had actual knowledge of the suit and were prepared to defend it. The court deemed the caption amended to conform with the affidavits of service and predicate notices.

Matter of Garcia, 16 Misc. 3d 1123A; 847 N.Y.S.2d 901 (Sup. Ct. Queens Cty. 2007)(Thomas, J.)

Before an action may be commenced against an IP, a potential plaintiff must first obtain leaveof the

court that appointed the guardian. The custody of the IP's estate is no longer in the IP but in the court, under the administration of the guardian. The IP cannot defend or prosecute a civil action in person or by an attorney after a guardian has been appointed. While an IP remains liable for his debts, an action to recover such debts must be commenced against the guardian in his representative capacity and the caption of the action must designated the legal status of thedefendant as an IP. CPLR 309 (b) requires that a plaintiff must serve BOTH the IP and guardian and CPLR 1203 states that no default judgment may be entered against a person judicially declared to be incapacitated unless his representative appears in the action or until 20 days after appointment of a GAL. Where a creditor, through its attorney, ignored all of these principals and proceeded to a default judgment against an IP after numerous interventions by his guardian, the court vacated the restraint in the IP's bank account, authorized the guardian's attorney to move to have the default judgement vacated at the creditor's expense and directed the creditor and its attorney to appear before it to show cause why they should not be held in contempt of court.

Countrywide Home Funding Co. v. Henry J.K., 16 Misc.3d 1132A; 847 N.Y.S.2d 900 (Sup. Ct., Nassau Cty. 2007) (Asarch, J.)

IP's guardian moved to have a default judgment of foreclosure against her home vacated. The judgment had been entered subsequent to the IP's hospitalization for mental illness but several years before a guardian was appointed for her. The Court cited law establishing that a default judgment entered against a party incapable of protecting his interests is invalid and unenforceable unless a guardian ad litem is appointed for such person. Also, the fact that no committee or guardian has been appointed at the time of a foreclosure action is not dispositive of whether the litigant is operating under a disability. The Court therefore directed that a hearing be held to determine whether the plaintiff mortgage company knew, or should have known, about the alleged incapacity of the IP at the time of the foreclosure action.

Matter of the Application of Rosen, 16 Misc.3d 1108(A); 2007 NY Slip Op 51348U (Sup. Ct., Otesego Cty. 2007)

Counsel appointed for an IP in a contested accounting proceeding which had occasioned by allegations that the guardian first appointed had been self-dealing, did not approve of the proposed terms of settlement of the accounting. However, the guardian appointed subsequent to the removal of the first guardian did approve of the terms of the settlement. The court held that it was the approval of the current guardian that controlled because it is not counsel but the client who approves of a settlement and, this client being incapacitated has a guardian who by statute (MHL 81.21(a)(20), and by the language of the order granting her powers, has the power to defend and maintain a judicial action to its conclusion.

Walker v. Feller, 2005 U.S. Dist. LEXIS 17055 (EDNY)

Civil action brought by IP was dismissed, because once adjudicated incapacitated, he could not

bring suit on his own. However, while an incapacitated person cannot commence a civil action on his or her own behalf, the Mental Hygiene Law specifically provides that such a person can seek to remove the guardian "when the guardian fails to comply with an order, is guilty of misconduct, or for any other cause which to the court shall appear just. (§ 81.35) Thus, the IP can sue his guardian (Self Help) to bring its alleged misconduct to the attention of the State court which appointed SHCS by making a motion to remove the guardian (NYCHA commenced a nonpayment proceeding. Self Help, allegedly made no effort to pay the arrearage or to contest the eviction proceedings. As a result, the IP appeared in Civil Court himself, where he "explained to the Judge that [his] ... Guardians where [sic] conspiring with [NYCHA] ... to defraud [him] ... out of [his] ... apartment by refusing to aid [him] ... and protect [his] ... rights ...."). See also, related case- In re Michael Tazwell Walker, 2005 Bankr. LEXIS 1576 (Bankruptcy Ct, EDNY 2005) (Feller, J.) (Order by bankruptcy court dismissing petition with prejudice, on grounds *inter alia*, that person for who guardians is appointed under MHL Art 81 lacks capacity to file petition in own name.

In re Irving Wechsler, 3 AD.3d 424; 771 N.Y.S.2d 117 (1st Dept. 2004)

Guardian may not commence divorce action on behalf of ward. Although the guardian does have the power to maintain a civil proceeding, that grant of power does not include filing for divorce because whether to pursue a divorce is too personal a decision.

Matter of the Application for an Individual with a Disability For Leave to Change Her Name, 195 Misc.2d 497; 760 N.Y.S. 2d 293 (Civ. Ct., Richmond Cty 2003) (Straniere, J.)

Mildly MR individuals was permitted to change her name in Civil Court without a guardian. Court was initially uncertain whether it could hear case without guardian but, after reviewing purpose of Art. 81 ultimately decides that she is not so functionally limited as to be unable to petition for her name change. Court also points out that it has no jurisdiction over guardianship and would have to refer the case to Supreme Court first and further that is no Article 81 Part in Richmond County and recommends statutory amendments to alter this situation.

Matter of Black (Seiber), 2002 N.Y Misc LEXIS 1442, October 31, 2001, Sup. Ct., Suff. Cty. (Berler, J.)

Although CPLR 1201 refers to service of legal papers on incompetents and conservatees and it should also be construed to include incapacitated persons for whom Art. 81 guardians have been appointed -Ward may not be sued directly- Guardian must be sued in representative capacity and only then, with leave of the guardianship court which can hold hearing to determine whether to grant such leave as suit will affect the guardianship estate and cost IP legal expenses. Guardian who is an attorney may not act as IP's attorney in a suit against the IP and guardian in his representative capacity-conflict of interest and appearance of impropriety arises.

Matter of M.G., NYLJ, 9/3/02 (Sup. Ct., Westchester Cty. 2002)(Rosato, J.)

Person adjudicated incapacitated may not contract to hire an attorney. Attorney who was retained by an IP who knew about his clients prior adjudication of incapacity could not recover fees, even in *quantum meruit*.

Saratoga Hospital v. Timothy Chamberlain, (Sup. Ct., Saratoga Cty) Index No, 2000-3209 Oct. 11, 2001 (NOR) (copy attached)

Plaintiff, who initially sued an IP's guardian without alleging that he was doing so in the guardian's representative capacity for the IP sought leave to amend his complaint. Court denied motion to amend finding that the amendment is without merit because an IP is not adjudicated incapacitated and thus may sue or be sued in the same manner as any other person. The court states "The proper defendant is [the IP]."

Palamera v. Palamera, NYLJ, 6/7/01 (Sup. Ct., Kings Cty.)(Rappaport, J.)

Where proceeding brought under RPAPL 1521(1) to void real estate transaction on the theory that the transferor lacked the capacity to make the transaction named the allegedly incapacitated transferor as one of the plaintiffs, proceeding will be dismissed absent any proof that the transferor possessed the capacity to retain counsel to pursue this claim. The proper procedure would have been to apply for an Article 81 guardian and for the guardian to pursue the claim on behalf of his ward.

Matter of City of Ithica (Barol), 283 A.D.2d 703,724 N.Y.S.2d 211 (3rd Dept., 2001)

Court appoints special guardian for woman who was delinquent in real state taxes. finding that her incapacity interfered with her ability to recognize that her failure to pay taxes will result in her loss if her property. Special guardian fails to file bond and assume duties, is eventually dismissed and no further guardian is appointed. Court reasons that there is no need for the special guardian since a guardian ad litem can be appointed in the foreclosure proceedings. Such proceeding are then filed against the woman personally as she now has no guardian. The pleadings do not assert that she may have doubtful capacity but they do not mention the prior Art. 81 proceeding as part of the procedural history. No hearing on her capacity is held and no guardian ad litem is appointed. Trial court eventually grants foreclosure, Appellate Division reverses and remands stating that petitioner should have been more diligent in bringing the capacity issue to the court's attention and developing it and that once the issue of capacity was even raised, the court had the duty to protect a party incapable of protecting her own interests, especially when her home is in controversy.

140 West Equities v. Fernandez, NYLJ, 8/16/00, p. 21 (Civ. Ct., NY Cty.)(Hoffman, J.)

Person with guardian can defend a civil suit only through the guardian.

Obsanzki v. Simon, NYLJ, 3/5/03, p.17., Col. 2 (Kramer, J.)

Person with guardian can defend a civil suit only through the guardian; Gal can not replace Art 81 guardians even where landlord did not know of the existence of the Art 81 guardian.

Surry Hotel Assoc., LLC v. Sabin, NYLJ, 6/29/00, p. 25 (Civ.Ct., NY Cty.)(Lau, J.)

Person with guardian can defend a civil suit only through the guardian. Judgment vacated where guardian was not served even though landlord had never been served with Art.81 order appointing guardian since landlord had reason to know of tenant's incapacity.

Matter of Linden-Rath, 188 Misc.2d 537; 729 N.Y.S.2d 265 (Sup. Ct., NY Cty., 2001) (Lebedeff, J.)

Where AIP was served with Notice of Eviction it was proper for guardian to seek stay in the guardianship part. Once guardian is appointed, litigation against the guardian, as representative of the AIP, should not proceed without permission of the court that appointed the guardian. Guardian cannot waive this obligation by appearing in another court and no other court can waive the obligation by proceeding with suit.

Matter of Ruth "TT", 283 A.D.2d 869; 725 N.Y.S.2d 442 (3rd Dept., 2001)

Ruth "TT" set up intervivos trust leaving her estate to charity and excluding three presumed distributees. Trustee of that trust petitions under Art.81 for guardianship of Ruth TT's person and property. In Art. 81 proceeding in Supreme Court the trustee/petitioner is represented by law firm DFH&K. Supreme Court in that Art 81 proceeding appoints trustee/petitioner as the Art. 81 guardian of the person and special guardian to report to Supreme Court on handling of trust. Thereafter, the three presumed distributees commence proceeding in Surrogate's Court to challenge Ruth TT's capacity to establish the trust. In this Surrogate's proceeding, the three presumed distributees are represented by law firm DFH&K. The trustee/Art 81 guardian of the person/special guardian moves to have the law firm DFH&K disqualified because, as counsel for the trustee/petitioner .in the Art. 81 proceeding, they had access to information in Ruth "TT"'s files that they can now use against her interest in keeping the trust alive as she had created it. Surrogate's Court hold that the trustee/Art 81 guardian of the person /special guardian has standing to bring the motion to disqualify on ward's behalf by reason of her fiduciary duty to Ruth TT and consequent right to assert ward's legal rights. Surrogate's court concludes further holds that law firm DFH&K should be disqualified by reason of their conflict of interest. Appellate Division affirms the decision of Surrogate's Court for same reasons.

Murphy v. NYC, 270 A.D.2d 209; 704 N.Y.S.2d 818 (1st Dept., 2000)

Appointment of guardian did not deprive IP of standing to sue.

Huber v. Mones, 235 A.D.2d 421; 653 N.Y.S.2d 353 (2nd Dept., 1997)

A person of unsound mind but not judicially declared incompetent may sue or be sued in same manner as any ordinary member of community. Where person who had not been declared incompetent or incapacitated commenced a proceeding in Surrogates Court, a subsequent determination by Supreme Court in an Article 81 proceeding that she was in need of appointment of special guardian to manage her property did not mean that she lacks standing to bring proceeding in Surrogates Court.

Surrey Hotel Assoc. v. LLC. v. Sabin, NYLJ, 6/29/00, (Civ. Ct., NY Cty., 2000)

Default judgment against IP vacated where guardian was not served.

F. Limitations on Guardian's powers

Matter of Heidi B. (Pasternack), _AD3D_, 2018 N.Y. App. Div. LEXIS 6891 (2nd. Dept., 2018)

The Appellate Division modified a judgment which appointed a guardian and granted the guardian broad powers by deleting the powers that were not recommended in the court evaluator's report, noting that the broad grant of powers was inconsistent with the statutory requirement that the guardian be granted "only those powers which are necessary to provide for personal needs and/or property management of the incapacitated person in such a manner as appropriate to the individual and which shall constitute the least restrictive form of intervention."

Matter of Drayton, 127 A.D.3d 526; 8 N.Y.S. 3d 65 (1st Dept., 2015)

Where guardian enters in to a stipulation with the landlord for the IP's eviction, with the intent of placing the IP in a more restrictive setting, and under the circumstances the IP was not advised of the Stipulation, there was no finding of good cause shown and there was no hearing on the issue of whether the Guardian could place the IP in a more restrictive setting, the Appellate Division, First Dept vacated the stipulation and remanded the case to the Joint Housing/Guardianship part for a hearing pursuant to the MHL 81.22.

<u>Mater of Bonora</u>, 123 A.D.3d 699; 998 N.Y.S.2d 400 (2nd Dept., 2014)

Mere fact that a guardian was appointed in an Article 81 proceeding, and given the power to choose the IP's place of abode, does not warrant the conclusion that the guardian possessed the authority to change the IP's domicile.

<u>Matter of Chiaro</u>, 28 Misc.3d 690; 903 N.Y.S. 2d 673 (Sup. Ct, Suffolk Cty.)(Leis, J.)

One of the IP's sons, Dennis Chiaro, moved for a contempt order against his brother David Chiaro. The court noted the rights of each of the four sons, as remaindermen of the Chiaro Family Revocable Trust, was a matter the parties focused on in reaching a compromise in this contested Article 81 proceeding. The parties had stipulated in open court that the trust would be amended to include all four brothers as equal 25 percent beneficiaries. The court noted that after a review of the record of prior proceedings it was clear that David, as property management guardian for his mother, the IP, was required to amend the trust, and his failure to comply with the clear mandate resulted in Dennis's motion to hold David in contempt. Despite David's inaction, however, the court concluded that same was insufficient to support a finding of civil contempt because David never effectively had the power to amend the trust. The court explained that pursuant to the language of the trust instrument, the IP lost the power to amend the trust once she because incapacitated, and the appointment of a guardian did not restore this power to her. As the IP had no power to amend the trust, a guardian, who can only assume powers actually held by the IP, could hold no derivative power. Thus, since David's willful disregard of the court's mandate did not defeat, impair, impede or prejudice Dennis' rights, the court denied Dennis' motion. Nevertheless, the court ruled that the stipulation was to be construed to reflect that the trust assets would be divided equally among the four sons without the need for amendment.

<u>Matter of Jesse Lee H.,</u> 68 Misc. 3d 865; 889 N.Y.S. 2d 479 (2nd Dept., 2009)

Citing MHL 81.20 (a) (7) which instructs that a guardian of the person must give the IP the greatest amount of independence and self determination consistent with his functional limitations, the court held, under the circumstances of this case, that the guardian, the IP's mother, was subject to certain conditions concerning the IP's visitation with his father.

<u>Acito v Acito</u>, 23 Misc.3d 832; 874 N.Y.S. 2d 367 (Sup. Ct. Bronx Cty. 2009) (Gesmer, J.)

Where an order appointing a guardian provided, among other things, that the guardian was empowered to prosecute a divorce proceeding on behalf of the IP and settle it subject to the further approval of the court that had ordered the guardianship, and the IP died after the matrimonial court had so ordered the divorce settlement but before the court that had issued the guardianship could approve it, the divorce could not be finalized because to do so would have had the effect of retroactively expanding the authority of the guardian.

<u>Matter of Oringer</u>, 8 Misc.3d 746; 799 N.Y.S.2d 391 (Sup Ct , NY Cty., 2005) (Lucindo-Suarez, J.)

Where Order appointing guardian did not specifically authorize guardian to exercise right of election under EPTL 5-1.1-A, guardian could not do so absent a subsequent order of the court authorizing same since, under MHL 81.29 all rights and powers are specifically retained by IP unless specifically authorized by the court .

<u>Matter of Solomon T R.</u>, 6 A.D.3d 449; 774 N.Y.S.2d 360 (2nd Dept., 2004)

Guardians, who had power to make decisions about APS social environment, sought and obtained order restraining certain individuals from harassing or visiting the AIP. These individuals appealed. Appellate Division, *inter alia*, reverses the order finding that on the facts there was no proof that these individuals were harassing the AIP or that they should be restricted from visiting him. Although the decision does not provide any details, the Court does quote MHL 81.22[a][2] and seems to suggest that restricting their visits might be inconsistent with the AIP's wishes and preferences and that in making the decision to restrain the visitors, the guardian may not have kept in mind these considerations.

<u>Estate of Levine</u>, 196 AD.2d 654, NYLJ, 9/21/00, p. 27 (Surr. Ct., Bronx Cty.)(Surr. Holtzman, J.)

Guardian may not have implicit authority to change AIP's legal residency where order appointing guardian does not specifically grant that power.

<u>Matter of Burns</u>, 267 A.D.2d 755; 699 N.Y.S.2d 242 (3rd Dept., 1999)

Where guardian sought court approval to make charitable gifts from IP's assets, notice was to be given to IP's presumptive distributees.

<u>Matter of Heagney</u>, NYLJ, 4/24/00, p. 37, col. 5 (Sup. Ct., Westchester Cty.)(Friedman, JHO)

In guardian's petition for final accounting, County of Rockland contested, *inter alia*, failure of guardian to properly and expeditiously apply to Medicaid so that County could be repaid money owed for services. Court found that guardian was not given power" to apply for government and private benefits on behalf of the person," and thus, did not violate fiduciary duties towards AIP.

G. Power to do Estate and Medicaid planning

(i) Substituted judgment

In a series of decisions, all related to the same individual, various Surrogates grapple with the issue whether a 17-A guardian may engage in gift giving in furtherance of Medicaid/tax planning with different conclusions. See, **Matter of Schulze**, NYJL, 9/3/96 pg. 1, col. 1 (Surr. Ct. NY Cty. 1996)(Surr. Preminger)(Court allows 17-A guardians to make gifts for estate tax planning purposes under same test that applies to Art 81 guardians. In this case, it allowed the gift giving since it would not leave the ward with an estate so depleted that she could not cover the cost of her own care and further, her immediate family, which was wealthy in its own right pledged to provide for her care should there be a change in circumstances; **Matter of Schulze**, 23 Misc. 3d 215, 869 NYS 2d 896 (Surr. Ct., NY Cty. 2008)(Surr. Roth) (There is no express provision in SCPA Art. 17-A empowering a 17-A guardian to make gifts as contrasted with such an express grant of power to MHL Art. 81 guardians under MHL 81.21. The court holds 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 ad maximization of gifts to charities are among the objectives that have ben recognized as supporting guardians' exercise of such authority to make such gifts.) ; **Matter of Joyce G. S.**, 30 Misc. 3d 765; 913 NYS 2d 910 (Surr. Ct., Bronx Cty., 2010) (Surr. Holzman); (Surrogate Holzman expressly rejected Surrogate Glen's holding in **Matter of John J.H.** In doing so, Surrogate Holzman held that "under the law as it presently exists, it has the power to invoke the equitable doctrine of substituted judgment to approve gifts or tax saving transactions on behalf of article 17-A wards. The court explained that in enacting the SCPA, the Legislature afforded the Surrogate's Court full equity jurisdiction as to any action, proceeding or other matter over which jurisdiction is or may be conferred" (see SCPA 201[2]), and provided that the proceedings enumerated in the SCPA are not exclusive (see SCPA 202). The Legislature further provided that after the appointment of a 17-A guardian, the Surrogate's court "may entertain and adjudicate such steps and proceedings...as may be deemed necessary or proper for the welfare of such mentally retarded or developmentally disabled person" (see SCPA 1758). Accordingly, Surrogate Holzman concluded that there appears to be no reason why the Surrogate's Court cannot utilize the common law or the criterial set forth in MHL § 81.21 (d) to approve a gift on behalf of an article 17-A ward.

Matter of Modesta V. (Maya V.), 107 A.D.3d 1008; 966 N.Y.S.2d 914 (2nd Dept., 2013)

The Appellate Division upheld the Supreme Court's denial of the IP's daughter's petition authorizing the transfer of the IP's assets to he so as to enable the IP to qualify for Medicaid. Stating that pursuant to MHL § 81.21, the court could authorize such a transfer if it were satisfied that "a competent, reasonable individual in the position of the incapacitated person would be likely to perform the act or acts under the same circumstances,: the Appellate Division noted that the daughter did not make such a showing therein, highlighting the limited information she provided in support

of the petition, and the absence of any indication that the proposed asset transfer plan had been approved by the guardian of the IP's property.

Matter of Nellie Abrams, 31 Misc.3d 830; 921 N.Y.S.2d 485 (Sup. Ct., Kings Cty., 2011)

IP's transfer of her home to her daughter (to avoid mismanagement and waste of her largest asset by a family member who appeared to have undue influence over her) was subject to the three-year look-back rules in effect prior to February 2006. Since the IP did not apply for Medicaid until May of 2010, the transfer, which took place several months prior to February of 2006, was an exempt resource, and did not effect the IP's Medicaid eligibility.

Matter of M.L., 25 Misc. 3d 1217A; 901 N.Y.S.2d 907 (Sup. Ct. Bronx Cty., 2009) (Hunter, J.)

Guardian's motion for leave to expand his powers to gift a percentage of available assets in accordance with the IP's testamentary intentions to the date of the order to show cause *nunc pro tunc* and to make a loan of a percentage of the IP's available assets to the guardian and initiate Medicaid planning *nunc pro tunc* was, upon reargument, granted. The guardian submitted an affidavit and stated upon the record that he understood that he would be bound by a promissory note to use the remaining portion to pay for the IP's care through the penalty period created by the gift.

Matter of Emil Z., 9/4/09, NYLJ 29, (col. 3) (Sup. Ct. Nass.Cty.)(Asarch, J.)

Court permitted Medicaid exempt transfers to the AIP's wife to allow her to continue to support the family in the family residence and to reimburse herself for certain expenses she incurred for the benefit of the IP but declined further transfers that would leave an amount in the IP's name that would provide for his care for only a 5 year period. Part of the court's rational was that the wife had been delinquent in paying for some of the IP's past care and the court was hesitant to permit the transfer of additional assets that might leave him dependent upon others outside the jurisdiction of the court to pay for his care. The court stated that these funds, which were damages in the medical malpractice action, were for the IP's future care and should remain in a vehicle established for his benefit and suggested that the guardians consider establishing an SNT.

Matter of M.L 24 Misc.3d 293; 24 879 N.Y.S.2d 919 (Sup. Ct. Bronx Cty. 2009) (Hunter, J.)

A guardian made application for authorization to engage in Medicaid planning on behalf of the IP. Although most of the plan was approved by the court, the court would not authorize a proposed gift to the IP's niece as a means of achieving Medicaid eligibility. This niece had been named by the IP as the beneficiary in her Last Will & Testament. Instead of allowing the gift, the court compelled the guardian to use the vehicle of a pooled trust rather than a gift to create Medicaid eligibility stating that if the funds were gifted outright to the niece, there would be no legal obligation that the niece spend the IP's money on the IP's needs. The court opined that although the IP's intent was for the niece and not the charity that operated the pooled trust to inherit her money upon her death, the IP

would presumably want her own needs met during her lifetime and the pooled trust arrangement would insure that result even though it would undermine her testamentary intent.

Matter of Mildred A., 21 Misc.3d 1123A; 873 N.Y.S.2d 511 (Sup. Ct., Nassau Cty. 2008)(Asarch, J.)

Where the IP's daughters were in dire financial situations and homeless, the IP had a long standing history of making gifts to her daughters, and where the court determined that under a worst case scenario there would be sufficient assets to support the IP, the court permitted the guardian to make gifts to the daughters under a theory of substituted judgement and specified that these gifts were made for purposes other than qualifying the IP for Medicaid so as to avoid any penalties.

Matter of AT, 16 Misc.3d 974; 842 N.Y.S.2d 687 (Sup Ct . Nassau Cty., 2007) (O'Connell, J.)

An elderly and infirm man petitioned for guardianship over his female companion of many years who contributed substantially to his support and with whom he lived. Although he was not appointed, an independent guardian was. This man moved to reargue and the guardian cross moved to have him evicted from the premises that he had shared with the IP who was now in a nursing home out of state. The man sought to have the guardian's powers modified to allow the guardian to give him permission to continue living in the home and to gift funds to him to provide for his support. The court stated that before approving any gifts or support the court must be satisfied by clear and convincing evidence that a competent reasonable person in the position of the IP would be likely to perform the act or acts under the same circumstances under the doctrine of substituted judgement codified in MHL 81.21. The court also pointed out that this request should be made to the guardian and not the court directly and therefore, gave the applicant additional time to submit whatever he deemed appropriate to satisfy the statutory requirement by clear and convincing evidence and the guardian time to respond.

Matter of Rolland, 13 Misc.3d 230; 818 N.Y.S.2d 439 (Sup. Ct., Tompkins Cty., 2006) (Peckham, J.)

The original order appointing a guardian did not grant the power to make gifts on behalf of the AIP. The guardian later petitioned for authority to make gifts to the AIP's sisters and to have the order issued *nunc pro tunc* to a date prior to the effective date of the Federal statute extending the look back period to 5 years (42 USC 1396p(c)(1)(B)(i). The court agrees that under MHL 81.21 and the doctrine of substituted judgement it can grant gift giving power and then analyses the factors in MHL 81.21 (d) to determine if the power should be granted in this case and, if so, whether it should be granted to the extent requested. It finds that the AIP did not have a pattern of gift giving and that he held a firm belief that people should work hard and save for their own retirement. The court also calculates whether the AIP would have enough to meet his own needs if he were to give such gifts and find that he could not meet his own needs of the gifts were given in the amounts requested. The

court reasoned that it cannot granted the order *nunc pro tunc* because it would not be merely correcting a ministerial error and that even if could do so, it would not help because the new Federal statute requires that the funds actually be distributed prior to the effective date of the statute. Thus, the court finds that under the new Federal law, the AIP would have to retain 5 years worth of his own assets to become Medicaid eligible at the time he finally spends them down. Based on those calculations, the court grants the gift giving power to the guardian but limits the amount of the gift to half of the amount requested in the petition.

In the Matter of Judith Watson, as Guardian of the of the person and/or property of Herman Hagerdorn, an Incapacitated Person, to engage in Medicaid Planning, 9 Misc.3d 560; 800 N.Y.S.2d 338 (Sup. Ct., Monroe Cty, 2005)(Polito, J.)

Petitioner sought to do Medicaid planning *nunc pro tunc* retroactive to the date the AIP was transferred to a facility eligible for medicaid funding. The parties did not dispute that this application for medicaid planning met the several requirements of MHL § 81.21, or that retroactive effect may be given to the date of application but the County disputed the request of petitioner to make the transfer retroactive tot he date the AIP went into facility. Court finds that the petitioner failed to make a timely transfer or request at that time either under her power of attorney, or her guardianship authority and that the premise behind MHL §81.21 in approving medicaid transfers was to give the guardian the same rights that the incompetent would have had if not incompetent, but no greater.

Matter of Oringer, 8 Misc.3d 746; 799 N.Y.S.2d 391 (Sup Ct., NY Cty. 2005) (Lucindo-Suarez, J.)

Where Order appointing guardian did not specifically authorize guardian to exercise right of election under EPTL 5-1.1-A, guardian could not do so absent a subsequent order of the court authorizing same since, under MHL 81.29 all rights and powers are specifically retained by IP unless specifically authorized by the court.

In the Matter of the Application of Mark Forrester for the Appointment of a Guardian for the Person And Property of Carl Forrester, 1 Misc.3d 911A; 781 N.Y.S.2d 624 (Sup. Ct., St. Lawrence Cty. 2004) (Demarest, J.).

Where petitioners, the AIP's niece and nephew who had little prior contact with the AIP, sought be named co-guardians and to engage in Medicaid planning that would result in the transfer of the AIP's assets to themselves, Court approves the appointment of them as guardians but denies the application to do Medicaid planning. Court reasons that although Medicaid planning is a legitimate function of a guardian, (a) the petitioners were not the AIP's dependants, (b) there was no clear and convincing evidence that they were the natural objects of the AIP's bounty, (c) the AIP had not expressed any prior donative intent toward his niece and nephew through a pattern of past giving and (d) the AIP

would not benefit from the transfers other than to become prematurely Medicaid eligible. Court holds that it will not read into the guardian's power to use substituted judgement a presumption that people would rather their property go to relatives rather than be put to use for their own care, even if it means that their property will go to the government.

Matter of McNally (Williams), 194 Misc.2d 793; 755 N.Y.S.2d 818; (Sup. Ct., Suff. Cty. 2003), *aff'd* 4 AD2d 432; 771 N.Y.S. 356 (2nd Dept., 2004)

"..neither [the court] nor the guardian should be empowered to substitute their judgment for that of a person for whom a guardian has been appointed merely because they believe that the decision of such person is not the best one. This is not the case here. Medical testimony establishes that [the AIP] suffers from dementia. Her expressed preferences is not only undesirable, it is not rationale and abundantly contrary to her best interests."

Estate of Domenick J. Carota, NYLJ, 2/26/02 (Surr. Ct., Westchester Cty. 2002)

Guardian may exercise right of election for IP under EPTL 5-1.1-A(C)(3)(E).

Matter of Burns (Salvo), 287 A.D.2d 862; 731 N.Y.S.2d 537 (3rd Dept., 2001)

Where guardian wants to make charitable gift on behalf of IP to entities that were not beneficiaries of her estate, court reaffirms guardian's power to use substituted judgment and effect such transfer if, under the circumstances, a reasonable person in the IP's position would have done so.

Matter of Shah, 95 N.Y.2d 148; 711 N.Y.S.2d 824, 733 NE2d 1093, (2000); *affirming*, 257 A.D.2d 275; 694 N.Y.S.2d 82 (2nd Dept., 1999)

Guardian (wife) allowed to transfer all of comatose IP husband's assets to herself to render IP Medicaid eligible and to maintain her support. Court makes it absolutely clear that a person should normally have absolute right to do anything that he wants to do with his assets, including giving those assets away to someone else "for any reason or for no reason." No agency of the government has any right to complain about fact that middle class people confronted with desperate circumstances choose voluntarily to inflict poverty upon themselves when it is government itself which has established rule that poverty is prerequisite to receipt of government assistance in defraying of medical expenses. If competent, reasonable individual in position of IP would be likely to make such a transfer, under the same circumstances to insure that his care be paid by the State, as opposed to his family, then guardian can do it for him.

Matter of John "XX", 226 A.D.2d 79; 652 N.Y.S.2d 329 (3rd Dept., 1996), *lv. to app. denied*, 89 N.Y.2d 814; 659 N.Y.S.2d 854 (1997)

Guardian properly transferred bulk of his assets to IP's adult daughters within Medicaid guidelines,

in order to shield those assets from potential Medicaid lien for cost of nursing facility and other medical services. IP was likely to require continued nursing home care, costs of which will exhaust his assets, and it cannot be reasonably contended that competent, reasonable individual in his position would not engage in estate and Medicaid planning proposed by guardian. Finally, incapacitated person appears not to have manifested any intention inconsistent with proposed transfer, and there can be no question that his daughters are natural and (as expressed in his will) actual objects of his bounty.

Matter of Phlueger, 181 Misc.2d 294; 693 N.Y.S.2d 419 (Surr. Ct., NY Cty., 1998)

Re: Substituted judgment standard: where the IP has indicated views on the act for which the approval is sought, or his desires are otherwise known, the court will approve act even if it is not optimal choice so long as it is within parameters of reason. On the other hand where there is no information as to the IP's intent for the act, the court is more likely to restrict approval to acts within the range of reasonable choices that would optimize the person's situation.

Matter of Baird, 167 Misc.2d 526; 634 N.Y.S.2d 971 (Sup. Ct., Suffolk Cty., 1995)

Guardian may renounce inheritance on behalf of IP in order to retain IP's Medicaid eligibility if IP could have exercised same option had she not had guardian.

Matter of Beller (Maltzman), 1994 NY Misc. Lexis 698; 212 NYLJ 43 (Sup. Ct., Kings Cty.1994) (Leone, J.)

In this excellent analysis of Medicaid planning under Article 81, the court ordered that guardian (son of 81-year-old nursing home patient with degenerative dementia that is not expected to improve) be permitted to transfer his mother's assets to himself and her grandchildren for the purpose of making her eligible for Medicaid that will pay for her nursing home stay. Court held that under §81.21, patient; 1) lacks the mental capacity to perform this act and is not likely to regain it because of her degenerative condition; 2) there was clear and convincing evidence that a competent person would perform these acts (the transfers) under the same circumstances as no one would rationally choose to "spend-down" all of their assets for nursing home care when the law provides an estate-preserving alternative; 3) there was clear and convincing evidence, shown by her will, that the patient, when she had capacity, did not manifest any intention inconsistent with the acts for which approval has been sought.

Matter of Cooper (Daniels), 162 Misc.2d 840; 618 N.Y.S.2d 499 (Sup. Ct., Suffolk Cty., 1994)

Guardian could transfer IP's property to daughter to make IP eligible for Medicaid. IP should be permitted to have same options available to him with respect to transfers of his or her property that are available to competent individuals. A reasonable individual in father's position would be likely to make proposed transfer since such person would prefer that this property pass to his child rather

than serve as a source of payment for Medicaid and nursing home care bills where choice is available.

Matter of Da Ronca (Da Ronca), 167 Misc.2d 140; 638 N.Y.S.2d 275 (Sup. Ct., Westchester Cty., 1994)

Guardian who is wife may transfer the husband's assets to herself where Medicaid will pick up cost of nursing home care and cost of nursing home care will deplete estate in less than seven years, which will render his wife and son destitute. MHL 81.20 (a) (6) (iv) provides that guardian of the property shall use property and financial resources and income available therefrom to maintain and support IP, and to maintain and support those persons dependent upon IP." MHL 81.21 (a)(2) provides that powers of a guardian may include the power to "provide support for persons dependent upon [IP] for support, whether or not incapacitated person is legally obligated to provide that support."

Matter of Driscoll, 162 Misc.2d 840; 618 N.Y.S.2d 499 (Sup. Ct., Suffolk Cty., 1993)

Petitioner, Article 81 guardian of his wife, sought power to renounce on her behalf a substantial inheritance (the ½ share) that his wife was due to receive from their deceased son. Social Services primarily objected because it felt that the inheritance should have been disclosed in the Medicaid application and that renunciation would make IP ineligible for Medicaid. However, court granted power of renunciation, citing Social Services Law §366 for substituted judgment doctrine, also adopted in Article 81, that institutionalized people do not became ineligible for those services solely by the transfer of a resource if that transfer was made to or for the benefit of the patient's spouse because a spouse is the "natural object of his [partner's] bounty."

Matter of Furrer, NYLJ, 2/22/96, p. 35, col. 2 (Sup. Ct., Suffolk Cty., 1996) (Luciano, J.)

At time of petition, AIP was patient in State psychiatric facility. There were already probate proceedings pending regarding estate of AIP's late husband. The petitioner, hospital director, sought to be appointed as Art. 81 guardian so that he could exercise surviving spouse's right of election in order to offset part of her outstanding debt to state for her care. AIP's son also filed cross-petition for Art. 81 guardianship. GAL had already been appointed in probate proceeding. Under the EPTL, either guardian may exercise the right of election. Principal issue was whether the Article 81 guardian should be given preference over the Surrogate's GAL in exercising right of election. Finding the AIP clearly incapacitated, the court appointed her son as Art. 81 guardian for property management but reserved right of election to Surrogate Court's GAL because of Surrogate's special expertise. Judge Luciano emphasized that this special expertise is particularly important as there may be questions under the EPTL law as to extent of the AIP's right of election.

Matter of DiCeccho (Gerstein), 173 Misc.2d 692; 661 N.Y.S.2d 943 (Sup. Ct., Queens Cty., 1997)

Court grants guardian, AIP's son, power to transfer AIP's residence to himself, with life estate retained for life of AIP and to transfer some assets to other family members, provided that sufficient assets are retained to pay for AIP's needs during period of Medicaid ineligibility.

Matter of Klapper, 1994 NY Misc. Lexis 700; 212 NYLJ 27 (Sup. Ct., Kings Cty.)(Leone, J.)(We do not have this on file)

Guardians may be granted authority to make Medicaid planning transfers if the three requirements of §81.21 were met as, to rule otherwise would deny incapacitated persons the opportunity to preserve their assets that is available to those with capacity. Court held that IP's intent to continue to support her son's family could be established by her pattern of past gifts.

Matter of Laudia, NYLJ, 7/2/96, p.25, col.1 (Sup. Ct., Nassau Cty.)(Rossetti, J.)

Court granted petition of wife, already co-guardian of her incapacitated husband, seeking approval for transfer to her of his interest in their joint property and his individual property. Transfers were intended to support her, as Medicaid's minimum monthly needs allowance is insufficient. Transfers are not required to continue his eligibility for Medicaid because he is already incapacitated. Having applied the §81.21 test, the court concluded that the transfers are appropriate within the legislative intent of providing for the IP's dependents.

Matter of Mattei, 169 Misc.2d 989; 647 N.Y.S.2d 415 (Sup. Ct., Nassau Cty., 1996)

Guardian directed to exercise IP's right of election against husband's estate where failure to do so would likely have resulted in IP's Medicaid ineligibility due to IP's failure to pursue available resources. Interests and well-being of IP are paramount, and while desire to provide for one's children may be considered, such should not be given controlling weight where there are potential adverse consequences to IP. There was a substantial probability that if IP was Medicaid ineligible, her nursing home placement would be terminated. But, see, Matter of Street, infra.

Matter of Street, 162 Misc.2d 199; 616 N.Y.S.2d 455 (Surr. Ct., Monroe Cty., 1994)

Where DSS intervened in probate proceeding in effort to force guardian for incompetent surviving spouse in nursing home to exercise right of election, which would make him Medicaid ineligible, Court examines whether it is in best interest of incapacitated spouse for right to be exercised and determined that nothing would change in his care if court forced guardian to exercise right of election, therefore court denied DDS request.

Matter of Parnes, NYLJ, 11/2/94, p. 32, col. 2 (Sup. Ct., Kings Cty.)

Court authorized transfer of an elderly IP's assets to her husband for Medicaid planning. Court notes that amount of interspousal transfers which can be made is not limited to amount of community spouse resource allowance. Institutionalized spouse can transfer unlimited assets to community spouse without triggering any period of ineligibility for Medicaid payment of nursing home costs.

Matter of Scheiber (Zahodnick), NYLJ, 10/18/93, p. 38, col. 5 (Sup. Ct., Suffolk Cty., 1993)

Court allows guardians to renounce inheritance on behalf of AIP, without direct proof that it would have been AIP's intent, where there was no evidence that it was contrary to AIP's intent, and it was reasonable that AIP might have acted to enhance tax savings.

Matter of Vignola (Pollock), NYLJ, 9/26/97, (Sup. Ct., Queens Cty.)(Kasoff, J.)

For Medicaid planning purposes, guardian sought to renounce half of inheritance ward would receive from her deceased husband's estate. Noting the "rule of halves," guardian argued that this renunciation should not result in criminal penalties and that no period of Medicaid ineligibility would be imposed. Discussing recent legislation, court granted the power to make the renunciation, provided that sufficient assets were retained to pay for the ward's needs during any penalty period.

Matter of Heller (Ratner), 1995 NY Misc. Lexis 723; 214 NYLJ 19 (Sup.Ct., Kings Cty.) (Leone, J.)

Guardian moved for order authorizing him to establish Medicaid exempt luxury and burial accounts and to gift portions of her assets to her family, pursuant to the terms of her Totten trusts, for purpose of Medicaid planning. Court applied §81.21(d) four factor test and ruled that because she is incapacitated; unlikely to regain capacity; she has no dependents and her needs will be accommodated by Medicaid and reserving funds for the penalty period; and the court resolved the question of IP's testamentary intent by looking to her Totten trusts that name proposed donees as beneficiaries.

Matter of Elsie B. (Lerner), 265 A.D.2d 146; 707 N.Y.S.2d 695 (3rd Dept., 2000)

Court can empower guardian under MHL §81.21 to authorize guardian to exercise right retained by IP as settlor of revokable intervivos trust to modify trust by adding co-trustees.

(ii) Medicaid Planning trusts: Supplemental Needs/Pooled Trusts

a. Funds that can be placed into trust

(i) Personal injury awards/own funds

Matter of Kroll, __NY3D___; 2016 N.Y. App.DIv. LEXIS 6389 (2nd Dept. 2016)

Trustees of a lifetime trust created with the assets of a grandfather for the benefit of his disabled grandson, who was , at the time of the application, 20 years old and receiving SSI and Medicaid, petitioned to "decant" the trust into an SNT for his benefit pursuant to EPTL 10-6.6. Under the original trust, the trust funds would become available to the boy outright when he turned 21. The purpose of the application to decant was to protect the grandson's eligibility to his public benefits when he turned 21. The Department of Health objected, arguing that the since the funds came from a trust for his benefit, the sought after SNT was a first party self settled trust and thus required a payback provision, which the proposed trust did not contain. The lower court rejected that argument and granted the trustee's application. DOH appealed and on appeal, the court upheld the lower court's decision finding that since the trust was not created with grandson's own assets initially, the funds were not an available asset, that this was not a first party trust and that it did not require a payback provision .

Matter of Woolworth, 76 A.D.3d 160; 903 N.Y.S.2d 218 (4th Dept., 2010)

The Appellate Division, Fourth Department, reversed an Order of the Surrogate's Court which denied so much of the petition of a disabled medicaid recipient as sought to establish an SNT to be funded with her entire share of the settlement proceeds of her action seeking damages for her husband's wrongful death ($283,438.30). Ruling that he was only willing to approve an SNT to the extent that it would be funded with $100,000, the Surrogate stated, "In the end, I believe that I have a responsibility to the public fisc that takes priority. I recognize that to have someone pay from their own resources when somehow, [some way] we can get the government' to pay is an old fashioned thought but it is a thought I agree with." The Appellate Division ruled that the Surrogate had abused its discretion in conditioning its approval of the SNT upon the petitioner's agreement to limit the funding thereof to $100,000. The Court explained that by placing these limitations, the Surrogate ensured that the petitioner would lose her eligibility for Medicaid, "a result that is inconsistent with the public policy underlying SNTs" (enhancing the life of the beneficiary), and "the Surrogate's function in approving and supervising their establishment." Finally, the Appellate Division noted that "none of the pertinent statutes or regulations supports a limitation upon the amount of money that may be used to fund an SNT, and none of the cases construing those statutes and regulations has in fact imposed such a regulation."

Matter of Emil Z., 9/4/09, NYLJ 29, (col. 3) (Sup. Ct. Nass.Cty.)(Asarch, J.)

Court permitted Medicaid exempt transfers to the AIP's wife to allow her to continue to support the family in the family residence and to reimburse herself for certain expenses she incurred for the benefit of the IP but declined further transfers that would leave an amount in the IP's name that would provide for his care for only a 5 year period. Part of the court's rational was that the wife had been delinquent in paying for some of the IP's past care and the court was hesitant to permit the transfer of additional assets that might leave him dependent upon others outside the jurisdiction of the court to pay for his care. The court stated that these funds, which were damages in the medical malpractice action, were for the IP's future care and should remain in a vehicle established for his benefit and suggested that the guardians consider establishing an SNT.

Matter of Iris W., 1/24/08, NYLJ 37, (col. 2) (Surr Ct., Bronx Cty) (Surr. Holzman)

Guardian petitioned for authority to transfer the proceeds of his ward's medical malpractice action into a pooled trust (NYSARC Community Trust I Master Trust) and to seek reimbursement from these settlement proceeds for his payment of funeral expenses for the ward's mother, substantial expenditures he voluntarily made on behalf of the ward for many years and approval of attorney fees and disbursement made in connection with this application. The court granted the authorization to transfer the funds to the pooled trust, sought attorney fees and approved the request for reimbursement to the extent that it would have approved same if authorization had been requested prospectively.

Matter of Anna P., 16 Misc 3d 988; 841 N.Y.S.2d 730 (Surr Ct., Bronx Cty., 2007) (Surr. Holzman)

Petitioner guardian petitioned to withdraw the entire balance of the settlement proceeds on deposit in a ward's guardianship account in order to settle and voluntarily pay a claim by the New York State Office of Mental Retardation and Developmental Disabilities (OMRDD) for non-Medicaid covered expenses provided to the ward.. OMRDD indicated that if the guardian voluntarily paid the amount owed on its claim, then it would defer processing 90% of that payment and deposit those funds for the benefit of the ward in a master trust. The guardian would then act as a liaison with the New York State Association of Retarded Citizens, Inc. (NYSARC) and make payment requests for non-Medicaid covered expenses through the NYSARC trustees. The court found that OMRDD had the discretion to defer and possibly discount the funds that it could recover in litigation in exchange for saving the litigation expenses by the voluntary transfer of the funds to it, to be used by the NYSARC. Therefore, granting the petition was in the ward's best interests because (1) the ward would not lose her Medicaid eligibility because there will no longer be any funds on deposit in the guardianship account for her benefit; and (2) her non-Medicaid covered expenses can be paid by the trust, deferring the balance owed to OMRDD, to be paid, in whole or in part, from any funds remaining in the trust upon Anna's death.

Chambers v. Jain, 4/20/07 N.Y.L.J, 24 (col. 1)(Sup. Ct., Queens Cty. 2007)(Agate, J.)

The Court that presided over a med mal case and related infant's compromise proceeding applies the formula set forth in Ahlborn and adopted by NY in Lugo. It determined the total value of the damages, then determined the ratio between the total damages and the amount of the settlement and then applied that ratio to the full Medicaid lien to determine the amount of the lien that can be satisfied.

Article: "Hidden Medicaid Lien? 'Ahlborn Supplemental Needs,' " Jay J. Sangerman, NYLJ, Feb, 16, 2007, p. 4 , col 4.

The article makes the point that all that Ahlborn may accomplish is the delaying of the satisfaction of the Medicaid lien until after the death of the beneficiary of the SNT. The author warns attorneys to be careful when drafting the remainder provisions of SNT's so as not to include in the remainder ALL the Medicaid funds paid out to the individuals over his lifetime and to be sure to exclude portions that, under Ahlborn, Medicaid should not recoup.

Matter of Dowd, 2006 NY Misc Lexis 5126; 236 NYLJ 72 (Surr. Ct., Westchester Cty) (Surr.Scarpino)

17-A ward had a non-payback (3rd party) SNT funded directly with an inheritance. He also had two other guardianship accounts, one funded by an inheritance that went to him directly instead of directly into an SNT and the other was savings from his own wages. His guardians sought to render him Medicaid eligible so he could enter a group home and petitioned to pour both accounts into the existing SNT. The Court held that they could not do so but that they could create a payback, (1st party) SNT and pour the funds into that which would render him Medicaid eligible during his life time and he would have to pay back Medicaid upon his death with any remaining funds to the extent that there were any liens.

Fergeson v. IHB Realty, Inc., 13 Misc.3d 1029; 821 N.Y.S.2d 848 (Sup. Ct. Kings Cty., 2006) (Lewis, J.)

(*N.B. This case raises important issues related to SNT's but does not involve an SNT)*

Supreme Court, Kings County held that the US Supreme Court decision in Ahlborn did not dictate that a Medicaid lien should remain unsatisfied just because in hearing a personal injury claim it sent the damages determination to an arbitrator who did not allocate any portion of the damages to medical expenses. The court reasoned that when it delegated the damages assessment to the arbitrator, it reserved for itself the right to determine certain issues, including satisfaction of liens, when confirming and ordering the arbitration award and it could, consistent with public policy and the intent of the relevant portions of OBRA'93, order a portion of the settlement to go to satisfy the Medicaid lien.

Matter of Dowd, 2006 NY Misc Lexis 5126; 236 NYLJ 72 (Surr. Ct., Westchester Cty) (Surr. Scarpino)

A mentally retarded 17A ward was the beneficiary of a 3rd party, "non-payback" SNT. He lived at home and was not receiving Medicaid. In addition to the funds in the SNT, he had two bank accounts outside of the trust: one containing funds he had inherited directly and the other containing funds he had earned. When the guardians sought to move him to a group home, they needed to apply for Medicaid and petitioned the court to transfer the two bank accounts into the existing SNT to avoid having to spend the funds down to achieve eligibility. DSS objected. The Surrogate denied the application without prejudice to bringing a new application to created a 1st party "payback" SNT for the contents of both bank accounts.

Estate of Cora Barnes v. Lawrence Nursing Home, NYLJ, 11/20/03, p. 19 (Sup. Ct., Kings Cty.)(Kramer, J.)

Interpreting PHL 2801-d(5) the court holds that where nursing home resident received a tort damage award for personal injury inflicted by the nursing home, the award would not become a pyhric victory by rendering her ineligible for Medicaid in the FUTURE, however, applying the principals of Cricchio, the Medicaid lien for PAST treatment would not be waived.

Ianazzi v. Seckin, NYLJ, 12/9/02) (Sup. Ct., Kings Cty.)(Pesche,J)

Example of case where DSS lien is upheld under Cricchio (see below)

Gold v. United Health Services, 95 N.Y.2d 683; 723 N.Y.S.2d 117; 746 NE2d 172 (2001)

Social Services Law §104 (2) limits the amount that a public welfare official may recoup from an infant who receives public assistance benefits but that limitation does not apply to an infant who receives Medicaid funds. Medicaid is always the payor of last resort and a Medicaid lien must be satisfied in full before the infant's funds may be placed into an SNT, even if it means that there will be nothing left to place into the SNT. **OVERULED BY ARKANSAS v. AHLBORN (SEE BELOW)**

In re: Blakey (Buhania), 187 Misc.2d 312; 722 N.Y.S.2d 333 (Sup. Ct., Monroe Cty., 2000)

Court denies OMRDD claims for reimbursement of "improperly paid" Medicaid because when the benefits were paid, the funds were not "available" to the client and will not be "available" until she has a guardian to take them on her behalf. Court authorizes attorneys fees to the AIP's attorney pursuant to the Civil Rights Attorney's Fee Act of 1976 against AG for raising this argument, even though Attorney General claims to have raised the argument in good faith claiming this area of the law is still unsettled.

Carpenter v. Saltone Corp., 276 A.D.2d 202; 716 N.Y.S.2d 86 (2nd Dept., 2000)

Under rule of Baker v. Sterling, 39 NY2d 397 (1976), a Medicaid lien for a person under age 21 must be satisfied to the extent to of reimbursing Medicaid for funds paid for medical treatment for the minor. Citing the Appellate Division decision in Gold v. United Health Services Hosps., 261 AD2d 67 (1999), and other cases, Court held that counsel for an infant in a personal injury action may not circumvent the rule of Baker by denominating the entire settlement as being for pain and suffering.

Matter of Link v. Town of Smithtown(Gibson), 162 Misc.2d 530; 616 N.Y.S.2d 171 (Sup. Ct., Nassau Cty., 1994), *aff'd*, 226 A.D.2d 351; 640 N.Y.S.2d 768 (2nd Dept., 1996), *reversed and remanded sub nom* Cricchio v. Pennissi, 90 N.Y.S.2d 296; 660 N.Y.S.2d 679 (1997) *on remand sub nom as* Link v. Town of Smithtown, 175 Misc.2d 238; 670 N.Y.S.2d 692, (1997), *later proceeding* A.D.2d, 700 N.Y.S.2d 52 (1999).

Department of Social Services is entitled to satisfy Medicaid lien placed on proceeds of personal injury settlement before those funds can be transferred into an SNT.

Calvanese v. Calvanese, 93 N.Y.2d 111, 688 N.Y.S.2d 479 (1999), *cert denied*, *sub nom*., Callahan v. Suffolk Cty., 528 US 928; 120 S. Ct. 323 (1999)

Deals with question left open in Cricchio whether entire amount of a personal injury settlement is available to satisfy Medicaid lien, or only that portion of settlement specifically allocated to past medical expenses? Court holds that restricting recovery of lien to that portion of a settlement allocated to past medical expenses is contrary to statutory mandate that Medicaid be payor of last resort. Entire amount of personal injury settlement, not only that portion of settlement specifically allocated to past medical expenses, is available to satisfy Medicaid lien and cannot be placed into a SNT. **OVERULED BY ARKANSAS v. AHLBORN (SEE BELOW)**

Matter of Fredric, NYLJ, 6/8/98 (Sup. Ct., Nassau Cty., 1998)(Rossetti, J.)

Lower court decision following Calvenese issued just after App. Div decision.

Lugo v. Beth Israel Medical Center, NYLJ 8/10/06 p. 23, col. 1. Supreme Court , NY Cty)

Trial court holds that Arkansas v. Kansas (above) overrules Calvenese (above) and Gold (above). Only that portion of settlement specifically allocated to past medical expenses, is available to satisfy Medicaid lien and the rest CAN be placed into a SNT.

Arkansas Department of Health and Human Services v. Ahlborn, 164 L. Ed 2d 459; 74 U.S.L.W. 4214; 126 S. Ct. 1752 (2006)

An individual was severely and permanently injured in an auto accident and her medical expenses were covered by Medicaid administered by the Arkansas Department of Health and Human Services ("ADHS"). The recipient subsequently settled with alleged tortfeasors for approximately one sixth of her damages which, in addition to medical expenses, included future expenses, permanent injury, and lost earnings. The recipient contended that the ADHS was only entitled to claim the portion of the settlement attributable to medical expenses, but the ADHS asserted that under its state code ADHS was entitled to recover from the settlement the full amount it paid in medical expenses. The U.S. Supreme Court unanimously held that federal Medicaid law concerning third-party liability did not authorize the ADHS to recover an amount in excess of the recipient's recovery for medical expenses, and that the federal anti-lien provisions affirmatively prohibited such recovery by the ADHS. Federal laws requiring the recipient to assign payments from third parties only extended to payments for medical care and did not allow ADHS to collect the full amount of benefits paid, and the ADHS was federally precluded from asserting a lien on the settlement for the full amount.

Matter of Moretti, 159 Misc.2d 654; 606 N.Y.S.2d 543 (Sup. Ct., Kings Cty., 1993)(*superceded by statute*)(1994 amendment to EPTL 7-1.12)

Court finds that if AIP had capacity to act, it is apparent that he would have created an SNT with proceeds of personal injury settlement, naming himself as the beneficiary, which would "supplement and not supplant" government entitlements, thereby enabling him to enjoy an enhanced quality of life. While it is noted that §81.21(a)(6), in describing the guardian's powers to make transfers on behalf of IP, refers to such transfers as those made "for the benefit of another person," OBRA '93 now makes clear that disabled person's assets may be transferred to SNT for his own benefit.

Matter of Bigajer, NYLJ, 5/27/94, (Surrogate Court, Kings Cty.)

Court applies OBRA '93 and grants application by co-guardians (parents) to create SNT for developmentally disabled ward (son) with personal injury award before NY adopted OBRA, citing supremacy clause of US constitution.

Matter of LaBarbera (Donovan), NYLJ, 4/26/96, p. 36, col. 6 (Suffolk Sup.)(Luciano, J.)

Court denies application to establish SNT for comatose AIP with proceeds of personal injury settlement where income from settlement currently exceeds and is likely to continue to exceed her expenses, although it did give guardian opportunity to seek establishment of SNT should this situation change in future.

(ii) Inheritances

Estate of Devore, 12/16/10 N.Y.L.J. 34, (col. g) (Surr. Ct. Kings Cty.) (Surr. Torres)

Surrogate Court approves a settlement whereby the Office of Mental Health agrees to defer collecting 90% of a psychiatric patient's inheritance until after his death, thereby allowing the inheritance to be placed into a NYSARC third party trust to be used for the patient's benefit throughout his lifetime.

Matter of Olive VV., (Stipulation of 12/7/00)

The Attorney General agreed to withdraw its appeal and has stipulated that inherited funds are not "available" for Medicaid qualifying purposes until the date of distribution rather that the date of death. Therefore, such inherited funds may be placed into Supplemental Needs Trusts rather than applied to satisfy pre-existing Medicaid liens. This agreement is consistent with the outcomes in Matter of Patrick B.B., Matter of Steven S., and Matter of William S.,either previously reported in the main volume of this booklet or in this volume.

Matter of Patrick "BB", 267 A.D.2d 853; 700 N.Y.S.2d 301 (3rd Dept., 1999)

Question whether IP's inheritance was available resource for purposes of Medicaid eligibility, was rendered moot where State relinquished its claim and did not object to the funding of SNT.

Matter of Steven S., Sup. Ct., Kings Cty., 6/19/00, (Scholnick, J.)(NOR) (not an Art. 81 case)

Medicaid lien accruing after death of ward's father but prior to distribution of inheritance to ward cannot be satisfied before creation of SNT because funds did not belong to ward when Medicaid lien was created, they were just an expectancy but not vested and not under his control or his representatives control when lien accrued.

Matter of William S., Index No. 1999-002249, (Sup. Ct. Broome Cty., 1/28/00 NOR)(Thomas, J.), NOR

OMRDD petitioned for the appointment of guardian of the person and property for profoundly retarded man who became the beneficiary of his deceased father's IBM tax-deferred savings plan. OMRDD wanted guardian to control that fund and turn it entirely over to the state as compensation for past care, arguing that it became an "available resource" as soon as the father died in 1997 and Medicaid had therefore been incorrectly paid for the care of William S. The court followed the MHLS argument and cited as controlling precedent, Matter of Little, 256 A.D.2d 1152 for the proposition that for the purpose of determining Medicaid eligibility, a resource is not available until it is actually distributed to and in the control of the Medicaid recipient. The court then granted

MHLS partial summary judgment, dismissing OMRDD's claim of incorrectly paid Medicaid and then ordering the inheritance placed in a supplemental needs trust upon the determination, following an evidentiary hearing, that William S. requires a special guardian.

(iii) Income and benefits

Matter of Ruben N., 55 A.D.3d 257; 863 N.Y.S. 2d 789 (1st Dept., 2008), ***recalled and vacated at 71 A.D.3d 897; 898 N.Y.S.2d 459 (2nd Dept 2010)***

A young man with a congenital birth disorder who had been correctly paid Medicaid for his care in his early years was injured, at the age of 28, as a result of medical malpractice and compensated by the third party for the injury. The settlement, minus satisfaction of the State's Medicaid lien, was placed into a payback SNT for his benefit. The amount of Medicaid recoupment paid to the State before funding the trust represented only the amount of Medicaid paid after the injury caused by malpractice of the third party. The young man died approximately one year after the SNT was funded. After his death, the State filed a claim with the trustee pursuant to the payback provision of the trust to satisfy the balance of the lien it claimed for all the Medicaid paid to the young man through his entire lifetime as a result of his congenital disability and not the recent injury that resulted in the settlement funds in the SNT. The Appellate Division held that the State was not entitled to re-coup the full amount paid to the young man over his lifetime. The Court reasoned that there may be no recovery by the State for the correctly paid Medicaid except to the extent that recovery was available against a right of action or from a recovery against a responsible third party, citing 42 USC 1396a (a)(18); 42 USC 1396p(b) (1); NY Soc. Serv. Law 369 (2)(b)(i); NY Soc. Serv. Law 369 (2) (c); NY Soc. Serv. Law 104-b; and 18 NYCRR 360-7.11(b)(5). Also, citing the line of cases under Ahlborn, the State's right of recovery from responsible third parties is limited to payment for medical expenses. That is, federal law "does not sanction an assignment of rights to payment for anything other than medical expenses - not lost wages, not pain and suffering, not an inheritance." (Arkansas Department of Health and Human Services v. Ahlborn, 547 US 268, 283-285). **Upon motion to reargue, the Appellate Division, citing Matter of Abraham XX, 11 NY3d 429) recalled and vacated its earlier decision and ordered that the DSS was entitled to recover for the remaining portion of the corpus of the SNT, if any, the unreimbursed portion of all medical assistance benefits provided to Ruben N. during his lifetime which were not covered by the Medicaid lien previously satisfied.**

Wong v. Daines et al, 582 F. Supp. 2d 475; 2008 U.S. Dist LEXIS 75453 (SDNY 2008)

In calculating Medicaid benefits, only income already contained in a payback SNT, that has not passed through the hands of the beneficiary, is sheltered. SSD income placed in an SNT, and any

income generated by it that remains in the trust, is not counted in determining the individual's eligibility for Medicaid. However, in calculating the amount of the Medicaid benefits and thus, in turn the NAMI, that income is counted pursuant to 42 CFR 435.832, the relevant post -eligibility regulation.

Matter of Samuel Erman, May 14, 2007, N.Y.L.J. 21 (col. 1)(Surr. Ct., Kings Cty.) (Surr. Seddio)

There was no need to establish an SNT since the funds that would have been placed into the trust were Holocaust War Reparation Compensation which were exempt assets that would not have rendered the ward ineligible for Medicaid pursuant to18 NYCRR 360-4.6 (b)(2)(iv) and 02 OMMADM-3 (iv)(B)(2)(4).

Matter of Kaiser v. Commissioner of the NYS Department of Health, 13 Misc.3d 1211A; 824 N.Y.S.2d 755 (Sup Ct., Nassau County, 2006)

An Article 81 guardian had been appointed pursuant to an order which directed the guardian to establish an SNT for the benefit of the IP's disabled daughter into which the guardian would pour the IP's Social Security and pension income. The IP was in a nursing home and her care was funded by Medicaid and Medicare. When the guardian tried to set up the trust as directed, the Commissioner calculated the NAMI (Net Available Monthly Income) as including the IP's income described above so that there was no money left to with which to fund the trust. The Commissioner took the position that in order to be exempt from inclusion in the NAMI, the income placed into the trust had to be for the benefit of the IP only and could not be diverted for the daughter's support. After Fair Hearing, the Commissioner's position remained the same. The guardian brought on an Article 78 petition in Supreme Court, Nassau County to challenge the Commissioner's decision and that court granted the petition, holding that the income could be set aside in an SNT for the disabled daughter under the express language of State law (Soc. Services Law §366.5(d)(3)(ii)(C),(D)), the Commissioner's own regulations (18 NYCRR 360-4.4(c)(2)(iii)(C)(1)(iii)) and Federal Law (42 USC 1396p(c)(2)(B)(iii)). This out come was consistent with a previous unpublished decision of that Supreme Court, Nassau County (Covello, J.) in Matter of Correri, Nassau County, Index # 17372/04 (May 19, 2005).

Matter of Sussman, NYLJ, p. 25, 9/7/04 (Surr. Ct. Westchester Cty)(Surr. Scarpino)

" ...the funding of a supplemental needs trust with funds emanating from Social Security Disability Income is permissible and does not contravene any public policy considerations ..(see Matter of Kennedy ...) ..."

Matter of Kennedy, NYLJ, 4/21/04, p. 20 (Surr. Ct., Nass.. Cty,)(Surr. Riordan)

SNT may be funded with SSD monthly income and such funding, which has the effect of avoiding

the spend down requirement of Soc. Serv. Law §366(2)(a)(7), does not violate that section. Therefore, 40 year old mentally retarded man living in the community receiving both SDD of $1,391/mo. and Community Medicaid did not have to spend down the difference between his SSD and the SSI of $662/mo by applying the remaining $729/mo to his care by AHRC and could instead put the $729/mo into the SNT to be used for his supplemental needs that Medicaid and SSI would not pay for.

b. Proper trustees

Matter of Smergut, 31 Misc. 3d 875; 924 N.Y.S. 2d 747 (Sup. Ct., Nassau Cty., 2011) (Diamond, J.), aff'd 99 AD3d 901; 951 N.Y.S.2d 913(2nd Dept., 2012)

The Court entertains and then grants an application by an OPWDD licensed provider (Life's WORC) to appoint a family member as a Special Guardian to deposit a retroactive SSD benefit in excess of $100,000 in the Life WORC's pooled trust for the benefit of LD, a member of the Willowbrook Class. The Attorney General's Office, the Consumer Advisory Board and the NYCLU, as counsel to the Willowbrook Class, objected to the WORC pooled trust and advocated for an "under 65 payback trust" administered by a neutral third party, consistent with the terms of the Willowbrook stipulation. In part, the State maintained, (as did the Willowbrook Class), that Life WORC as a residential provider of services for LD, had a conflict of interest and should not serve as the trustee for LD. Reliance was placed on *Patrick BB.* but the Court finds *Patrick BB* unpersuasive. Among other things, the Court holds that "absent a showing of special circumstances, the Court declines to impose a glass upon the existing statutory plan that would, as a matter of course, require the employment of a payback trust over a pooled trust whenever both options are available and no other special factors dictate a preference for the use of one over the other."

Matter of Lauro, 44 A.D.2d 951; 1974 NY App. Div. LEXIS 8274 (Sup. Ct., Onondaga Cty.)(Wells, J.)

Court denies application for guardian to determine the supplemental needs of the AIP so that SNT trustee, a bank, can disburse funds to meet the AIP's supplemental needs in accordance with the trust. Court finds that proper trustee is the one named in the trust. Trust requires that the named trustee use its discretion, not the discretion of person unnamed in the trust. Appointing the guardians for this purpose would, in effect, reform the trust impermissibly.

Matter of Patrick "BB", 284 A.D.2d 636; 725 N.Y.S.2d 731 (3rd Dept., 2001)

Where Court held that MHL §81.19(e) prohibited appointment of Commissioner of OMRDD as guardian of property because OMRDD is a creditor of AIP, it also held that MHL §13.29 and §29.23 did not authorize said Commissioner to hold the funds is any other capacity short of guardianship,

such as "SNT-like account".

Matter of Larson, 190 Misc.2d 482; 738 N.Y.S.2d 827(Surr. Ct., Nassau Cty. 2002)

Court permits creation of Other Qualifying Instrument calling it a "MHL 13.29 account" (SNT like trust) for OMRDD client in which OMRDD is the trustee. Decision states that parents, who were the co-guardians, "conditionally gifted" the funds ($25,000) to the State and the state set up the trust with the "gifted" funds. Court finds it different from Patrick BB because these funds were actually gifted.

Matter of Regina, NYLJ, 11/2/01, p.20, col. 4 (Sup. Ct., Queens Cty.)

Mother, who was already the Art 81 guardian of the person and property management was permitted to be named as SNT trustee despite conflict of interest with income beneficiary so long as trust was amended to include an annual accounting requirement and notice to DSS.

Matter of Pace, 182 Misc.2d 618; 699 N.Y.S.2d 571 (Sup. Ct., Suffolk Cty., 1999)

Co-guardians were parents of their adult disabled son who resides in group home and attends day programs, both of which are funded through Medicaid program. Parents could serve as co-trustees of SNT even though they ultimately stood to inherit corpus of the trust after Department had been reimbursed for medical assistance provided. Court held that there is no blanket rule prohibiting all parents or relatives who are remaindermen, from serving as trustees of supplemental needs trusts.

Matter of Kacer (Osohowsky), NYLJ, 11/1/94, p. 33, col. 1 (Sup. Ct., Suffolk Cty.) (Luciano)

Establishment of SNT denied where trust named same persons as co-trustees and beneficiaries of trust corpus upon the person's death, which presents serious conflict of interest. READ FOR EXCELLENT DISCUSSION OF SNT'S AND RELATIONSHIP OF FEDERAL OBRA '93 STATUTE TO EPTL STATE STATUTE AUTHORIZING SNT'S.

Contrast

DiGennerro v. Community Hospital of Glen Cove, 204 A.D.2d 259; 611 N.Y.S.2d 591 (2nd Dept., 1994)

Establishment of SNT denied where trust named infant's parents as both co-trustees and beneficiaries of trust corpus upon infant's death, which presents serious conflict of interest. Additionally, there was no provision in trust instrument for court approval of withdrawals made by trustees, nor was there any requirement that trustees account to court on annual or bi-annual basis.

Matter of Mc Mullen, 166 Misc.2d 117; 632 N.Y.S.2d 401 (Sup. Ct., Suffolk Cty., 1995)

A request by parents (co-guardians) of incapacitated child for authorization to establish SNT is denied where co-trustees are also potential remaindermen, since this arrangement creates an impermissible conflict.

Matter of De Vita, NYLJ, 2/17/95, p. 33, col. 5 (Sup. Ct., Suffolk Cty., 1995)

2/17/95--A mother and father applied for an order approving SNT for incapacitated son's personal injury award with the mother to serve as trustee. The mother also served as guardian. Court denies request because trustee gives accountings to guardian and requiring her to report to herself is an impermissible conflict of interest.

5/22/95– Prior problem with inadequate accounting was resolved with provision requiring that copies of trust's federal tax return be submitted to father and court examiner as well as herself as guardian. However, court still did not approve SNT because mother, who served as trustee, still stood to benefit by another provision distributing all remaining principal and income by the laws of intestacy. This was an impermissible conflict of interest, despite fact that any money left would be negligible.

c. Pooled trusts

Matter of Steven Siegel, 5/30/08, Index #18311/06 (Sup. Ct., Suff. Cty) (Sgroi, J.) (unpublished)

Where application was made by the Consumer Advisory Board ("CAB") to place a Willowbrook Class AIP's $68,000 retroactive Social Security payment into a pooled trust , MHLS, on behalf of the AIP, successfully advocated for the establishment instead of an individual SNT. The Court held that the individual SNT was appropriate and indicated its belief that such an individual trustee would be more responsive to the needs of the AIP than might be the case with a pooled trust. The Court directed that the trust should include language directing the trustee to consult with CAB as to how the money could best be used to meet the AIP's needs.

NYS Association for Retarded Children et al. v. Spitzer, (unpublished stipulation and order available from departmental office of MHLS); EDNY 72 CV 356, 357 (RJD)

When Willowbrook class member comes into sum by virtue of a Social Security lump sum payment of $10,000 - $50,000, or any other asset such as a tort recovery or inheritance of $10,000 - $100,000, the State may not refuse to petition the court to have the funds placed into a pooled trust. If a lump sum social security payment exceeds $50,000 or any other asset exceeds $100,000 the State may petition to have the funds placed in an individual SNT but the SNT instrument shall direct that the

trustee consult with Consumer Advisory Board ("CAB") as to how to best use the funds for the class member's benefit and the State must advise the court that if a suitable individual trustee is not available that there is still an option of a pooled trust. The State and CAB must remain neutral on the question of the best type of trust for the clients and if the asset is between $5,000 and $10,000 the funds may be placed in an individual court-ordered patient account and treated as a medicaid exception trust under SS Law 366.2(b)(2)(iv) with a payback provision.

Matter of Christine Banks, NYLJ, 6/28/00, p. 26 (Sup. Ct., NY Cty.)(Parness, J.)

Court appointed guardian with power to establish pooled trust for benefit of IP. Guardian fails to carry out its duty to establish trust. During roughly 2 years time that trust should have been in existence but was not, Medicaid made substantial medical payments on IP's behalf. Then, new guardian appointed. He locates additional assets and then applies to add them to pooled trust previously approved by court. DSS opposes, saying that it has lien for payments made and Medicaid should be payor of last resort. Court allows establishment of pooled trust citing intent of Court of Appeals in Shah and rule of equity that says that "equity regards as done that which should have been done."

Matter of Steffi Salomon, NYLJ, 9/2/98, pg. 23, col. 5 (Surr. Ct. New York Cty. 1998)

An Article 17-A guardian can transfer a ward's assets into a charitable pooled asset trust. The UJA Trust is established pursuant to Social Security Services Law, which mirrors the substance of the federal Omnibus Reconciliation Act of 1993. The pooled trust concept combines the resources of various individual beneficiaries and enables them to receive the advantage of nonprofit investment management which an individual supplemental needs trust could not ordinarily obtain.

Matter of Siegel (Altschuler), 169 Misc.2d 613; 645 N.Y.S.2d 999 (Sup. Ct., Nassau Cty., 1996)(Rossetti, J.)

Trustees sought to transfer assets from SNT to charitable pooled trust. The income trust was set up for two allegedly incapacitated sisters. The court stated that, if assets were put into a pooled trust, when the sisters died remaining amounts could be kept in the trust for charitable purposes, rather than just for reimbursing Medicaid. Court stated that the "U.J.A. trust" at issue was a proper pooled asset trust under federal Medicaid legislation, but it did not approve the transfer, as the income trust was irrevocable without certain steps taken.

Matter of Sarah Rosenbloom, Index No. 9404844, (Sup. Ct., Dutchess Cty.)(Bernhard, J.) 5/9/95, NOR

80-year-old mentally retarded woman inherited $34,000 from brother. Court, pursuant to 42 U.S.C. §1396, appointed UJA to place money in "pool trust," because SNT is only available for Medicaid purposes to people under 65. However, "pool trust," which must be established and managed by

non-profit association, functions in same way, as state will still be reimbursed after her death.

d. Notice to and Involvement of local DSS

Matter of Cooper, Feb 8, 2007 NYLJ, p. 17, col 1, (Sup. Ct., Queens Cty. 2007) (Thomas, J.)

Where the petitioner mother who was the property management guardian for her daughter and the bank that was the trustee of the SNT moved for leave to purchase real property and an handicapped accessible van for the IP from the assets of the SNT, the local Department of Social Services did not object to the purchase of the van but did object to the purchase of the residence. The Court found it "unfathomable" that the Department of Social Services could find the purchase of a home an unreasonable and unnecessary expense and that it would instead require a young handicapped girl to live in deplorable conditions merely to keep the assets of the trust liquid. The Court stated that it could not "imagine a more justified or prudent use of the trust that to permit the purchase, believing that the child's shelter and daily living conditions should be a comfortable environment and not detrimental to her heath and well being" as it present is.

Cano v. Shmonie Corp., NYLJ July 22, 2004 (Sup. Ct., Bronx Cty 2004)(Katz, J.)

Infant plaintiff's personal injury action was settled for $2.19 million. Plaintiff sought an order permitting the placement of settlement proceeds in a "portable" supplemental needs trust [SNT]. Department of Social Services [DSS] argued that SNT's should not be "micro-managed" by courts. Court rejected the assertions by the DSS that a portability provision within the SNT would violate Estate, Powers and Trusts Law §[7-1.9, with the result that the SNT might be considered a revocable trust, rendering the plaintiff ineligible for Medicaid. The court determined that to permit an SNT to be constructed in a way to prevent the family of a disabled person to move freely to another state without jeopardizing the disabled's ability to receive entitlement payments would violate public policy.

Matter of Mc Mullen, 166 Misc.2d 117; 632 N.Y.S.2d 401 (Sup. Ct., Suffolk Cty., 1995)

DSS should be given notice of proceeding to establish SNT so they may intervene and provide guidance regarding beneficiary's eligibility for Medicaid since SNT that is judicially approved and conforms to all criteria necessary to render beneficiary eligible for Medicaid, may later be determined ineligible by an administrative determination. To assure that proposed SNT qualifies to fulfill its intended purpose, guardian's motion to establish and fund such trust will be denied until trust is formally approved by County and State DSS, or any appropriate reviewing authority, in writing.

e. Creation of SNT/Proper petitions and petitioners

Application of Hodges, 1/14/2010, NYLJ 35 (col.4) (Surr. Ct. NY Cty)(Surr Webber)

Application under Article 81 for guardianship was resolved by creation of SNT to receive and mange an inheritance for the AIPS brother in lieu of guardianship. Although the Surrogate did not explain its decision in terms of least restrictive alternative or alternative resources, it is a good example of a creative solution that that conforms to both concepts.

Matter of Page, Jan. 14, 2009, NYLJ, p. 31, col. 4 (Surr. Ct., NY Cty .) (Acting Surr. Jacobson)

58 year-old adult with mental capacity petitioned to create SNT for his own benefit and to fund the trust with proceeds of a settlement for his mother's wrongful death and personal injury. He submitted an unexecuted copy of the proposed trust agreement. With the Court's permission, he was permitted to be the settlor of the trust and his friend the trustee. The court approved establishment of the SNT upon a finding that: the provisions of the proposed trust conformed to EPTL 7-1.12 and with present Federal and State law, that jurisdiction has been obtained over all necessary parties including the Department of Social Services, that the trust correctly provided that the State will receive all amounts remaining in the trust upon the death of the beneficiary, up to an amount equal to the total medical assistance paid to the beneficiary during his lifetime, and that any amounts after payment of this amount to the State will be paid to the beneficiary's estate.

Matter of Application of Tonya S., 2006 N.Y. Misc. LEXIS 4236; 236 NYLJ 124 (Surr. Ct. Bronx Cty. 2006) (Surr. Seddio)

Where an infant's compromise decree directed the fees to be paid over to the child's guardian, the court denied a mother's application to receive the funds in her capacity as the child's mother and to place them into an SNT. The court directed her to become the guardian first, then, in her capacity as guardian, to apply for public benefits and then return to court with proof that she had done both and only then would the court turn over the funds to be placed into the SNT.

Matter of Romsey, NYLJ, October 11, 2006, Vol. 236, (Kings Cty, Surrogate's Ct) (Surr. Lopez Torres)

Example of another case permitting an SNT to be settled by a self petitioner.

Matter of Bruce S. DeaMario, NYLJ 8/12/05, p. 30 (Surr Ct , Nassau Cty) (Surr. Czygier)

Example of another case in which petitioner self settles an SNT acting as his own petition. Petitioner suffers from Multiple Sclerosis but is competent to handle his own affairs. Court citing Gillette

grants petition.

Estate of Paul M. Schuller, NYLJ, 11/3/04, p.31 (Surr Czygier) Surr Ct. Suff. Cty.)

Petitioner, a physically disabled man who was mentally competent to handle his own affairs, petitions to establish self settled SNT. Court grants petition, citing Matter of Gillette.

Matter of Cusack, NYLJ, 10/29/03 (Surr. Czygier)

Petitioner, a physically disabled woman who was mentally competent to handle her own affairs, petitions to establish self settled SNT. Court grants petition citing Matter of Gillette)

Matter of Gillette, NYLJ, 4/4/03, p. 23, col. 3 (Broome County, Surr. Peckham)

Disabled person under 65 who has no parents, grandparents or need for guardian sets up his own SNT w/o court intervention. SSA refuses to recognize the trust as an OBRA qualifying trust and therefore counts the resources in the trust when determining eligibility. Disabled person petitions the court to recognize the trust and set it up *nunc pro tunc* as of the date it was first funded. Court holds that it cannot do it because it can not retroactively establish something that was not legitimate in the first instance. Therefore, disabled person petitions the court to create a new trust. **"HE DOES NOT SIGN OR FUND IT BEFORE SUBMISSION TO THE COURT**" Court notes, "In this way the expense of a guardianship proceeding can be avoided for a person who is disabled, but not otherwise in need of a guardian". **See, excellent article discussing how to establish first party SNT in light of this case at NYLJ, 6/2/03 p.1 col. 1. See, Newsday 9/3/03 p. A23 "allowing a trust without a guardian" by Robin Topping (discussing Nassau County case before Surr. Riordan following Gillette)**

f. Proper Court

Matter of the Establishment of a Supplemental Needs Trust for the Benefit of Michael M, 4/5/2010 N.Y.L.J. 31, (col. 6) (Surr. Ct. Bronx Cty.) (Surr. Holtzman)

An Article 81 guardian of the person and property sought leave to create an SNT for the benefit of her ward and to fund the SNT with her ward's distributable share of his mother's estate as well as with funds currently held in the Article 81 guardianship account. Under the circumstances of this case, including that a portion of the funds were subject to the Article 81 guardianship proceeding, and it appeared that the Supreme Court had reserved the right to approve any compensation to be paid for legal services in any matter, it is not clear that the appointing court granted the petitioner authority to commence the SNT proceeding in the Surrogate court. Accordingly, the Surrogate denied the application without prejudice unless, within 90 days of the date of its decision and order,

the petitioner obtained and presented an order of the appointing court indicating that she has the authority to make the instant application to the Surrogate Court.

Matter of the Application of Wachovia Bank, N.A , as trustee of the Article Sixth Trust of the Will of Edith M. Leslie , NYLJ, Sept. 9, 2008, p. 36, col. 6 (Surr Ct. NY Cty., Surr. Glen)

Although it had initially been contemplated that the Surrogate would retain jurisdiction over an SNT established in decedent's will for the benefit of her disabled daughter, given that there was also an Art. 81 guardian and therefore continuing jurisdiction of Supreme Court over the guardianship, and given that the trustee of the SNT was the same person as the guardian, issues regarding commissions of the SNT trustee were to be addressed in Supreme Court consistent with MHL 81.28.

Matter of the Will of Edith M. Leslie, 2008 N.Y. Misc. LEXIS 5747; 240 NYLJ 57 (Surr. Ct., Bronx Cty.) (Surr. Glen 2008)

An SNT had been created in Surrogate's Court under a construction of a general trust under the will for the benefit of decedent's disabled daughter. In addition to being the beneficiary of this trust, this daughter was also an IP with an Article 81 guardian. The Article 81 guardian was the proposed trustee of the SNT. Among other things, the petition sought an order fixing the future annual fees of the guardian and directing that the guardian's fee be paid from the SNT. The Surrogate instead held that given the continuing nature of the Supreme Court's jurisdiction over the guardianship, all issues regarding the commissions of the trustee of the SNT were to be addressed by the Supreme Court consistent with MHL 81.28, as also provided in the term of the proposed SNT. The Surrogate also held that to the extent the guardian incurred fees and costs not payable from the SNT in connection with investigating and securing appropriate medical care for the IP, the guardian could seek fees from the general trust. Finally, the Surrogate held that it would retain jurisdiction over administration of the general trust that had been created under the will.

Matter of Lehman, 2008 N.Y. Misc. LEXIS 2106; 239 NYLJ 61 (Surr Ct ., Bronx Cty.) (Surr. Holzman)

An Article 81 guardian, who had been appointed in Supreme Court (by a now retired Justice), applied in Surrogate's Court to fund an SNT with the proceeds of a wrongful death action that had been compromised in the Surrogate's Court in connection with the settlement of the estate of the IP's mother. The Article 81 guardian also requested that from these same proceeds, the Surrogate fix legal fees to various attorneys who represented him or the IP previously pursuant to the order of the Supreme Court. The Surrogate reasoned that although jurisdiction had been obtained over all the parties, the application should have been made in Supreme Court because establishing the SNT would require an increase in the authority of the petitioner over that originally granted by the Supreme Court. The Surrogate then reasoned that if the case were transferred to it, it would have jurisdiction to act on all the issues since the funds were derived from the compromise in Surrogate's Court. Therefore, the Surrogate deemed the application to have been made pursuant to SCPA

501(1)(b) seeking the Surrogate's consent to receive any action pending in Supreme Court relating to the administration of the estate if, upon referral back to Supreme Court, the Supreme Court in the exercise of its discretion, decides that the matter should proceed in Surrogate's Court.

Matter of Isaiah Jenkins, NYLJ, 6/2/03, p. 33, col. 5 (Surr. Scarpino)

Surrogate's Court has the authority to review an SNT and determine whether its terms satisfy applicable statutory requirements and case authority (EPTL 71.12; OBRA 93, 42 USC §1396p[d][4][A]; SSL §366[2][b][2]. This review protects the incapacitated person's interest and ensures the fulfillment of fiduciary obligations and compliance with the controlling laws and rules regarding eligibility for government benefits.

g. Reformation of Trusts to SNTs

Estate of Joseph B. Sieminski, Deceased, 7/6/10, NYLJ, 40 (col. 5) (Surr. Ct Suff. Cty.) (Surr. Czygier)

Court reformed a testamentary trust to an SNT because it found that this trust was created before enactment of the State and Federal Legislation creating SNT's and that reformation effectuated the grantor's intent to prevent the beneficiary from losing his government benefits.

Estate of Luckner Polycarpe, 4/1/2010 NYLJ 41, (col. 6)(Surr. Ct., Queens Cty.) (Surrogate Nahman)

Surrogate reformed a testamentary trust established for the benefit of the decedent's spouse, so that the trust could be administered as a SNT in conformity with the provisions of EPTL §7-1.12 in the event she were to develop a severe and chronic or persistent disability during the term of the trust.

Matter of Rappaport, 21 Misc.3d 919; 866 N.Y.S.2d 483 (Sup. Ct. Nass. Cty. 2008) (Riordan, J.)

The court permitted reformation of a testamentary trust into an SNT.

Estate of Newman, 18 Misc.3d 1118A; 856 N.Y.S.2d 500 (Surr Ct., Bronx Cty, 2008) (Surr. Holzman)

Court reformed a testamentary trust to an SNT because it found that the reformation effectuated the grantor's intent to prevent exhaustion of the trust by use of trust funds to pay for expenses already covered by government benefits.

Matter of Estate of Longhine, 15 Misc.3d 1106A; 836 N.Y.S.2d 500 (Surr. Ct., Wyoming Cty., 2007)(Surr. Griffith)

Surrogate permits reformation of a testamentary trust into 3rd party SNT where the affidavit of the drafting attorney showed that creation of an SNT was not presented to the testator due to the lack of time between the onset of his final illness and his death, but that the testator was the sole caretaker for his disabled son, his son was receiving public benefits that he would lose due to the inheritance, the bulk of the estate was real property and the testator would likely have chosen to create an SNT had he been presented with the option.

Estate of Goldie Hyman, NYLJ, Mar. 7, 2007, p. 21, col .1(Surr. Ct., Nassau Cty.) (Surr. Riordan)

The Surrogate reforms a testamentary trust into an SNT stating: "The policy of the State of New York is to encourage the creation of Supplemental Needs Trusts for people who are mentally or physically disabled [citations omitted]. Courts have shown a willingness to reform wills to obtain the benefits of an SNT where the testator's intent to supplement, rather than supplant, government benefits is evident from the language of the testamentary instrument." In this case, the testator clearly acknowledged his daughter's disabilities and his intent to provide for her continuing needs.

Estate of De Rosa, NYLJ, 4/20/06, p. 30, col. 2 (Surr. Ct., Kings Cty)

Surrogate permits reformation where testamentary trust was created prior to the codification of EPTL 7-11.2, the beneficiary was aged and in need of a home attendant, the will provided that the trust proceeds be used only to supplant and not supplement other available resources, there was a clause in the trust providing for termination of the trust if the beneficiary was denied benefits due to the trust's existence and the trust also provided that the beneficiary has no power to dispose of any trust assets.

Matter of Kamp, 7 Misc. 3d 615; 790 N.Y.S.2d 852 (Surr Ct., Broome Cty., 2005) (Peckham, J.)

Court examines the question whether a third party testamentary trust benefitting the settlor's mentally retarded son who had a SCPA 17-A guardian, for which payout of income is not discretionary with the trustee and that was created before the enactment of EPTL 7. 1-12 and OBRA '93 can be reformed into an SNT where the payout of both income and principal would be required by law to be discretionary with the trustee. Court finds that the trust can be reformed because: (1) The settlor's intent to provide for the care of his mentally retarded son and minimize taxes is clear and it may be presumed that he would have created an SNT is that was then possible; (2) the clear intent of the Legislature was to benefit persons with disabilities; and (4) a guardian has the right and power to engage in Medicaid planning; and (5) The court can substitute its judgment for what the disabled individual would have done if able. The court rejects the reasoning of Matter of Rubin,

4 Miscd3d 634 (NY Cty 2004) as construing the law of reformation too narrowly.

Matter of Sylvia U. Rubin, NYLJ, p. 24, 6/15/04 (Surrogate Preminger)

Trusts that was created before Supplemental Needs Trusts were invented by either case law or statute (pre- OBRA'93, pre- Escher and pre- EPTL 7-1.12) could not be reformed to be third party non-payback SNT's because the reformation would alter the intent of the settlor of the trust not merely correct a mistake in the trust and the court would be substituting its own intent for that of the settlor's. Moreover, it could not be said that the settlor's intent to take care of the disabled person could not be carried out since the guardian's could still created "payback" (self settled) SNT's. Court denied reformation but permits creating of payback trusts. See also, **Matter of Katherine H. Mortimer, NYLJ, p. 24, col 5, 6/15/04 (Surr. Preminger)(NY County)**(also denying reformation).

Matter of Ciraolo, NYLJ, p. 31, 2/9/01 (Surr. Ct., Kings Cty .) (Feinberg, J.)

Court permits reformation stating: "it is divorced from the realities of life to presume that if the testator were aware of the facts as they now exist, he would desire to pay the immense cost for his child's care in preference to having society share his burden. (Citing Matter of Escher)

Matter of Henry J. Winski, NYLJ, 6/30/03, p.33, col. 1

Example of reformation of testamentary trust into SNT. (No discussion)

Article: Departing from Terms of a Trust : Doctrine of Equitable Deviation Comes into Play, NYLJ p. 1 , vol. 234 , Oct 3 , 2005

h. Trustee Compensation/Legal Fees

S.D. v 2150 LLC, 33 Misc3d 1201(A); 938 N.Y.S.2d 229 (Sup. Ct., Bronx Cty., 2011)

Supreme Court denied SNT trustee's application to approve a trustee compensation agreement, noting that in the absence of a court order or provision in the ward's infant compromise order, compensation shall be in accordance with SCPA § 2309.

Matter of Marion C.W., 83 AD3d 1089; 925 N.Y.S.2d 558 (2nd Dept., 2011)

Appellate Division affirms Supreme Court's award of attorney's fees to non-party trustee of the AIP's trust, noting that it is proper for the court in which the trust litigation is conducted to determine the amount and source of counsel fees in that litigation.

Matter of the Application of Wachovia Bank, N.A, as trustee of the Article Sixth Trust of the Will of Edith M. Leslie , NYLJ, Sept. 9, 2008, p. 36, col. 6 (Surr Ct. NY Cty., Surr. Glen)

Although it had initially been contemplated that the Surrogate would retain jurisdiction over an SNT established in decedent's will for the benefit of her disabled daughter, given that there was also an Art. 81 guardian and therefore continuing jurisdiction of Supreme Court over the guardianship, and given that the trustee of the SNT was the same person as the guardian, issues regarding commissions of the SNT trustee were to be addressed in Supreme Court consistent with MHL 81.28.

Matter of Sussman, NYLJ, p. 25, 9/7/04 (Surr. Ct. Westchester Cty)(Surr. Scarpino)

Counsel fees set by court upon Affirmation of Services and paid from the funds earmarked for the trust prior to its funding (SCPA 405(1)(b).

Matter of Mathew Ryan F., 1 Misc. 3d 909(A); 781 N.Y.S. 2d 623; 2004 N.Y. Misc. LEXIS 12 (Sup. Ct., Nassau Cty).(Berler, J).

Where SNT is created by Art. 81 guardian, legal fees paid by the trustees are inherently reviewable by the Art 81 Court, even if the trustee does not object to paying such fees. SNT's cannot be used to circumvent the protections of guardianship. While most trusts leave legal fees to the discretion of the Trustee, SNT's are unique. In this case, the Court reduces the fees because many were charged to assist the trustee to learn about matters that did not require the assistance of a lawyer. A simple call to DSS by the trustee would have yielded the same results.

i. Court supervision of trusts

Matter of Martin, 38 Misc. 3d 895; 957 N.Y.S.2d 608 (Sup. Ct., Suff Cty., 2012) (Luft., J.)

Court set down for a hearing the question of whether the trustees of a supplemental needs trust properly exercised their discretion regarding the spending of trust assets noting that "a court's responsibility to an infant does not disappear merely because the proceeds are deposited in a supplemental needs trust. The infant remains a ward of the court, no matter what form the investment of fiduciary funds takes." The court, noting that an SNT may not be used to abrogate or circumvent the protections of a guardian arrangement, added that a court approving a SNT must provide for court approval of withdrawals by the trustees, and require accountings to the court on an annual or biannual basis.

Matter of JP Morgan Chase (Marc C.H.), 38 Misc. 3d 363; 956 N.Y.S.2d 856 (Surr. Ct. NY Cty. 2012) (Glen, Surr.)

When a co-trustee of a discretionary Escher trust for the benefit of a profoundly disabled young man residing in an OPWDD residence brought on a SCPA guardianship proceeding to obtain guardianship of the person over his ward, it came to light that neither trustee had ever visited their ward, made any effort to ascertain his needs nor spent any of his multimillion dollar trust on him but they had never-the-less taken their trustee fees. The Surrogate held that: (i) a trust provision absolving the trustees of the duty to file annual accountings is unenforceable as against public policy when a ward is disabled, (ii) *sua sponte* ordered detailed accountings to be filed to protect the disabled ward, (iii) held that the trust provision affording the trustees absolute discretion did not insulate them of liability for the breach of their fiduciary duty attributable to their inaction, and (iv) held that the breach of their fiduciary duty should result in denial or reduction of their commissions for the period of their inaction.

Matter of Petition to Create First Party Supplemental Needs Trust Pursuant to EPTL §7-1.12 for the Benefit of David Berke, NYLJ, 11/29/06, p. 25, col. 6 (Surr.Ct., NY Cty) (Surr. Glen)

First party SNT for mentally competent, physically disabled adult under the age of 65 was approved. Court directed that the accountings be submitted to the Department of Social Services and also to Mr. Berke, the trust beneficiary, but stated that it was unnecessary to submit the accountings to the court.

Matter of Paul Harris, NYLJ June 10, 2005, p. 34 (Surr Ct., Kings Cty) (Surrogate Tomei)

Court requires SNT to provide for annual accounting and bond and continuing court supervision NY even though TTE plans to move out of state until another court in the next state assumes jurisdiction over the trust.

Matter of Kevin Pete Kaidirimaoglou, NYLJ, 11/5/04, p.28 (Surr Czygier) (Surr Ct. Suff. Cty.)

Court (1) dispenses with requirement that trustee file annual accounting, reasoning that (a) trustee must notify DSS if he will make large expenditure depleting the estate and (b) trustee must judicially settle account prior to his discharge. Court states: "The undersigned has opined on a number of occasions that a supplemental needs trust trustee should not be treated differently than a testamentary or inter vivos trustee. There are safeguards in place to protect the lifetime beneficiary and DSS, for example, the trustee must give notice to the social service district in advance of certain transactions [see 18 NYCRR 360-4.5 and Article 5.2 of the proposed trust] and is required to post a bond. Furthermore, this court has the authority to compel a trustee to account at any time and an interested party may petition for same. It is therefore unnecessary to mandate an annual accounting and burden the trust with the inherent costs. Accordingly, the request of DSS to include a provision directing

the filing of an annual accounting is denied." **BUT** holds that SNT may not provide for automatic succession of true successor trustee. successor must be approved by court at time of successions.

Estate of Paul M. Schuller, NYLJ, 11/3/04, p.31 (Surr Ct. Suff. Cty.) (Surr Czygier)

Court dispenses with requirement that trustee file annual accounting, reasoning that (a) trustee must notify DSS if he will make large expenditure depleting the estate and (b) trustee must judicially settle account prior to his discharge.

Cano v. Shmonie Corp., NYLJ, 7/22/04 (Sup. Ct., Bronx Cty., 2004)(Katz, J.)

Infant plaintiff's personal injury action was settled for $2.19 million. Plaintiff sought an order permitting the placement of settlement proceeds in a "portable" supplemental needs trust [SNT] without court supervision. The court held that its supervisory and protective role with respect to the infant plaintiff, who remains a ward of the court, superceded the assertion by the Department of Social Services [DSS] that SNT's should not be "micro-managed" by courts.

j. Termination of trust

Matter of Ortiz, NYLJ, 8/27/04, p. 26, (Surr Ct., Bronx Cty)(Surr Holtzman)

SNT was terminated when beneficiary's circumstances changed after it was no longer needed. The court terminated the trust upon the condition that the relevant governmental agencies were reimbursed for the benefits paid to the beneficiary while the trust was in existence.

k. Particular Terms of Trust

(i) Attorneys Fees Subject to Review by Court

Matter of the Petition of James Butler to Establish a First Party Supplemental Needs Trust Pursuant to EPTL §7-1.12 For the Benefit of James Butler, 7/25/2007 NYLJ 34 (col. 1) (Surr. Ct., New York County)(Surr. Glen)

Although the co-trustees may determine in the exercise of their discretion as fiduciaries that the retention of an attorney for a particular matter is appropriate, the trust agreement must provide that any disbursements from the trust to pay attorneys retained by the co-trustees are subject to review for reasonableness by the court.

<u>Matter of the Petition of Debra Berlan-Luterzo to Establish a First Party Supplemental Needs Trust Pursuant to §7-1.12 for the Benefit of Richard S. Berlan</u>, 7/25/2007 NYLJ 34, col. 3)(Surrogate's Court, New York County) (Surr. Glen)

Although a trustee may determine in the exercise of her or his discretion as a fiduciary that the retention of an attorney for a particular matter is appropriate, the trust agreement must provide that any disbursements from the trust to pay attorneys retained by the trustee are subject to review for reasonableness by the court.

(ii) Amendment of Trust Only Upon Court Approval

<u>Matter of the Petition of James Butler to Establish a First Party Supplemental Needs Trust Pursuant to EPTL §7-1.12 For the Benefit of James Butler</u>, 7/25/2007 NYLJ 34 (col. 1) (Surr. Ct., New York County)(Surr. Glen)

Although the co-trustees may determine in the exercise of their discretion as fiduciaries that the retention of an attorney for a particular matter is appropriate, the trust agreement must provide that any disbursements from the trust to pay attorneys retained by the co-trustees are subject to review for reasonableness by the court. Second, the trust should provide that it can be amended only upon court approval.

<u>Matter of the Petition of Debra Berlan-Luterzo to Establish a First Party Supplemental Needs Trust Pursuant to §7-1.12 for the Benefit of Richard S. Berlan</u>, 7/25/2007 NYLJ 34, col. 3)(Surrogate's Court, New York County) (Surr. Glen)

Although a trustee may determine in the exercise of her or his discretion as a fiduciary that the retention of an attorney for a particular matter is appropriate, the trust agreement must provide that any disbursements from the trust to pay attorneys retained by the trustee are subject to review for reasonableness by the court. Second, the trust should provide that it can be amended only upon court approval.

(iii) Reversal of Gifts and Planning Devices

<u>Matter of Ostrander (Reeves)</u>, 2009 NY Slip Op 307794U; 2009 N.Y. Misc. LEXIS 5367 (Sup. Ct, Wayne Cty. 2009)(Kehoe, J.)

The Court denied the motion of co-conservators, appointed in 1992, to upwardly modify their powers *nunc pro tunc* to include the powers to make gifts and to engage in medicaid planning on behalf of their elderly ward. In so doing, the Court noted that the co-conservators' plan, if approved, would result in a unilateral modification of the admission agreement between the ward's Nursing Home,

and the Co-Conservators (in which they had agreed, inter alia, to guarantee continuity of payment from the ward's funds, and to refrain make any transfers which would jeopardize DSS' ability to receive full payment for services which would be rendered to the ward), and would violate the intent of the Medicaid program. The Court added that the *nunc pro tunc* making of gifts does not appear to be in accordance with the factors to be considered under MHL § 81.21(d). Nevertheless, the Court granted the co-conservators the powers to make gifts and to engage in medicaid planning prospectively.

Matter of "Jane Doe," An incapacitated person, 16 Misc. 3d 894; 842 N.Y.S. 2d 309 (Sup. Ct., Kings County, 2007)(Leventhal, J.)

Court imposed constructive trust on funds that had been transferred to AIP's spouse for Medicaid planning purposes after spouse failed or refused to abide by plan to use the funds for the AIP's benefit and directed the bank holding the funds to transfer the funds from the IP's spouse to the IP.

(iv) Dispensing with Annual Accounting

Matter of JP Morgan Chase (Marc C.H.), 38 Misc. 3d 363; 956 N.Y.S.2d 856 (Surr. Ct. NY Cty. 2012) (Glen, Surr.)

When a co-trustee of a discretionary Escher trust for the benefit of a profoundly disabled young man residing in an OPWDD residence brought on a SCPA guardianship proceeding to obtain guardianship of the person over his ward, it came to light that neither trustee had ever visited their ward, made any effort to ascertain his needs nor spent any of his multimillion dollar trust on him but they had never-the-less taken their trustee fees. The Surrogate held that: (i) a trust provision absolving the trustees of the duty to file annual accountings is unenforceable as against public policy when a ward is disabled, (ii) *sua sponte* ordered detailed accountings to be filed to protect the disabled ward, (iii) held that the trust provision affording the trustees absolute discretion did not insulate them of liability for the breach of their fiduciary duty attributable to their inaction, and (iv) held that the breach of their fiduciary duty should result in denial or reduction of their commissions for the period of their inaction.

Estate of Tauba Korn, 3/9/2010, NYLJ 45 (col. 1) (Surr. Ct. Kings Cty.) (Surr. Lopez-Torres)

Surrogate approves SNT but modifies its terms so that the Trustee is not required to file an annual accounting.

Matter of Wayne Marks, 3/10/2010 NYLJ 38 (col.6) Surr. Ct. Kings Cty. (Surr. Lopez-Torrez)

SNT approved with the modification that the trustee was not obligated to file Annual Accountings or a Final Accounting with the Clerk of the Court.

Matter of Del Toro, 2008 NY Misc. LEXIS 672; 239 NYLJ 11 (Surr. Ct., Suff. Cty., 2008)(Surr. Czygier)

Court dispenses with requirement in proposed trust instrument requiring annual accounting by trustee of SNT since trustee must notify the social services district in advance of certain transactions, for example those tending to substantially deplete the trust principal.

Matter of Rosen (Pepe), 12/26/2007, NYLJ 38, (col. 4)(Surr. Ct. Suff. Cty)(Czygier, Surr.)

Where guardian (17-A) sought authorization to create an SNT for the benefit of the ward to be funded with the wards' assets, the Surrogate dispensed with the requirement of an Annual Accounting because the trustee was required by law and the terms of the trust to give notice to the local social services district in advance of certain transactions and would be required to judicially settle her account prior to being discharged.

(v) Accounting Required Under Article 81 Methods

Matter of Lula A., 4/27/2010, NYLJ 34 (col.1) (Surr. Ct. Bronx Cty.)(Surr. Holtzman)

In a self-petition for an SNT, Surrogate held that a provision requiring an accounting in the nature of an Art 81 accounting was improper and directed that the petition be granted without that provision. The Surrogate reasoned that such a provision may be appropriate in an SNT for a disabled person who is a ward of a guardian, but not for someone who is self-petitioning.

Matter of De Las Nueces, NYLJ, August 15, 2008, p. 38, col. 4 (Surr Ct. Westchester Cty.) (Surr. Scarpino)

Trust by its terms requires annual accounting in the form and manner required by MHL 81.31 and that such accounting be examined in the manner required by MHL 81.31.

(vi) Terms Against the Best Interest of the Beneficiary and/or Against Public Policy

<u>Matter of JP Morgan Chase (Marc C.H.)</u>, 38 Misc. 3d 363; 956 N.Y.S.2d 856 (Surr. Ct. NY Cty. 2012) (Glen, Surr.)

When a co-trustee of a discretionary Escher trust for the benefit of a profoundly disabled young man residing in an OPWDD residence brought on a SCPA guardianship proceeding to obtain guardianship of the person over his ward, it came to light that neither trustee had ever visited their ward, made any effort to ascertain his needs nor spent any of his multimillion dollar trust on him but they had never-the-less taken their trustee fees. The Surrogate held that: (i) a trust provision absolving the trustees of the duty to file annual accountings is unenforceable as against public policy when a ward is disabled, (ii) *sua sponte* ordered detailed accountings to be filed to protect the disabled ward, (iii) held that the trust provision affording the trustees absolute discretion did not insulate them of liability for the breach of their fiduciary duty attributable to their inaction, and (iv) held that the breach of their fiduciary duty should result in denial or reduction of their commissions for the period of their inaction.

<u>Matter of the Guardianship of Conor Maloney</u>, 11/20/09 N.Y.L.J. 40 (col. 5)(Surr Ct. Suff Cty) (Surr. Czygier)

The Surrogate struck down several terms in an SNT as against the best interests of the beneficiary and/or against public policy including provisions: (1) divesting the court of authority to direct that payments be made to beneficiary if all his needs for support and education are not being met by the trustee, (2) allowing the trustee to terminate the trust in her sole discretion during the beneficiary's lifetime as if he had died; (3) permitting the trustee to pay the beneficiary's funeral/burial expenses before reimbursement has been made to Medicaid, (4) allowing the trust, as an estate planning devise, to continue beyond the beneficiary's lifetime if all his heirs at law had not yet turned 35 years of age; (5) allowing the trustee to make payments to herself in her sole discretion and to name herself as a custodian of the funds under UGMA; (6) allowing the trustee unilaterally to increase the number of trustees at anytime, up to a total of three, without the requirement of a bond; (7) permitting the trustee to lend money to herself or any of the other trustees and for each of them to have the authority to borrow such funds; (8) to move the situs of the trust without further order of the court, and (9) to be exonerated from any liability for self-dealing.

(vii) Requirement of Bond

<u>Matter of Silverman</u>, 41Misc.3d 1234(A);983 N.Y.S.2d 206 (Surr Ct. Nass. Cty. 2013) (Surr. McCarty)

A 17- A guardian sought to establish an SNT to be funded with a small inheritance of $15,814.14.

The petition requested that a trustee's bond be waived because of the small sum involved. Over the objection of the Office of the Attorney General, the Surrogate acknowledged that it was the court's general practice to require a bond only where the corpus of the guardianship estate exceeds $30,000.00 and, absent any legal argument by the AG's office to supports its opposition, upheld the provision of the proposed trust waiving the bond.

l. Retroactive Establishment

In the Matter of the Funding of a Supplemental Needs Trust for the Benefit of Daniel J.V., 33 Misc3d 1222(A); 943 N.Y.S. 2d 791 (Surr. Ct., Bronx Cty, 2011) (Holzman, Surr.)

The Surrogate allowed for the nunc pro tunc retroactive establishment of an SNT dating back to the return date of a previous application for the SNT that had been rejected because the disabled individual did not have the capacity to make application for himself at that time and a 17-A guardian first need to be appointed to make the application for him. This had the effect of reinstating his benefits. The Surrogate reasoned that he would have been entitled to a decree establishing and funding an SNT for his benefit as of the earlier date had a duly appointed guardian of his property been appointed. The Surrogate stated: "The express purpose of an SNT is to permit a person such as the ward to have the trust assets available for those needs that are not covered by Medicaid without affecting his Medicaid eligibility. It would defeat the spirit of EPTL 7-1.12, if not also its express provisions, to deny its benefits to the ward based on a bequest which he lacked the capacity to obtain prior to incurring expenses covered by Medicaid and where no other person at that time was authorized to apply for an SNT on his behalf."

Estate of Tauba Korn, 3/9/2010, NYLJ 45 (col. 1) Surr. Ct. Kings Cty. (Surr. Lopez-Torres)

A testator left her real and personal property to her daughter and brother except for a specific bequest of $50,000 which she left to her disabled son to be placed into an SNT for him. The residuary was to go to her daughter and brother. She did not provide for the contingency that her daughter and brother would predecease her and thus, when they did, the residuary passed via intestacy to her son, but, by the terms of the Will passed outside the SNT and would thus have had the effect of disqualifying him for public benefits. The Surrogate permitted the trust to be reformed to include both the original $50,000 and the residue of the estate since it was clear that this result was the testator's intent.

Matter of Hector S., 11/18/09 NYLJ, 33 (col. 3) (Surr. Ct. Bronx Cty., 2009) (Surr. Holzman)

Upon learning of funds in a Willowbrook class consumer's guardianship account, OMRDD sought, pursuant to the Willowbrook decree, a declaration of incorrectly paid Medicaid, to have half of those

funds used to repay the debt to Medicaid and to have the other half placed into an SNT-like arrangements for the consumer's benefit. The court approved the application.

<u>Matter of Robert Miller</u>, 20 Misc.3d 1111A, 867 N.Y.S. 2d 376 (Sup. Ct. Queens Cty., 2008) (Thomas, J.)

Court permits *nunc pro tunc* establishment of a first party SNT to the date that the then incapacitated IP initially entered a hospital, which had the effect of rendering him Medicaid eligible as of that earlier date, stating: "[The IP] was clearly entitled to a judgement which contained a properly established SNT. Such judgment would have been timely established but for his incapacity in 2005 and the failure by the city to request such relief in its petition which would have been immediately granted in the Order to Show Cause commencing the proceeding and, if authorized, the guardian would have acted prior to the critical date."

m. Payback to State

Matter of Kroll, __NY3D___; 2016 N.Y. App.DIv. LEXIS 6389 (2nd Dept. 2016)

Trustees of a lifetime trust created with the assets of a grandfather for the benefit of his disabled grandson, who was , at the time of the application, 20 years old and receiving SSI and Medicaid, petitioned to "decant" the trust into an SNT for his benefit pursuant to EPTL 10-6.6. Under the original trust, the trust funds would become available to the boy outright when he turned 21. The purpose of the application to decant was to protect the grandson's eligibility to his public benefits when he turned 21. The Department of Health objected, arguing that the since the funds came from a trust for his benefit, the sought after SNT was a first party self settled trust and thus required a payback provision, which the proposed trust did not contain. The lower court rejected that argument and granted the trustee's application. DOH appealed and on appeal, the court upheld the lower court's decision finding that since the trust was not created with grandson's own assets initially, the funds were not an available asset, that this was not a first party trust and that it did not require a payback provision .

<u>Matter of De Luca</u>, (Krushnaukas), 40 Misc. 3d 1218(A); 975 N.Y.S. 2d 708 (Surr. Ct., Nass. Cty,)(Surr. McCarty)

Surrogate approves the deposit of a $400,000 inheritance of a 56 year old OPWDD consumer into an individual third party SNT with an alternative of placing the funds into a charitable pooled trust if the trustee becomes unable to serve. Formation of this trust in this form was granted over the objection of the Attorney General's office on behalf of the State who argued: (a) that an SNT would not likely contain a payback provision and thus OPWDD would lose its right to collect the consumers outstanding debt and also (b) that the use of an SNT after age 65 would create a transfer penalty. The Surrogate concluded: (a) that the Legislature had not expressed a preference for a

payback trust over a charitable pooled trust and (b) that transfer of the funds to a pooled trust at some possible future date would be at the discretion of a court and thus held that the Attorney General's objections were meritless.

Matter of Michele Krush, 40 Misc. 3d 1218(A); 975 N.Y.S. 2d 708 (Surr. Ct. Nass. Cty. 2013)(Surr. McCarty)

The Public Administrator petitioned to place a disabled individual's inheritance into an individual SNT, with a fall back plan for the funds to be place into a charitable pooled trust should the trustee become unable to serve. OPWDD objected, arguing that the funds must be placed in a payback trust. The Surrogate held that both options are available and no other special factors dictate a preference for the use of one over the other.

Matter of Grillo, 2008 NY Slip Op 30532U; 2008 N.Y. Misc. LEXIS 7987(Sup. Ct. Nassau Cty.) (Riordan, J.)

Upon the death of the beneficiary of an SNT, DSS made claim against the remainder in the trust for all Medicaid expended both before and after the creation of the trust. The estate administrator opposed paying back the Medicaid payments made before the trust had been created. The court held that the trust itself stated, that Medicaid should be paid "the total Medicaid assistance provided to the beneficiary during his lifetime" and that pursuant to 42 USC 1396p [d] [4][A] and NY SSL 366 [2] [b] [2] [iii] the full amount expended, both before and after the creation of the trust, must be repaid.

Matter of Hector S., 11/18/09 NYLJ, 33 (col. 3) (Surr. Ct. Bronx Cty. 2009) (Surr. Holzman)

Upon learning of funds in a Willowbrook class consumer's guardianship account, OMRDD sought, pursuant to the Willowbrook decree, a declaration of incorrectly paid Medicaid, to have half of those funds used to repay the debt to Medicaid and to have the other half placed into an SNT-like arrangements for the consumer's benefit. The court approved the application.

Matter of the Estate of Abraham XX, 11 N.Y. 3d; 871 N.Y.S. 599 (2008)

Pursuant to federal and state law, the State holds a remainder interest in all amounts remaining in the trust "up to an amount equal to the total medical assistance paid". The Court of Appeals in this case interprets that phrase to mean that the State may recover the lifetime Medicaid benefits paid on behalf of the recipient. The Court rejected the argument that the phrase means the state's recovery of only those payments made after the date of the trust's creation. The Court held this to be so even though the payments made prior to the creation of the trust were properly made to a poor person who was entitled to Medicaid and thus were properly paid and, but for the later creation of the SNT, would not have been recoverable.

n. Calculation of NAMI

Williams et al v Shah, 2014 U.S. Dist. LEXIS 4652 (EDNY 2014) (Mauskopf, USDJ)

Integral Guardianship Services (IGS) brought a §1983 action on behalf of three named wards who were Medicaid recipients receiving care in nursing homes, and others similarly situated. They alleged that the NYS Department of Health (DOH) violated 42 USC §1396 et al by including guardianship related expenses in the NAMI and excluding them from the calculation of the personal needs allowance. Defendant DOH moved to dismiss on the grounds that Plaintiff lacked standing, the motion was granted and the complaint was dismissed. The court held, *inter alia* that plaintiffs failed to allege any injury "fairly traceable" to defendant's conduct or the provisions of the Medicaid Act and that any financial liabilities for their nursing home care plaintiffs may incur as a result of not paying the NAMI are the result of an independent economic choice to pay their guardians instead of the nursing home. The court also noted that there is no obligation under federal law for the guardian to be paid and that this obligation was created purely under MHL Article 81, a NYS statute, thus, any hardship entailed by plaintiffs' need to compensate their guardian is not a product of state action that contravenes the Medicaid Act, but rather of plaintiffs' failure to seek redress readily available under the New York Mental Hygiene Law and therefore the claim was also barred by the 11th amendment. The court further noted that it is the guardian itself that it disadvantaged by the policy of excluding guardianship-related fees from the NAMI calculation and that the guardian is not a party to this action.

Matter of Gay Lee Freedman (Backer), 42 Misc.3d 1235(A); 988 N.Y.S.2d 522 (Sup. Ct., Richmond Cty., 2014)(Minardo, J.)

Although the Order appointing the guardian expressly provided that the IPs pension income, Social Security income and assets in the guardianship account were to be considered unavailable for the purpose of calculating Medicaid eligibility in the month received, HRA determined that the IP was subject to a substantial NAMI. The guardian challenged this determination in an administrative appeal to the NYS Department of Health which affirmed the HRA determination. The guardian thereafter filed the instant Article 78 proceeding to challenge the determination and Supreme Court held, citing Deanna W., that the agency determination was neither arbitrary nor capricious and, not withstanding the terms of the Order appointing the guardian, was not without reason and therefore declined to direct HRA to rebudget the NAMI.

Matter of J.T., 42 Misc. 3d 1202(A); 984 N.Y.S. 2d 632 (Sup. Ct., Bronx Cty., 2013)(Hunter, J.)

The Supreme Court granted the motion of the NYC Human Resources Administration ("HRA") to exclude certain guardianship fees from an incapacitated person's NAMI calculation when determining his Medicaid eligibility, reasoning that although guardianship fees were medical expenses pursuant to 18 NYCRR 360-4.9(a)(4), to direct HRA and ultimately the NYS Department

of Health (the agency responsible for the administration of the Medicaid program) to exclude certain sums from the calculation of NAMI would exceed the Court's authority.

Matter of Deanna W., 76 A.D.3d 1096; 908 N.Y.S. 2d 692 (2nd Dept., 2010)

The Appellate Division, Second Department, held that the Supreme Court had erred in directing the Department of Social Services to disregard guardianship expenses when calculating the IP's net available monthly income (NAMI) for the purpose of determining Medicaid eligibility, holding that the agency's interpretation of its own regulations, including Medicaid eligibility regulations, was reasonable.

Matter of Jennings v. Commissioner, NYS Department of Social Services, 71 AD3d 98; 893 N.Y.S.2d 103 (2nd Dept, 2009)

Where the 85 year old settlor of an SNT for the benefit of her disabled son poured all of her recurring pension and Social Security retirement income into the SNT for her son's benefit, she was not render ineligible for Medicaid to pay for her own care in a nursing home, but that income was held to be appropriately considered as part of the calculation of her post-eligibility NAMI toward her own care. This case has an excellent discussion of the relationship between Medicaid eligibility and the NAMI as well as a thorough discussion concerning the history, legal basis and purpose of SNT's.

o. SNT as Alternative to Guardianship

Dinnigan v. ABC Corp , et al . , 35 Misc3d 1216A;951 N.Y.S.2d 85 (Sup. Ct. Suff. Cty., 2012) (Whelan, J.)

In an application to approve an infant compromise in a tort claim proceeding, the court, *inter alia*, ordered the funds placed in to an already existing SNT stating: "Such distribution obviates the need for the appointment of [a] fiduciary of the property for the disabled plaintiff, such as an Article 81 property management guardian, guardian of the property of a person disabled under Article 17-A et. seq. of the SCPA or the guardian of the property of an infant under CPLR 1210."

p. Duties of Trustee

Matter of James H. Supplemental Needs Trusts, _AD3d _; 2019 NY Slip Op 03713, 1 (3rd Dept., 2019)

The Appellate Division upheld the trial court's removal of the IP's brother as trustee of his SNTs because the contentious relationship between the IP's guardian and the trustee impeded the proper administration of the SNTs. Specifically, the trustee (who was a trust remainderman) often took issue with the guardian's actions and retaliated by refusing to proffer payment from the SNTs for appropriate expenses. Additionally, the trustee did not understand the SNTs or what expenses were

permissible, making it difficult for him to perform his most basic duties as trustee

Lirizano v. LI Jewish Education/Research, 28863/1996, NYLJ 1202609859342 at *1 (Sup. KI, Decided June 25, 2013 (Jacobson, J.)

A bank, as trustee of a $400,000 SNT for the benefit of an infant, dissipated all but about $3,250.00 of the trust assets in the first six years of the trust's existence by relegating much of its responsibility to the infant's mother instead of exercising it own judgment and by, among other things, allowing the mother to pay for private care services instead of accessing publically funded services to care for her son. The court ordered the bank to replace over $176,0000 into the trust and denied it's application for trustees fees on the grounds that it had breached it fiduciary duty to its ward.

q. Who May Create a Trust

The Supplemental Needs Fairness Act allows individuals with disabilities to create their own first party trusts without having to rely on a third parties to settle the trusts for them. **See**, 42 USC 1396p(d)(4)(A).

H. Voiding previously executed legal instruments including Stipulations of Settlement, Wills, Conveyances, Contracts, Health Care Proxies and Powers of Attorney

Matter of Cynthia W., _Misc.3d_, 2019 NYLJ LEXIS 4537 (Sup. Ct., NY Cty., 2019)

The petitioner, an attorney, commenced a proceeding seeking the appointment of a personal needs and property management guardian for his wealthy 86 year-old mother, Cynthia. Before commencement of this proceeding, Cynthia's husband filed a family offense proceeding against the petitioner. After a hearing in that proceeding, a Family Court referee found that the petitioner engaged in menacing and aggravated harassment, and issued an Order of Protection in favor of Cynthia and her husband, which remained in effect at the time of the guardianship hearing. The guardianship court now held that the petitioner failed to present evidence of Cynthia's incapacity, and that Cynthia B.'s advance directives adequately protected her and constituted the least restrictive form of intervention. The court noted that most of the petitioner's testimony was based on his disdain of Cynthia's husband and her husband's children, and highlighted his suspicious procedural delay tactics, and his improper conduct during the proceedings. The court denied the petition and dismissed the proceeding for lack of merit, determining that it was brought in bad faith. The court also directed the petitioner to pay the fees of the court-appointed attorney and court evaluator.

Matter of S.B. (E.K.), _Misc.3d_; 2019 NY Slip Op 29368 (Sup. Ct., Chenumg Cty.)(2019)
(earlier related decisions: Matter of S.B. [E.K.], 60 Misc.3d 735 [Sup. Ct., Chemung Cty.][2018], reversed, Matter of Elizabeth T.T. [Suzanne Y.Y. - Elizabeth Z.Z.], 177 AD3d 20 [3rd Dept., 2019])

The Supreme Court had appointed as the AIP's Article 81 attorney the attorney who previously drafted and executed a power of attorney in which the AIP designated her daughter, E.I. as her attorney-in- fact. The AIP's other daughter, S.B., subsequently filed a proceeding, inter alia, seeking to invalidate the POA, alleging that E.I. had isolated the AIP, that the POA was the product of undue influence, and that E.I. had otherwise breached her fiduciary duties. The court denied the attorney's motion to intervene in that proceeding, noting that his presence as a party was not necessary for it to determine the validity of the POA. The court expressed concern that the attorney needed direction as to whether he could properly rely on the attorney-in-fact to guide his strategy in defending the AIP against the guardianship. Citing N.Y.C.R.R. 1200.0, Rule 1.14(a) (which requires an attorney representing an individual with diminished capacity to maintain a conventional relationship with the client as far as reasonably possible), and MHL § 81.10 (which states that the role of counsel is to ensure that the AIP's point of view is presented to the court), the court reminded the attorney that insofar as the AIP had consistently expressed her opposition to the guardianship, he could make decisions and pursue a litigation strategy that honored that perspective without reliance on decisions made by the AIP's attorney-in-fact. Further citing to cases where the court must determine whether counsel retained by the AIP was chosen freely and independently, the court noted that although the subject attorney had not been retained by the attorney-in-fact, he had given the court the impression that he had either relied on her, or planned to rely on her, to control his strategy as the AIP's advocate. The court admonished that this would essentially allow the attorney-in-fact, who allegedly isolated the AIP from S.B., exerted undue influence in the creation of the POA, and breached her fiduciary duty to the AIP, to impermissibly direct the AIP's counsel. Ultimately, however, the court disqualified the attorney because he would be called as a witness to attest to the circumstances regarding the creation and execution of the contested POA.

Estate of Robert A. Frank, NYLJ, 7/23/19, at p. 28, col. 2 (Surr. Ct., Richmond Cty.), (Surr. Titone)

In a contested probate proceeding, the Surrogate's court denied a motion for summary judgment made by the beneficiary/proponent of the decedent's will, finding triable issues of fact on the issues of testamentary capacity and undue influence where the beneficiary/will proponent was appointed the decedent's temporary Article 81 guardian less than 30 days prior to the execution of the purported will, and where the drafter of the will was a partner in the law firm of the beneficiary/will proponent.

Matter of New York Found. for Senior Citizens v Hamilton, _AD3d_, 2019 N.Y. App. Div. LEXIS 2126, 2019 NY Slip Op 02044 (1st Dept., 2019)

In an appeal by a non-party landlord in an ongoing Article 81 guardianship proceeding, the Appellate

Division affirmed an order granting the guardian's motion to vacate a so-ordered stipulation of settlement entered into in a previous holdover proceeding. Highlighting the Housing Court's failure to allocute the tenant before he signed the stipulation, and the detailed evidence of the tenant's incapacity that was subsequently presented in the Article 81 proceeding, the Appellate Division held that the tenant lacked the capacity to enter into the stipulation. The Appellate Division further rejected the landlord's reliance on the Housing Court guardian ad litem's acquiescence to the stipulation, noting: (1) that the GAL (who, suspecting the tenant's need for greater assistance, ultimately referred him to APS) did not have the benefit of the evidence presented at the Article 81 proceeding, and (2) that, in any event, "[a] GAL is not a decision-making position; it is an appointment of assistance."

Matter of Nurse (Anonymous), 2018 N.Y. App. Div. LEXIS 2457 (2nd Dept. 2018)

An elderly man, who was experiencing dementia, transferred an interest in his residential real estate to his stepson, upon whom he was totally dependent for 24 hour personal care. Shortly thereafter, the man's biological children petitioned for, and were granted, co-guardianship of his person and property. They then moved to have the real estate transaction set aside on the grounds that their father had been incapacitated at the time of the transfer, and that the transaction was the result of undue influence and coercion by the stepson. After an evidentiary hearing, the Supreme Court, Kings County, voided the transfer for both reasons advanced by the co-guardians. On the stepson's appeal, the Appellate Division, 2nd Department, affirmed, reasoning that although persons suffering from dementia are not presumed incompetent, the expert testimony presented in this case established that the IP "certainly" did not understand the transaction, and the stepson failed to present sufficient evidence to the contrary. The Appellate Division further reasoned that although the burden of proving "undue influence" ordinarily lies with the party asserting that theory, where there exists a "confidential relationship," as in this case where there was inequality between the parties due to the IP's total dependence on the beneficiary of the transaction, the burden shifts to the beneficiary to show that the transaction was free of coercion. The Appellate Division added that the stepson failed to satisfy that burden.

Matter of CW, 2016 NY. Misc. LEXIS 1934 (Sup.Ct. Dutchess Cty.) (Pagones, AJSC)

Upon petition and detailed allegations by APS that the AIP was being subjected to physical, emotional and financial abuse by a purported caregiver who held Power of Attorney ("POA") and a health care proxy ("HCP"), the AIP consented to the appointment of a Part 36 guardian, thus rendering her a Person in Need of Guardian ("PING"), absent a finding of incapacity. Upon the request of AIP's counsel for provisional remedies under MHL 81.23 to protect the AIP, the court revoked the POA and HCP and issued an Order of Protection ("OOP"), noting that although MHL 81.23 refers only to alleged incapacitated persons ("AIP") and incapacitated persons ("IP") but not PINGs, and further, does not make specific reference to OOPs as a form of provisional remedy, the statute does reference injunctions, and the legislative intent of MHL Article 81 to protect vulnerable

adults who have fallen victim to abuse dictates the issuance of an OOP as an injunction against further contact with the PING in this case .

Matter of Mitchell, 2016 NY Misc LEXIS 2025 (Sup.Ct. Kings Cty. 2016) (Pesce, JSC)

Detailed factual discussion of a Guardian successfully bringing a discovery and turnover proceeding pursuant to MHL 81.43 and allegations of breach of fiduciary duty under GOL 5-1510(2) against the IP's former attorney-in-fact /health care proxy. After an evidentiary hearing, the court determined that the AIF/HCP had exploited his position, had neglected the IP and had engaged in substantial financial self dealing. The court voided the previously executed advance directives and awarded a money judgment against him on behalf of the IP.

Matter of Auqui, 139 A.D.3d 411; 29 N.Y.S. 3d 173 (1st Dept 2016)

AIP appealed an Order denying his petition to void a certain agreement he had entered into with a financial institution. Appellate Division, 1st Department, reversed on the law and granted the petition voiding the transaction, holding that the burden of proof was on the financial institution advocating the AIP's competency and that respondent had failed to meet that burden.

Matter of Caryl S.S. (Valerie L.S.), 47 Misc.3d 1201(A); 15 N.Y.S.3d 710 (Sup. Ct. Bronx Cty., 2015)(Aarons, J.)

Court sets aside the IP's health care proxies, powers of attorney and deed transfers finding them to have been the result of the exploitation of a relationship of trust and confidence to overwhelm the IP's will to the point where she could not resist.

Matter of Carl Willner (F.G.), 45 Misc. 3d 1222(A); 2014 N.Y. Misc. LEXIS 5056; 2014 NY Slip Op 51675(U) (Sup. Ct., Bronx Cty.)(Hunter, J.S.C.)

An Article 81 proceeding was commenced by the nursing home in which a 94 year old woman resided. During the related bedside hearing, it was discovered that the AIP had made a questionable payment of $50,000 to the nursing home after she had been found to lack capacity to do so by the nursing home's own psychiatrist. It was also discovered that the nursing home had commenced a civil action seeking payment from the AIP, also after she was found by the psychiatrist to lack capacity. The Court, noting its outrage at the behavior of the nursing home, and the AIP's health care agent/attorney in fact (the AIP's former attorney - whose assistance the AIP refused, and who had not had face to face contact with the AIP in over two years), parties "who have all unabashedly demonstrated . . . that they are only interested in getting paid," invalidated the HCP and POA and appointed an independent guardian. The Court empowered the guardian, *inter alia*, to defend the IP's interest in the civil action brought by the nursing home; to investigate whether she had been the

victim of financial exploitation; and, with prior court approval, to refer the matter to the Offices of the District Attorney and/or Attorney General.

Matter of Karen H.M., 45 Misc3d 858; 991 N.Y.S. 2d 868 (Sup. Ct., Bronx Cty. 2014)(Aarons, J.)

Court, finding no question as to the need for a guardian, appointed FSSY as an independent guardian after setting aside a validly executed Power of Attorney given by the AIP to one of her two daughters more than 10 years earlier. The petitioning sister has been providing primarily personal care to their mother in an apartment in her home and the cross-petitioning sister, who held the POA, had been responsible for her mother's finances. The Court, after taking testimony from several family members, found that the sister who had been holding the POA had violated her fiduciary duty by mishandling her mother's assets such that: (a) one of AIP's bank accounts for which she had oversight had been paid over to the State as unclaimed funds; (b) this sister arranged for the AIP to surrender her interest in inherited real estate to her for no consideration and she is now paying "rent" for the use of those same premises, which she is described as barely using; and, (c) her funds were used to pay for unqualified and unidentified care givers. The Court, after reviewing the entire history of the situation also found that the two sisters were unable to work cooperatively as co-guardians toward their mother's well being, as evidenced by their inability to agree on the AIP's place of abode or the timing of her medical appointments and other health care decisions, and thus appointed an independent guardian.

Auqui (Verdugo) v. Peachtree Funding Northeast, 41 Misc. 3d 1221(A); 981 N.Y.S.2d 639 (Sup. Ct., NY Cty. 2013) (Wilkins, J.)

In this action commenced by the guardian of an IP who had suffered a traumatic brain injury with post concussion syndrome which included impairment to his executive functioning, the court refused to set aside four agreements for lack of capacity to enter into them. The court held, after trial, that the IP's "mental weakness and questionable financial choices" were insufficient to justify setting aside a contract absent a showing that "at the time of the transactions, he was so deprived of his mental faculties as to be wholly unable to understand or comprehend the nature and consequences of executing the Agreements or, was unable to act in a reasonable manner in relation to the four separate transactions".

Matter of Curtis, 40 Misc3d 1233 (A); 975 N.Y.S.2d 708 (Surr. Ct., Dutchess Cty 2013)(Pagones, J.)

The Surrogate dismissed the objections to the probate of the decedent's will in which the decedent named her live-in home health aide as her primary beneficiary, noting that, although the decedent was found to be an incapacitated person in a proceeding brought under MHL Article 81, she nevertheless possessed testamentary capacity. The Surrogate further held that the objectant had failed to sustain her burden of proving that the will was the product of undue influence, noting that

the facts that aide had become a "motherly-figure" to the decedent and that the aide spent a lot of time with her, was not sufficient.

K.A.L v R.P., 35 Misc. 3d 1211A; 950 N.Y.S.2d 723 (Sup. Ct., Monroe Cty.)(Dollinger, J.)

Court grants surviving spouse's motion to dismiss the decedent's daughter's complaint seeking to annul the decedent's marriage, which took place as the decedent lay on his death bed, and "simultaneously" with the decedent's execution of a codicil to his will (at which time it was undisputed that the decedent was of sound mind and free from any constraint or undue influence). In so doing, the Court noted, inter alia, that the plaintiff did not state a cause of action under MHL §81.29 (d) which permits a court to revoke a marriage contract, because not only had no guardian been appointed for the decedent (a prerequisite for such relief), there was never even any suggestion that the decedent was "insane or 'mentally incapable.'"

Matter of Roberts, 34 Misc3d 1213A; 946 N.Y.S. 2d 69 (Surr. Ct., NY Cty., 2011) (Anderson, J.)

The Surrogate Court denied so much of a motion for summary judgment by the decedent's niece as sought to dismiss the objections of the decedent's relatives to the probate of a 2003 will and a 2004 codicil thereto, based on their claim that these testamentary instruments, in which the decedent bequested an increasingly larger share of her estate to her niece, and a smaller share to relatives and friends, was procured by undue influence. The Court held that based on the conflicting documents submitted (which included hospital records from 2000 and 2004 showing that the decedent suffered bouts of paranoia, dementia and confusion, an Article 81 petition which did not result in the appointment of a guardian for the decedent, a psychiatrist's affirmation, the court evaluator's report and the 1404 testimony of attesting witnesses), even though the decedent may have had the requisite capacity to execute a will, triable issues of fact existed with respect to whether the instruments were the product of the niece's undue influence.

Palmara v. Palmara, 2011 NY Slip Op 33088U; 2011 N.Y. Misc. LEXIS 5648 (Sup. Ct., Kings Cty., 2011)

In an action to invalidate a deed pursuant to RPAPL 1521 (1) relating to property conveyed by the father to the defendant-son, to the exclusion of the plaintiff-daughter, in the father's last will and testament and a subsequent deed, the Supreme Court, inter alia, granted the son's motion to dismiss the action, noting that the daughter had failed to establish that the father was incompetent to execute the documents, or that they were the product of undue influence.

<u>Matter of Mario Biaggi, Jr.</u>, 33 Misc. 3d 1221(A); 943 N.Y.S.2d 790 (Sup. Ct, Bronx Cty., 2011) (Hunter, J.)

The court held that a guardian was not required to return to court to ask the court to rule on the IP's testamentary capacity before taking the IP to a lawyer to draft a Will, stating : "... allegations of testamentary capacity and undue influence are matters that should be more appropriately be brought up, if necessary, post- mortem and not at this time before this court [sitting in the Article 81 guardianship proceeding]..."

<u>Matter of Garrasi</u>, 33 Misc3d 1224(A); 943 N.Y.S. 2d 791 (Surr. Ct., Schenectady Cty. 2011) (Surr. Versaci)

In an estate proceeding, an objectant sought to have the Surrogate set aside a transaction made by the decedent's attorney -in -fact during his lifetime on the theory that Power of Attorney had been voided during the course of an Article 81 proceeding and thus all of the transactions made by that attorney-in - fact should fall. The Surrogate found that a court can only revoke a power of attorney *upon a judicial determination that it was executed while the principal lacked capacity* and, once revoked, all prior transactions made with the use of that power of attorney are voidable. In this case, the Power of Attorney was revoked in the course of an Art 81 proceeding based on an oral stipulation of the parties to that proceeding that revoked all powers of attorney and health care proxies for decedent. Revocation was not based upon an adjudication of decendent's capacity on the day that he executed the power of attorney. Moreover, nowhere in the stipulation did the parties agree, nor did the Supreme Court order, that any of the prior transactions made through the use of the Power of Attorney be voided, thereby suggesting that the parties intended that the revocation of the Power of Attorney be prospective only. The Surrogate reasoned that to find otherwise would have a chilling effect on the potentiality of settling an MHL Article 81 proceeding whereby a power of attorney is routinely revoked by stipulation of the parties upon the appointment of a guardian to avoid competing and/or conflicting agencies. Such parties would be unwilling to agree to a revocation of the power of attorney if by doing so, the agreement could be misinterpreted and the revocation misapplied retroactively, rendering all prior acts done under its authority voidable when such effect was not the intent of the parties and there has been no finding of prior incapacity. Therefore, the Surrogate held that the revocation of the power of attorney based upon the agreement of the interested parties did not, in and of itself, render voidable, the transactions made under its authority prior to its revocation.

<u>Matter of Schmeid, deceased</u>, 88 A.D. 3d 803; 930 N.Y.S.2d 666 (2nd Dept. 2011)

In a contested probate proceeding, the former wife and nurse of an 97 year-old man, who had been declared incapacitated during the course of an Art. 81 proceeding as of a date prior to his marriage to appellant, appealed unsuccessfully from a decree of the Surrogate's Court denying her motion for permission to file objections to will admitted to probate. During the course of the Article 81 proceeding Supreme Court had directed the annulment of the decedent's marriage but did not revoke

the Will. The Appellate Division reasoned that EPTL 5-1.4 creates a conclusive and unrebuttable presumption that any provisions in a will for the benefit of a former spouse are revoked by divorce or annulment and that it was enacted to prevent a testator's inadvertent disposition to a former spouse where the parties' marriage terminated by annulment or divorce and the former spouse is a beneficiary in a testamentary instrument which the testator neglects to revoke. Thus, it held that since petitioner's marriage to the decedent was annulled, absent an express provision in the propounded will to the contrary (see EPTL 5-1.4[a]), the bequest to the petitioner and her nomination as executor under the 2003 Will were properly deemed to be revoked and, therefore, the Surrogate's Court had properly denied petitioner's motion for permission to file objections to the 2003 Will since she did not have an interest in the decedent's estate as required by SCPA 1410.

<u>J.P. Morgan Chase Bank Natl. Assoc. v Haedrich</u>, 29 Misc3d 1215(A); 918 N.Y.S. 2d 398 (Sup Ct., Nassau Cty., 2010) (Phelan, J.)

Guardian moved for an order vacating all judgments of foreclosure, mortgages, notes and consolidation agreements and for an order staying a foreclosure proceeding, arguing that the mortgages, executed in 1999 and 2003, respectively, were made at a time that Mr. and Mrs. Haedrich were incapacitated. In denying the motion, the court deemed "patently insufficient to demonstrate either that at the time these transactions occurred, Mr. and Mrs. Haedrich were incompetent or that the lender 'knew or was put on notice' of the purported incapacity," the following evidence presented by the guardian: (1) a 2010 letter from the couple's physician, stating that in 1990, Mrs. Haedrich suffered from a lung infection, and that Mr. Haedrich, who was first seen in 2004, "gave a history of Alzheimer's disease;" and (2) the alleged testimony of Mrs. Haedrich's psychiatrist, at the 2005 article 81 proceeding, that she then suffered from dementia.

<u>U.S. Bank, N.A., v Bernhardt</u>, 28 Misc3d 1234(A); 960 N.Y.S.2d 342(Sup. Ct., Richmond Cty. 2010) (Giacobbe, J.)

In a case where the court vacated a default judgment of foreclosure and sale and dismissed a foreclosure action against an AIP due to the plaintiff's failure to obtain personal jurisdiction over her, the court determined that title of the premises should nevertheless be retained by the bona fide purchaser at the foreclosure sale (and not revert back to the AIP) due to the temporary guardian's failure to prove that at the time the action was commenced, or when the property was sold, the purchaser knew or should have known that the AIP was incompetent, and due to the temporary guardian's failure to demonstrate a meritorious defense to the foreclosure action.

<u>Simar Holding Corp. v GSC</u>, 27 Misc3d 1219(A); 910 N.Y.S.2d 765 (Sup. Ct. Kings Cty. 2010) (Rivera, J.)

In an action seeking specific performance of a 2003 agreement in which Jane Doe purported to transfer her five story brownstone, valued at $ 1.3 million, to a real estate investor for $400,000, the court granted the motion of Ms. Doe's Article 81 guardian (appointed in 2008) seeking summary

judgment rescinding the agreement on the ground of unconscionability. Stating that the case "shock[ed] the conscience of the court, " the court emphasized that Ms. Doe had a history of mental illness (involving psychosis and delusions) which necessitated her involuntary psychiatric hospitalization in the years immediately preceding and following the execution of the agreement, and "the fact that [Ms. Doe] sold her home for approximately one third of its appraised value . . . to an individual whose sister/colleague approached [Ms. Doe] at her home and transported her by car on multiple occasions to the individual's office, where . . . the transfer eventually occurred without . . . [Ms. Doe] so much as being in the same room as [the] counsel" that the individual himself solicited on Ms. Doe's behalf.

Matter of Wonneberger, 2009 NY Slip Op 30573(U); 2009 N.Y. Misc. LEXIS 4842 (Surr. Ct. Nassau Cty. 2009) (Riordan, J.)

The Surrogate Court denied so much of a motion for summary judgment as sought to dismiss the IP's step-daughter's objections to the probate of the IP's will based on the step-daughter's claim that this will, in which the IP, inter alia, had removed her as sole beneficiary of the estate, and had left half of it to two neighbors, and which was made subsequent to an Article 81 proceeding that was discontinued by stipulation of the parties, but prior to the commencement of a second Article 81 proceeding which had led to the appointment of a guardian, was procured by undue influence. The Court held that based on the conflicting documents submitted (which included a physician's affirmation and the court evaluator's report, in connection with the first proceeding, a physician's affirmation in connection with the second proceeding, affidavits of the IP's home health aides and neighbors, and the testimony of attesting witnesses and the attorney who drafted and supervised the execution of the will), triable issues of fact existed with respect to the issues of the IP's testamentary capacity, and whether the will was the product of undue influence.

Matter of Doar (Hermina Brunson), 28 Misc.3d 759; 900 N.Y.S. 2d 593 (Sup. Ct. Queens Cty. 2009) (Thomas, J.)

Citing to the legislative intent and express requirements of the 1996 National Housing Act and its accompanying regulations at 26 CFR 206.41, the Article 81 Court placed the burden of proof upon the mortgage company to establish that it had properly counseled its prospective borrower as to the consequences of the mortgage and to certify that the AIP understood the consequences of the reverse mortgages she was taking out. The court then found that the mortgage company had failed to sustain its burden of proof and voided the mortgages.

Matter of Doar, NYLJ, 1/7/10, 42 (col. 1)(Sup. Ct. Queens Cty, Index # 14560/08)(Thomas, J.), aff'd, 72 A.D.3d 827; 898 N.Y.S.2d 465 (2nd Dept., 2010)

As part of the Art 81 proceeding, petitioner sought to establish that the AIP lacked capacity when she entered into a reverse mortgage and also that she has signed the agreement under duress. The court shifted the burden of proof to the lender to show that the lender has complied with its duty

under the National Housing Act to fully counsel the borrower and to show that the lender knew that the borrower had capacity to enter in to the agreement., and, then, when the lender could not meet this burden, the court voided the reverse mortgage.

S.S. v. R.S., 24 Misc.3d 567; 877 N.Y.S.2d 860 (Sup. Ct. Nassau Cty. 2009) (Murphy, J.)

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 heath care decisions and a related petition pursuant to PHL 2992(1, 3) voiding a heath care proxy issued by the AIP to his wife prior to suffering a heart attack and resultant severe brain damag 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 Heath Care Proxy instrument, were to be removed from life support, thus they were unable to establish that the heath care agent, his wife, was acting contrary to his stated wishes. Since the Heath Care Proxy was held valid, the court found that there was no need for the appointment of special guardian.

Matter of May Far C., 61 A.D.3d 680; 877 N.Y.S.2d 367 (2nd Dept., 2009)

Order and Judgement of the trial court appointing a temporary guardian was reversed and remitted upon a finding that the trial court had improvidently exercised its discretion in appointing a guardian. The court held that the evidence adduced at the hearing had established that the AIP had effectuated a plan for them management of her affairs and possessed sufficient resources to protect her well being, thus obviating the need for a guardian. The Court further found that although the evidence demonstrated that the AIP was incapacitated at the time of the hearing, there was no evidence that she had been incapacitated when she granted her daughter Power of Attorney and further there was no evidence that the chosen Attorney-in-Fact had engaged in any impropriety with respect to the care of the AIP or her assets.

Matter of Bell, 57 A.D.3d 397; 869 N.Y.S.2d 486 (1st Dept., 2008)

Appellate Division affirmed decision of trial court to set aside a conveyance of real property by an AIP to her son, where he failed to demonstrate by clear and convincing evidence that the sale of property to him at a price significantly less than market value was voluntarily and understandingly made, and fair and free of undue influence. The record showed that the sale of the property was made just one week after the AIP had executed a will providing that he was to purchase his sisters' interest in the property after the AIP's death and within 90 days after appraisal of the property. The sale, however, was effected with no notice to his sisters, and despite the fact that the AIP had a long-time family attorney, she was represented at the closing by an attorney who was a stranger to her and whom her son had engaged through the attorney who represented him at the hearing on the subject petition.

Matter of M.R. v H.R., 240 NYLJ 8; 2008 N.Y. MISC. LEXIS 4347 (Sup. Ct. Bronx Cty., 2008) (Hunter, J.)

Where MHLS counsel for the AIP alleged in a pre-trial motion that the AIP had never issued the power-of-attorney instrument by which his daughter, the purported attorney-in-fact had sold his home and used the proceeds in part for her own personal needs, the court revoked the power-of-attorney pending trial of the matter. The court further ordered that the AIP's bankbooks, documents, wallet and other personal effects be returned to him.

Matter of Kaminester, 17 Misc.3d 1117(A) (Sup. Ct. NY Cty 2007), *aff'd and* modified, Kamimester v . Foldes, 51 A.D.3d 528; 2008 NY App Div LEXIS 4315 (1st Dept.), *lv dismissed and denied* 11 N.Y.3d 781 (2008) ; *subsequent related case*, Estate of Kaminster, 10/23/09, N.Y.L.J. 36 (col.1)(Surr. Ct., NY Cty)(Surr. Glen)

After the death of the IP it was discovered by the Executrix of his estate that his live in girlfriend had secretly married him in Texas and transferred his property to her name in violation of a temporary restraining order that had been put into effect during the pendency of the Art 81 proceeding. These acts in violation of the temporary restraining order took place before the trial court had determined, following a hearing, whether the AIP required the appointment of a guardian. Upon the petition of the Executrix to the Court that had presided over the guardianship proceeding, the court "voided and revoked" the marriage and transactions and held the AIP's purported wife in civil and criminal contempt of court and ordered her to pay substantial fines. On appeal by the purported wife, the Appellate Division held that under the circumstances and upon the proof, the marriage had been properly annulled. In the subsequent case, arising in Surrogate's Court during the probate of the IP's Last Will, the Executrix sought a determination of the validity of the spousal right of election exercised by the purported spouse, arguing that her marriage to decedent had taken place 2 1/2 months after a Texas court had appointed a Temporary guardian, during the pendency of the NY Article 81 proceeding and 2 ½ months before the IP died. Moreover, in the earlier reported decision of Supreme Court, the court had found that there was a need for a guardian based on the IP's cognitive deficits and had posthumously declared the marriage revoked and voided due to his incapacity to marry. The purported wife argued that her property rights and marriage could not be defeated by the posthumous annulment because under DRL Sec. 7(2) a marriage involving a person incapable of consenting to it is "voidable", becoming null and void only as of the date of the annulment in contrast to MHL 81.29(d) permitting the Article 81 court to revoke a marriage "void ab initio," a distinction critical to the purported wife's property right. The Surrogate ultimately held, based upon both statutory and equitable theories, that the marriage had been "void ab initio," thus extinguishing the purported wife's property rights, including her spousal right of election.

Haddad v. Portuesi, 18 Misc. 3d 1126(A); 859 N.Y.S.2d 895 (Sup. Ct., Kings Cty. 2008) (Solomon, J.)

This case was an action by a buyer for damages and specific performance of a contract of sale of real estate entered into between the buyer and a seller who suffered from chronic schizophrenia. Despite the appointment of an Article 81 guardian for the seller subsequent to his entering into the contract of sale, the court held that the seller was presumed competent and that he failed to prove sufficiently that he lacked capacity at the time he entered into the contract.

Matter of Kaminester, 17 Misc.3d 1117(A) (Sup. Ct. NY Cty 2007), *aff'd and* modified, Kamimester v . Foldes, 51 A.D.3d 528; 2008 NY App Div LEXIS 4315 (1st Dept.), *lv dismissed and denied* 11 N.Y.3d 781 (2008) ; *subsequent related case*, Estate of Kaminster, 10/23/09, N.Y.L.J. 36 (col.1)(Surr. Ct., NY Cty)(Surr. Glen)

After the death of the IP it was discovered by the Executrix of his estate that his live in girlfriend had secretly married him in Texas and transferred his property to her name in violation of a temporary restraining order that had been put into effect during the pendency of the Art 81 proceeding. These acts in violation of the temporary restraining order took place before the trial court had determined, following a hearing, whether the AIP required the appointment of a guardian. Upon the petition of the Executrix to the Court that had presided over the guardianship proceeding, the court "voided and revoked" the marriage and transactions and held the AIP's purported wife in civil and criminal contempt of court and ordered her to pay substantial fines. On appeal by the purported wife, the Appellate Division held that under the circumstances and upon the proof, the marriage had been properly annulled. In the subsequent case, arising in Surrogate's Court during the probate of the IP's Last Will, the Executrix sought a determination of the validity of the spousal right of election exercised by the purported spouse, arguing that her marriage to decedent had taken place 2 1/2 months after a Texas court had appointed a Temporary guardian, during the pendency of the NY Article 81 proceeding and 2 ½ months before the IP died. Moreover, in the earlier reported decision of Supreme Court, the court had found that there was a need for a guardian based on the IP's cognitive deficits and had posthumously declared the marriage revoked and voided due to his incapacity to marry. The purported wife argued that her property rights and marriage could not be defeated by the posthumous annulment because under DRL Sec. 7(2) a marriage involving a person incapable of consenting to it is "voidable", becoming null and void only as of the date of the annulment in contrast to MHL 81.29(d) permitting the Article 81 court to revoke a marriage "void ab initio," a distinction critical to the purported wife's property right. The Surrogate ultimately held, based upon both statutory and equitable theories, that the marriage had been "void ab initio," thus extinguishing the purported wife's property rights, including her spousal right of election.

Matter of Mildred M. J., 43 A.D.3d 1391;844 N.Y.S.2d 539 (4th Dept., 2007)

The trial court properly determined that: (1) the petitioner failed to meet her burden of showing that the AIP had lacked capacity when she signed a Power of Attorney and Health Care Proxy because

the record contained: both testimony from a physician and nurse practitioner that the AIP would have been able to understand questions such as whom she would like to make her health care and financial decisions and testimony from the attorneys who were present at the execution of the documents that they had discussed the documents with her and she was capable of understanding the nature of the transactions that she was authorizing. The court also held (2) that the POA and HCP were not the product of undue influence because they were "not the product of persistent and subtle suggestion imposed upon a weaker mind and calculated, by the exploitation of a relationship of trust and confidence, to overwhelm the AIP's will to the point where she became the willing tool to be manipulated for the benefit of another."

Matter of G. S., 17 Misc. 3d 303; 841 N.Y.S.2d 428 (Sup. Ct., New York County, 2007) (Hunter, J.)

Proceeding was brought by nursing home because AIP's son and attorney-in-fact had paid only a portion of the outstanding nursing home bill from the proceeds of the sale of the AIP's home. The nursing home's theory was that the power of attorney should be voided because the son was breaching his fiduciary duty. The Court held that he had established that he had used his mother's funds responsibly and soley for her benefit and stated: "The purpose for which this guardianship proceeding was brought, to wit, for the nursing home to be paid for its care of [the AIP], was not the legislature's intended purpose when Article 81 of the MHL was enacted in 1993." The fees of the court evaluator and petitioner's counsel were assessed against the petitioner nursing home.

Buckley v. Knop, 40 A.D.3d 794; 838 N.Y.S.2d 84 (2nd Dept., 2007)

In an action to set aside a conveyance by a woman who, 8 months after the conveyance was adjudicated incapacitated, the Appellate Division held that although she was presumed competent at the time of the conveyance, the pleadings in the trial court established enough to raise a question of fact as to her competence as to allow the claim to set aside the conveyance go forward and held that the trial court had thus properly denied the motion to dismiss.

In the Matter of Loretta I., 34 A.D.3d 480, 824 N.Y.S.2d 372 (2nd Dept., 2006) and In the Matter of Johanna C. , 34 A.D.3d 465; 824 N.Y.S.2d 142 (2nd Dept., 2006); In the Matter of Annette I., 34 A.D.3d 479; 823 N.Y.S. 2d 542;(2nd Dept., 2006)

In a guardianship proceeding brought on because 3 allegedly incapacitated persons had allegedly been taken advantage of by a third party and, *inter alia*, coerced into signing away the deed to their home, the third party was neither named nor given notice that the court could ultimately divest her of her title to the property. Title was held by two of the AIPs and the third AIP was the child and natural heir of one of them. The trial court did order that title revert back and the third party appealed on the grounds that the court lacked jurisdiction over her to so divest her of title. With respect to the appeals in the matter involving the 2 AIPs who were title holders, the Appellate Division reversed that portion of the order finding the lack of jurisdiction over and notice to the

purchaser of the real property to be fatal. The court also noted that the transactions in question were not made by persons who were yet adjudicated incompetent and for whom a guardian had already been appointed but, rather, by persons who were unable to understand the nature and consequences of their actions, rendering the transactions *voidabl*e *but not void* and concluded that granting the guardians authority to commence a turnover proceeding against the third party rather than deeming the transactions void, and enjoining any further transfer of the subject real property pending the turnover proceeding was a more appropriate course of action. In the appeal involving the child and natural heir of the title holders, the appeal was dismissed on the grounds that the non-title holding child was not aggrieved.

Matter of Susan Jane G., 33 A.D.3d 700; 823 N.Y.S.2d 102 (2nd Dept., 2006)

The AIP was disabled as a result of a 1998 brain injury. Her functional limitations were undisputed. In 1992, prior to her brain injury, she executed an HCP in favor of her husband. In 1999, subsequent to her injury, she also executed a POA in favor of her husband. After keeping her at home with him for 5 years, her husband placed her in a nursing home. Two years later, her daughters became dissatisfied with her living arrangements and with their father's performance as POA. They brought an Article 81 petition. The trial court revoked both the 1992 HCP and the 1999 POA and appointed the daughters as co-guardians, finding that there was clear and convincing evidence that the 1999 POA had been executed when the AIP was incapacitated and also that the husband was no longer "reasonably available, willing or competent to fulfill his obligations under PHL 29-C, thereby warranting revocation of the 1992 HCP."

Matter of Margaret S., 2006 NY Misc LEXIS 2833; 236 N.Y.L.J. 9 (Sup. Ct. Richmond Cty.)(Giacobbe, J.)

Court voided the previously executed Health Care Proxy and Power of Attorney to the extent that the powers were granted with in the guardianship, stating that since the parties stipulated that the AIP was incapacitated and in need of a guardian, any consideration of the continued viability of the power of attorney and health care proxy was academic. The court reasons that by stipulating that the appointment is necessary, it is conceded *a fortiori* that the available resources defined in MHL §81.03 (e) were inadequate to provide for the AIP's needs. The court also reasoned that by applying for guardianship, the attorney-in-fact had, in effect, renounced his prior appointment. In refusing to void a prior real estate conveyance by the AIP, the court notes that the burden was on the daughter who was challenging the conveyance to prove undue influence and that she failed to meet the burden. The court noted that the AIP's diagnosis of Alzheimer's disease did not give rise to a presumption that the AIP lacked the capacity to make the transfer and that there was sufficient evidence that despite her illness she deliberately transferred he home to her son who had been living there for years and caring for her. With respect to her last Will and Testament, which addressed the fact that she had previously transferred the house to her son, the court noted that it's validity was not before the court but that in any event, a finding of incapacity under MHL Article 81 was based on factors that were different for those determinative of testamentary capacity.

Matter of Rita R., 26 AD3d 502; 811 N.Y.S.2d 89(2nd Dept., 2006)

During an Article 81 proceeding held in Surrogates Court the AIP was found to be incapacitated and also to have been lacking capacity during the preceding two years when she executed certain legal instruments including a POA, HCP, Trust and Will. Pursuant to MHL 81.29(d) the Surrogate's Court voided the POA, HCP and Trust. On appeal, the Appellate Division upheld the Surrogate Court's order and also modified it to also invalidate the Will.

Matter of Shapiro, 2001 NY Misc LEXIS 1359; 225 NYLJ 75 (Sup. Ct., Nassau Cty., 2001) (Rosetti, J)

Elderly IP transferred all $680,000 of her assets to neighbors who recently began helping her, although there were relatives in the picture who had been supportive. Despite presumption of capacity, evidence of dementia shifted burden to recipients of transferred funds to show that transfer was not due to undue influence or incompetence. Court voids transfer. Court noted that while it is bound to consider wishes and desires of IP, it is only bound to consider "competent" wishes consistent with IP's best interest.

I. Guardian may waive professional privileges on behalf of ward

Matter of Colby, 187 Misc.2d 695, 723 N.Y.S.2d 631 (Surr. Ct., NY Cty., 2001) (Surr. Roth)

Guardian, as personal representative, may waive attorney-client privilege on behalf of ward. (As of this writing, as a result of Colby, there is a proposed amendment to CPLR 4501 (4501-a) granting guardians and other personal representatives the power to waive professional privileges after the death or disability of the person whom they represent.)

J. Guardian's power to protect ward's assets

Matter of Domenica P., 2018 N.Y. App. DIV LEXIS 2041 (2nd Dept., 2018)

Appellate Division reverses an Order that granted a MHL 81.43 petition brought by a guardian to recover a $20,000 retainer paid by the IP's daughter to a law firm. The daughter, who had originally been appointed as the IP's personal needs guardian, but not her property guardian, was later removed as personal needs guardian, for cause. The daughter subsequently retained the law firm to challenge her removal, and paid the $20,000 retainer fee from a personal checking account in her sole name. After the law firm received the transcript of the removal hearing, which contained, inter alia, evidence that the daughter had no independent income, the law firm questioned the daughter about the source of the $20,000 retainer fee and she replied that it was from her personal savings. The law firm took the daughter at her word, and continued providing services to her until the retainer was

exhausted. When the daughter sought to pay further fees with a check drawn on an account she held jointly with the IP and the law firm refused the check, the daughter admitted that the original $20,000 retainer had been paid from the IP's funds. When the law firm refused to return the funds, the guardian instituted the instant turnover proceeding. The trial court granted the petition, without holding an evidentiary hearing, and ordered that the funds be returned. The Appellate Division reversed, reasoning that the law firm had earned the fees and that there was no evidence that they had engaged in any wrongdoing. A strong dissent argues that MHL 81.43 requires an evidentiary hearing, and that even on the papers, there was sufficient evidence that the law firm should have known that the funds belonged to the IP. The dissent added that the majority decision undermines Article 81's protective purpose.

Matter of Johnson v Bruno, _AD3d_; 2016 NY App. Div. LEXIS 5259; 2016 NY Slip Op. 05416 (3rd Dept., 2016)

In a proceeding brought by a guardian pursuant to MHL § 81.43 seeking to discover property that was allegedly being withheld by the IP's landlord, the Appellate Division reversed so much of an order of the Supreme Court as summarily awarded a money judgment to the landlord on his counterclaim seeking an award for past due rent and damages to the premises. In so doing, the Appellate Division highlighted the landlord's failure to file a verified answer as required by 81.43(b). The Appellate Division further noted that the Supreme Court had properly instructed the landlord that his avenue of recourse was to commence a separate action at law, and had even granted him permission to do so, and then inexplicitly awarded him a money judgment without hearing or receiving any evidence substantiating his counterclaim.

Matter of Kent, 188 Misc.2d 509; 729 N.Y.S.2d 352 (Sup. Ct., Dutchess Cty., 2001) (Pagones, J.)

Where guardian believe that AIP's prior attorney-in-fact had misappropriated funds belonging to IP, guardian properly sought and was granted an accounting under MHL §81.44 where following four factors existed: (1) fiduciary relationship; (2) entrustment of money or property; (3) no other remedy; and, (4) demand and refusal of accounting. Court reasoned that guardian had duty to protect ward assets under MHL §81.20 (6)(iii) and needed power to do that.

K. Least restrictive alternative/Deprivation of liberty

Matter of Cynthia W., _Misc.3d_, 2019 NYLJ LEXIS 4537 (Sup. Ct., NY Cty., 2019),

The petitioner, an attorney, commenced a proceeding seeking the appointment of a personal needs and property management guardian for his wealthy 86 year-old mother, Cynthia. Before commencement of this proceeding, Cynthia's husband filed a family offense

proceeding against the petitioner. After a hearing in that proceeding, a Family Court referee found that the petitioner engaged in menacing and aggravated harassment, and issued an Order of Protection in favor of Cynthia and her husband, which remained in effect at the time of the guardianship hearing. The guardianship court now held that the petitioner failed to present evidence of Cynthia's incapacity, and that Cynthia B.'s advance directives adequately protected her and constituted the least restrictive form of intervention. The court noted that most of the petitioner's testimony was based on his disdain of Cynthia's husband and her husband's children, and highlighted his suspicious procedural delay tactics, and his improper conduct during the proceedings. The court denied the petition and dismissed the proceeding for lack of merit, determining that it was brought in bad faith. The court also directed the petitioner to pay the fees of the court-appointed attorney and court evaluator.

Matter of C.O. (G.P.), _Misc.3d_, 2019 NY Slip Op 51922(U)(Sup. Ct., Broome Cty., 2019)

The Supreme Court denied a property guardian's petitions seeking judicial approval for the sale of two parcels of agricultural land owned by the IP, noting: that the properties, which were not in imminent risk of foreclosure, had significant meaning to the IP; that the IP ultimately hoped to bequeath them to her children; that the proposed sale was against both the IP's wishes and the wishes of her family; and that the proposed sale was not the least restrictive form of intervention necessary to provide for the IP's current needs

Matter of Heidi B. (Pasternack), _AD3D_, 2018 N.Y. App. Div. LEXIS 6891 (2nd. Dept., 2018)

The Appellate Division modified a judgment which appointed a guardian and granted the guardian broad powers by deleting the powers that were not recommended in the court evaluator's report, noting that the broad grant of powers was inconsistent with the statutory requirement that the guardian be granted "only those powers which are necessary to provide for personal needs and/or property management of the incapacitated person in such a manner as appropriate to the individual and which shall constitute the least restrictive form of intervention."

Matter of Fritz G., _AD3d_, 2018 NY. App. Div. LEXIS 5510 (2nd Dept., 2018)

The Appellate Division reversed an order that had appointed an AIP's mother as guardian of his person, holding that the evidence that he had a serious mental illness, was noncompliant with treatment, and had decided to live on the street, coupled with the Court Evaluator's cursory report and testimony (based on a single phone call with the AIP), was insufficient to establish incapacity under MHL Article 81. The AD noted, inter alia, that the court was required to consider the sufficiency and reliability of resources available to provide for an AIP's needs without the need for

a guardian, and emphasized that a guardian should only be appointed as a last resort. The AD further noted that the Supreme Court erred in having failed to consider less restrictive options to address the AIP's needs, including Assisted Outpatient Treatment ("AOT"), adding that reversal of the order appointing a guardian did not preclude the petitioner from pursuing the more appropriate remedy of AOT.

Matter of Marguerite N., Sup. Ct., N.Y. Cty. Unpublished Decision/Order, Index # 402768/09)(Jan. 22, 2016)(Masley, J.)(Copy available through MHLS 2nd Department, Special Litigation and Appeals Unit)

Citing MHL 81.16(c)(2), the court held that "[h]ousing mentally ill citizens who are declared incapacitated [and are] in prison or a nursing home because appropriate housing is limited or not available is a violation of Article 81 which requires the least restrictive form of intervention."

Matter of Ethyl P.B., 45 Misc.3d 1227(A); 5 N.Y.S.3d 327(Sup. Ct., Broome Cty., 2012) (Guy, ASCJ)

The AIP, a 90 year old woman suffering with progressive, short term memory loss, who acknowledged her need for assistance, expressed a preference for a community living arrangement with professional and home care assistance near her son that she had previously enjoyed as compared to a memory unit in an assisted living facility near her daughter where her daughter had placed her and she was then living. The court, noting her undisputed functional limitations and need for a guardian, and acknowledging the loving and caring relationship between the AIP and both of her adult children, ultimately appointed her son. Significantly, the court noted that although neither living situation was "risk free", the community living option did present greater risk to the AIP. The court, in a carefully nuanced decision, found that despite the somewhat greater risk, the AIP's health and safety would be adequately addressed by the community living option, that this was her "clear and consistently stated preference", that her son's plan did not expose the AIP to "undue or uncomprehending risk" and that therefore, on balance, appointment of her son would be more consistent with the objectives of Article 81. Finally, the Court directed that the daughter have access to all medical information and that her brother communicate with her regarding the AIP's care.

Application of Hodges, 1/14//2010, NYLJ 35 (col.4) (Surr. Ct. NY Cty)(Surr. Webber)

Application under Article 81 for guardianship was resolved by creation of SNT to receive and mange an inheritance for the AIPS brother in lieu of guardianship. Although the Surrogate did not explain its decision in terms of least restrictive alternative or alternative resources, it is a good example of a creative solution that conforms to both concepts.

<u>In the Matter of The Application of Joseph Meisels (Grand Rabbi Moses Teitelbaum)</u>, 10 Misc.3d 659; 807 N.Y.S. 2d 268 (Sup. Ct. Kings Cty., 2005) (Leventhal, J.)

An Article 81 petition was brought for guardianship over the Grand Rabbi of The Satmar sect. The parties wanted to bring the proceeding in the Bet Din religious tribunal but could not agree on which one so the petitioner ultimately filed in State Supreme Court. The court noted that the matter could not have been held in the Bet Din, which would have been akin to submitting it to arbitration because the case involved the capacity of an individual and not a religious matter; guardianship involves important civil liberties protected by due process, that such process includes a plenary hearing with counsel, application of the rules of evidence, the clear and convincing evidence standard, the placement of the burden of proof on the petitioner and the right to a jury. Thus, the court stated: "An Article 81 proceeding cannot be hard or determined other than by a New York State court."

<u>Matter of J.G.</u>, NYLJ, August 19, 2005 (Sup. Ct , Bronx Cty, 2005) (Hunter , J.)

Court, in denying the petition for assorted reasons, states: "There was no indication that the [AIP] understood that a finding of incapacity would deprive him of a great deal of power and control over his life...."

<u>Beach Haven Apartments, Assoc. LLC v . Riggs</u>, NYLJ, July 20, 2005, p. 20 col. 1 (Civ Ct, Kings Cty) (Finkelstein, J.)

Motion to appoint Guardian Ad Litem in eviction proceeding denied because there was no proof of proper service upon the proposed respondent. The Court states in the context of this decision that lack of service would be especially serious because the appointment of a GAL carries with it a loss of liberty merely "by the imposition of a stranger in the proposed ward's life."

<u>Matter of Joyce Z.</u>, NYLJ, 6/15/04 (Supreme Court, Nassau Cty.)(Asarch, J.)

Although the IP had been surviving, albeit in a psychotic state, in a home that was barely habitable, Court finds that it is not financially feasible to maintain her home and that it would be the least restrictive alternative to expand powers of Special Guardian to full guardianship powers and to allow the guardian to place the IP into adult foster care, sell the IP's home to pay off all outstanding liens and place the funds into an SNT.

<u>Matter of Jospe (McGarry)</u>, 2003 N.Y. Misc. LEXIS 134; 2003 NY Slip Op 50588(U) (Sup. Ct. Suff. Cty, 2003)(Berler, J.)

AIP consented to appointment of a guardian and admitted to functional limitations. She nominated her friend and neighbor to be her guardian. This friend was not physically able to help bath and dress AIP. The only matter in dispute was AIP's place of abode. AIP was in psych hospital at the time

of the petition and hearing. The treatment team maintained that she could be discharged only to an assisted living facility or adult home. The AIP wanted only to return home to her own apartment. While in the hospital, she met another patient who happened to be a licensed home health aide. This woman needed a job and a place to live. She and the AIP agreed that she would assist the AIP in exchange for room and board. Citing MHL §81.22 (A)(9) the court held that the availability of less restrictive alternative resources in the community dictated that the AIP should not be removed from her home and granted the guardian the power to change the AIP's abode only subject to further court order.

Matter of Lauro, NYLJ, 9/7/01, p. 17 (Sup. Ct., Onondaga Cty.) (Wells, J.)

Court denies a petition for guardianship where there was already an SNT in existence who would serve the same function stating: "Article 81 is designed to promote the use of the "least restrictive form of intervention" (MHL 81.01) ...Guardianship... no matter how noble, is still a deprivation of a person rights."

L. Major medical/end of life decisions

(i) Pre-Family Health Care Decisions Act

Matter of Russell, Article, NYLJ, 3/4/03, p.1, col.3 (decision on transcript, Sup. Ct., Nass. Cty., Rosetti, J., Jan. 23, 2003 (copy in Mineola and also distributed to MHLS 2nd Dept. staff under separate cover) NO LONGER THE LAW, SEE, THE FAMILY HEALTH CARE DECISIONS ACT ENACTED ON MARCH 17, 2010

Guardian, Family and Children's services, was appointed for IP. The guardian was not granted end of life decision making powers. In 1991, IP signed a Health Care Proxy (HCP) when she was competent stating that she did not want artificial nutrition or hydration under any circumstances. There was no precondition that she have irreversible brain damage or terminal illness. In the 1991 HCP she named her nieces as her proxy. In 1995 she executed a Living Will that also said no artificial nutrition or hydration but includes the pre-condition that she be suffering from a terminal illness with irreversible brain damage. IP then executed a 1999 HCP. This time she named one Roger Russell as her proxy to act as HCP but she did not address the end of life issues in specifics in that document. In 2003, when IP was terminally ill, Roger Russell wanted to keep her on life support. The court *sua sponte* conducts an O'Connor hearing to determined the IP's prior express intent. The court finds that putting the patient on life support this is contrary to the IPS wishes as expressed in the earlier HCP and Living Will and that such was her only expression of intent. Court finds that the latter HCP which did not address the end of life decision, did not cancel out the express intent in the previous instruments and therefore, the court voids the latter HCP and empowers the

guardian to make the end of life decision consistent with the IP's express intent as found by the Court.

Matter of Barsky (Kyle), 165 Misc.2d 175; 627 N.Y.S.2d 903 (Sup. Ct., Suffolk Cty., 1995) NO LONGER THE LAW, SEE, THE FAMILY HEALTH CARE DECISIONS ACT ENACTED ON MARCH 17, 2010

Power to direct whether life-sustaining treatment should be provided to or withheld from IP is denied. The right to decline treatment is a personal one which cannot be exercised by a third party if patient is unable to do so unless health care proxy or "Do Not Resuscitate Order" (DNR) is in place or there is otherwise clear and convincing evidence of patient's wishes regarding such treatment while patient was competent.

Matter of Maxwell Z., NYLJ, 10/1/96, p. 21, col. 3 (Sup. Ct., Suffolk Cty.)(Prudenti, J.) NO LONGER THE LAW, SEE, THE FAMILY HEALTH CARE DECISIONS ACT ENACTED ON MARCH 17, 2010

Two sisters each petitioned for guardianship of their father, who was unconscious and in a fetal position due to advanced Parkinson's disease. While this matter was pending, a temporary guardian was appointed. One sister requested an order giving authority to issue DNR order. Court denied this request, finding that "while there was credible evidence that Mr. Z. indicated in casual, rather than in solemn settings, general sentiments against the use of a respirator or machinery...," there was not clear and convincing evidence that the patient had ever formally expressed a desire to withhold life-sustaining treatment such as resuscitation, however medically futile it might be.

Matter of Luis Barcco, Unpublished Decision and Order, Sup. Ct. Queens Cty (Markey, J.) (Index # 61004/2010) March 23, 2010

Court holds the since the Family Health Care Decision Act would not go into effect for more than another month, the signature of the daughter of a mentally incapacitated man for whom amputation of his leg was recommended, was not valid and that she could only obtain medical decision making authority pursuant to a court order under Article 81 or some other appropriate legal mechanism.

S.S. v. R.S., 24 Misc.3d 567: 877 N.Y.S.2d 860 (2009) (Sup. Ct. Nassau Cty.) (Murphy, J.)

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 heath care decisions and a related petition pursuant to PHL 2992(1, 3) voiding a heath 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 Heath Care Proxy instrument, were to be removed from life support, thus they were unable to establish that the heath care agent,

his wife, was acting contrary to his stated wishes. Since the Heath Care Proxy was held valid, the court found that there was no need for the appointment of special guardian.

Matter of Guardianship of B., 190 Misc.2d 581; 738 N.Y.S.2d 528 (Sup. Ct., Tompkins Cty., 2002)(Peckham, J.)

Where order appointing guardian provides that no sterilization procedures should be performed without further hearing and with a GAL for the IP, and the IP and guardian petition for such procedure to be authorized, court (1) finds that IP, who wants the tubal ligation, has the capacity to make decision for herself and that such would be the least restrictive alternative and (2) that the guardian can be authorized to under MHL §81.22 to make major medical decisions in the best interest of the IP and in accordance with the IP's wishes so that guardian can also be authorized to make the decision here.

(ii) Family Health Care Decisions Act

a. Legislative Intent

Matter of AG (Restaino), 37 Misc. 3d 586; 950 N.Y.S. 2d 687 (Sup. Ct. Nass. Cty, 2012) (Diamond, J)

Court holds that a residential facility/hospital should not petition a court for the appointment of a special guardian for the sole purpose of seeking medicaid benefits when the patient is clearly incapacitated and clearly needs a guardian of the person, concluding that the legislative intent of the FHCDA was to fill a gap and provide a procedure to facilitate responsible decision-making by surrogates on behalf of patients who do not have capacity to make their own healthcare decisions and it was never intended to a substitute for the appointment of a guardian of the person" pursuant to Art. 81. The Court reasoned that: (1) under the FHCDA, there is a presumption that an adult has decision making capacity absent an adjudication or unless an Article 81 guardian is authorized to decide about health care for the adult, therefore, a hospital's determination that a patient lacks decision making capacity can be overridden by an incapacitated person who has not been deemed such by the court under Article 81; and (2) the potential powers of a guardian of the person are more extensive than the authority of a surrogate under the FHCDA. Therefore, although the petitioner nursing home did not seek appointment of a guardian of the person, after making a finding that the AIP lacks capacity to make persona decisions, the Court nevertheless did appoint the AIPS son as personal needs guardian in addition to appointing the nursing home as Special Guardian of the property to complete a Medicaid application.

b. Honoring Preferences of Person Facing Death

Matter of Doe, 2016 N.Y. Misc. LEXIS 3174, *1, 2016 NY Slip Op 26278, 1, 37 N.Y.S.3d 401 (N.Y. Sup. Ct. 2016) (King, JSC) (appeal pending)

Family of IP who has been in a persistent vegetative state and on life support for the past approximately 13 years moved to enjoin the Special Guardian from acting to withdraw life support. The Special guardian was empowered to make such decision pursuant to a settlement so ordered by the court at an earlier date . After taking much testimony from relatives of the IP as to whether she held any religious or moral beliefs, or has any preferences with respect to termination of life support, as required by PHL2994-d(4)(a)(i), and concluding that her prior expressed wishes for what her choice would have been under her current circumstances could not be ascertained , the Court looked to the best interest of the IP and held that the Special Guardian's assessment that it would be in the IPs best interests to terminate life support, satisfied the statutory requirements of PHL 2994-d(4)(a)(ii) and authorized the Special Guardian to act to terminate life support.

Matter of Regina L.F., 132 AD3d 1346; 17 N.Y.S.3d 379 (4th Dept 2015)

IP appealed from such portion of an Order and Judgment appointing Catholic Family Services as guardian of her person as directed that "comfort care for the incapacitated person shall always include food and hydration, whether orally or artificially, including comatose conditions". The Order was reversed and such provision was vacated on the grounds, that the IP had expressed, in a written health care advanced directive, a conflicting, prior, competent, clear and convincing end-of -life wish to have artificial nutrition and hydration withheld or withdrawn. The Appellate Division cited as the basis of its opinion the Court of Appeals decision in O'Connor (72 NY2d 517) and various provision of the NY Public Health Law.

Matter of Northern Manhattan Nursing Home (A.M.), 32 Misc3d 754; 928 N.Y.S.2d 810 (Sup. Ct., NY Cty. 2011) (Visitacion- Lewis, J.)

Court authorizes guardian of 92 year old ward in nursing home to consent to DNR/DNI, withholding of a PEG, and refusal of further diagnostic testing and medical treatment of metastatic cancer and to authorize only palliative and/or hospice care, and where there was documentary medical evidence and testimony that he had a terminal illness, that further treatment would be medically futile, that he would die within 6 months with or without such treatment and that further treatment would cause pain and suffering. Although the guardian had been unable to ascertain his preferences and wishes in the past, and the ward was now totally unable to communicate, there was some evidence that in the recent past he had been able to express his preferences and had refused to permit even minor medical procedures.

<u>Matter of Zornow</u>, 31 Misc3d 450; 919 N.Y.S. 2d 273 (Sup. Ct., Monroe Cty. 2010) (Polito, J.), "clarified" at 34 Misc3d 1209A; 2011 N.Y. Misc. LEXIS 6441 (2012)

A guardian of the person was appointed to make major medical and end-of- life medical decisions as the statutory surrogate under the Family Health Care Decision Act (FHCDA) for a ward who was a devout Catholic. Under FHCDA the guardian was obliged to make that decision in accordance with the ward's religious beliefs. The Court observed the irony that with respect to artificial hydration and nutrition, had there been a health care proxy (HCP) executed in favor of a most trusted friend or relative, the statutory presumption would have been in favor of artificial hydration and nutrition, but absent the HCP, under the FHCDA, the presumption is against it because the "quality of life" ethic is paramount under the FHCDA rather than the "sanctity of life" ethic. The court discusses in great detail Catholic doctrine, and concludes that under the "sanctity of life" doctrine of the Church, in nearly every instance, hydration and nutrition, even when administered artificially, are considered by the Church to be "ordinary" rather than "extraordinary" measures, and that hydration and nutrition must be administered except under certain very rare and narrow exceptions which are also discussed in great detail. The court also holds that with respect to end-of-life decisions, the guardians should consult with and obtain the advice of a priest or someone well trained in Catholic moral theology, as is recommended for in the Catholic Guide to End-of-Life Decisions by the National Catholic Bioethics Center. **In its later opinion "clarifying" its initial opinion, the court states that under either FHCDA which dictates that her religious wishes be followed or O'Connor, which it expressly states is still good law, the dying person is under no legal obligation to prove by "clear and convincing evidence "that s/he would want ordinary treatment such as artificial nutrition or hydration, only that s/he would not. The court ultimately concludes that in this case food and water be administered.**

<u>In the Matter of Erie County Medical Center Corpo</u>ration, 33 Misc. 3d 1208(A); 939 N.Y.S.2d 740 (Sup. Ct. Erie County 2011)

Petitioner, an Article 81 guardian and also the Skilled Nursing Facility where respondent resided, successfully moved pursuant to Article 81 of the Mental Hygiene Law and the Family Health Care Decisions Act (FHCDA) to expand its authority to withhold life sustaining treatment from its ward, including the authority to consent to a DNI order, to decline and/or withdraw a PEG or NG tube, and to consent to the issuance of "comfort only" measures. The court found that (1) through her counsel, the ward consented on the record to the increased authority sought by Petitioner and expansion of the guardian's powers would afford her the greatest amount of independence and self-determination and were consistent with her personal wishes, preferences and desires, as is required by both Article 81 and FHDCDA (PHL 2994-d (4). The court further found that her consent was evidenced by prior intent by her execution of a DNI prior to the appointment of a guardian as well as her refusal of medications, food and fluids, and her prior expression that she would not want tube feedings. Her physicians concluded that it was their opinion, to a reasonable degree of medical certainty and in accordance with medical standards, that continued treatment would be an extraordinary burden to

Jane Doe; that she suffers from medical illnesses that can be expected to cause her death within six months, whether or not treatment is provided; that given her advanced dementia, age and her coexisting medical conditions, it is unlikely that intubation or feedings through a PEG ir NG tube would prolong her life; that these measures would expose her to a number of significant complications, including possible perforation, recurrent infections and aspiration pneumonia; that the provision of treatment would be deemed inhumane and would cause an extraordinary burden to her; that her condition is irreversible and incurable; and that therefore she met the criteria set forth in Section 2994-d (5) of the Public Health Law such that the guardian should be granted the authority to withhold and/or withdraw life-sustaining treatment for Jane Doe, including the authority to consent to the issuance of a DNI, to decline or withdraw PEG/NG tube feeding, and to institute "comfort only" measures. The court also found it significant that petitioner's Ethics Committee agrees with the opinions of the treating and concurring physicians.

c. Retroactivity

<u>In the Matter of Erie County Medical Center Corporation</u>, 33 Misc.3d 12098(A); 939 N.Y.S. 2d 740 (Sup. Ct. Erie County 2011)

The Court found persuasive support for retroactive application of the FHCDA in: (1) Matter of Zornow; (2) the repeal of former Section of 81.29(e) of the Mental Hygiene Law which provided that it was not to be construed as either prohibiting or authorizing a court to grant to any person the power to give consent for the withholding or withdrawal of life sustaining treatment; and (3) the statement of the NYS Bar Association that it anticipates that FHCDA will be judicially applied to Article 81 guardians appointed prior to June 1, 2010, the effective date of the FHCDA.

d. Burden of Proof/Clear and Convincing Evidence

<u>In re Thomas Maldonado, M.D. v. R.J.</u>, 93 A.D.3d 465; 939 N.Y.S.2d 701(1st Dept 2012)

The Appellate Division First Department affirmed a finding by the trial court in a special proceeding brought pursuant to the Family Health Care Decisions Act (PHL 2994-r(1) that respondent patient lacks the capacity to make a reasoned decision with respect to the medical treatment recommended by his physicians and that such treatment is in respondent's best interests and authorized the petitioner doctor to arrange for major medical treatment under § 2994-g(4), including performing a right lower extremity amputation and all associated procedures. The Appellate Division held that the trial court properly found clear and convincing evidence of the respondent's lack of capacity in the testimony of two attending physicians at the hospital, one of whom was a board-certified psychiatrist and the respondent's testimony which showed, consistent with the psychiatrist's diagnosis of schizophrenia, that he lacked decision-making capacity because of his mental illness.

e. Appeals

Matter of Goldstein (Jean C.), 93 AD3d 1233; 951 N.Y.S.2d 443 (4th Dept. 2012)

Petitioner, a hospital administrator, commenced an Article 81 seeking a determination that respondent is incapacitated and in need of a guardian of the person and property. Supreme Court granted the petition and appointed respondent's stepdaughter as guardian. The court included a provision in the order and judgment limiting the guardian's authority to make end of life decisions with respect to the withholding or withdrawal of artificial administration of nutrition or hydration. On appeal, petitioner contends that the limitation on the guardian's health care decision-making authority violated the Family Health Care Decisions Act. Neither the guardian nor respondent appeal. The Appellate Division concluded that the appeal must be dismissed because petitioner is not aggrieved by the order and judgment

M. AIP As Incapacitated Fiduciary

Matter of Alan G.W., 2016 NY.Misc.LEXIS 834 (Sup. Ct., Cortland Cty. 2016)

The Court examined the question whether an attorney-in-fact may resign the principal's role as guardian for a third party and petition to substitute herself as guardian when the guardian became incapacitated to act. The court concluded that since neither the principal nor the attorney-in-fact was benefitting personally or financially from that exercise of authority and the act of resigning as guardian advanced the best interests of the third party, that the attorney-in-fact could act and that her authority fell within the "estate transactions" section of the power of attorney, citing GOL 5-1502G(2)

Estate of Iazzeta, 2008 NY Misc Lexis 2023; 239 NYLJ 52(Surr Ct, Westchester Cty., 2008)(Surr. Scarpino)

Article 81 guardian was granted letters of temporary administration to administer estate of AIP's deceased husband where AIP would otherwise have had right to such letters if not incapacitated.

Estate of Patricia Cohen, NYLJ, 1/2/07, p.24, col. 3

Where an 84 year old retired attorney who was living in a nursing home subsequent to a stroke petitioned to become administrator of his wife's estate, and such petition was opposed by his daughter, the court, granted his petition, and noted, inter alia, that he had not been the subject of a guardianship proceeding.

Estate of Ella Mae Niles, NYLJ, 7/13/04, p. 30 (Surr. Ct., Kings Cty.)(Surr. Feinberg)

A guardian moved to revoke the letters of administration previously granted to his ward on the grounds that she was now incapacitated to act and further sought to have letters of administration d.b.n. granted to him in her stead and to authorize him to convey the estate's interest in real property. The court granted all three applications.

Estate of Seymour Teitelbaum, NYLJ, p. 25, col 6, (Surr. Ct., West. Cty., Jan. 1, 2003)

Where IP was the named executor of an estate, and was now incapacitated to serve, IP's guardian could serve as the executor in IP's stead as Administrator c.t.a. In this case no executor's bond was required. Court allowed Guardianship bond to be sufficient.

N. Change of IP's domicile

Estate of Bonora, 44 Misc.3d 171; 984 N.Y.S.2d 562 (Surr Ct., Richmond Cty.) (Surr. Gigante)

Surrogate held that a guardian may change an incompetent's domicile without a court order if it is done on good faith and in the best interests of the ward. Here the Surrogate found that the guardian had changed the IP's domicile by transferring her from a nursing home in Kings County where she had lived to a nursing home in Richmond for more appropriate care and treatment once she had become ventilator dependent. There were no medical indications that she would be able to leave the nursing home in Richmond to return to Kings, her home in Kings had been razed and the land sold, and she had died in the Richmond nursing home.

Estate of Louise Bausch, NYLJ, 1/8/04, p. 20 (Surr. Ct., Suff. Cty.)(Surr. Czygier)

Ct. makes three relevant statements concerning change of domicile: (1) A finding that deceased was functionally impaired such that she required a guardian was not automatically a finding that she lacked the ability to formulate the intent to change her domicile; (2) A provision in an order of guardianship permitting the guardian to change the IP's abode is not a power authorizing the guardian to change domicile; (3) a court may change domicile and in this case, the court *implicitly* DID change the domicile because the substance of the order was directed to slowly moving the IP and her property back to Austria and directing that her ashes be returned to NY for burial with her husband.

Matter of Roy (Lepowski), 164 Misc.2d 146; 623 N.Y.S.2d 995 (Sup. Ct., Suffolk Cty., 1995)

Court empowers guardian to change abode but not domicile stating: "... the personal needs co-guardians ...shall choose the place of abode (Mental Hygiene Law §81.22[a]9), provided that the

choice of the place of abode shall not constitute a change of ... domicile to a jurisdiction outside the State of New York."

O. Right/Obligation to Testify

Lopez v. Meluzio, 2006 U.S. Dist. LEXIS 93912 (EDNY 2006)

The court held that a finding of incapacity in State court under Article 81 did not automatically render an IP incompetent to testify at a deposition in this Federal proceeding. The court found although this IP who suffered from cerebral palsy had difficulty speaking and spoke slowly, it was a result of his physical limitations and not the result of any inability to understand questions and frame answers.

P. Landlord/Tenant Issues

140 W. End Ave. Owners Corp. v. Dinah L., 66 Misc. 3d 555 (Civ. Ct., NY Cty., 2019)

In a nuisance holdover proceeding, the court issued a final judgment of possession to the landlord due to the conditions in the tenant's apartment, however, because the tenant was an elderly IP, who had lived in the apartment for 10 years, and because her guardian was trying to secure a safe, affordable dwelling for her, the court stayed execution of the warrant of eviction for 90 days to allow the guardian time to either cure the nuisance, or sell the apartment and relocate her.
*Nice summary of recent cases utilizing the expanded stay provisions of the Housing Stability and Tenant Protection Act

Matter of Prospect Union Assocs. v. DeJesus, 167 A.D.3d 540 (1st Dept., 2018)

For similar cases see also:

Diego Beekman Mut. Hous. Assoc. Hous. Dev. Fund Corp. v. McClain, _Misc3d_, 2019 NY Slip Op 50580(U), 4 (Civ. Ct., Bronx Cty., 2019)

2013 Amsterdam Ave. Hous. Ass'n v. King, _, Misc3d _, 2019 NYLJ LEXIS 1234, *4 (App. Term, 1st Dept., March 22, 2019)

Reversing a final judgment in favor of the landlord and directing the issuance of a final judgment in favor of the tenant, dismissing the petition (because the notice served by the landlord was deficient), the Appellate Term nevertheless suggested that in view of tenant's disabilities and the serious conduct at issue, the parties should explore reasonable accommodations that will enable him

to fulfill his lease obligations and avoid eviction, including, if warranted, the commencement of a proceeding by an appropriate party for the appointment of an MHL Article 81 guardian.

Diego Beekman Mut. Hous. Ass'n Hous. Dev. Fund Corp v McCain, 2019 N.Y.LJ. LEXIS 1127 (Civ. Ct., Bronx Cty. Decided 3/29/19, published 4/10/19)

642-654 Whippersnapper LLC v Mahoney, _Misc.3d_, 2019 N.Y. Misc. LEXIS 1586, 2019 NY Slip Op 29099 (App. Term., 1st Dept., 2019)

On an appeal on behalf of an elderly tenant, the Appellate Term modified a final judgment of possession and warrant of eviction in favor of his landlord by temporarily staying the warrant, and remanding the matter to the Housing Court for a hearing on whether accommodations proposed by the tenant's Article 81 guardian (appointed subsequent to the judgment) are reasonable and will curtail the risk of recurrence of the Collyer-type conditions that existed in his apartment and, if so, whether there should be a permanent stay of eviction. In so doing, the Appellate Term noted that the appointment of an Article 81 guardian for a tenant establishes that he is "handicapped" within the meaning of the Fair Housing Act (41 USC 3604[f][2][A]), and that the refusal to make reasonable accommodations in rules, policies, practices or services when such accommodations may be necessary to afford the tenant equal opportunity to use and enjoy a dwelling is a discriminatory practice. Further noting that the guardian had performed a heavy duty cleaning with extermination services and had indicated that home care services that are now in place will enable the tenant to maintain the apartment in an appropriate sanitary condition, the Appellate Term held that, in accordance with, inter alia, Matter of Prospect Union Assoc. v DeJesus, 167 AD3d 540 (1st Dept., 2018), a hearing was warranted to ascertain whether the tenant can now fulfill his lease obligations and avoid eviction. The Appellate Term added that the Housing Court "should also consider equitable principles in determining whether to provide the tenant an opportunity to cure," assessing factors such as his advanced age, disability, the hardship that eviction would cause, and his long-term tenancy of over 50 years at the subject premises.

Matter of Prospect Union Assocs. v. DeJesus, 167 A.D.3d 540 (1st Dept., 2018)

The Appellate Division granted the tenants' motion to vacate the final judgment of possession in favor of the landlord and for a permanent stay of the warrant of eviction to the extent of granting a temporary stay of the warrant of eviction and remanding the matter to the Housing Court for a hearing on whether to permanently stay the eviction. In so doing, the Court noted that under the Fair Housing Act ("FHA"), it is unlawful to discriminate in housing practices on the basis of a "handicap." 42 USC § 3604(f)(2)(A). The appointment of an Article 81 guardian for the subject tenants sufficiently established that they are "handicapped" within the meaning of the FHA, and may be entitled to a reasonable accommodation. The Appellate Division noted that what is "reasonable" varies from case to case, because it is fact-specific, but that the overarching guiding factor is that a landlord is obligated to provide a tenant with a reasonable accommodation if necessary for the tenant to keep his or her apartment. Indeed, a refusal to make reasonable accommodations in rules,

policies, practices, or services, when such accommodations may be necessary to afford a handicapped individual equal opportunity to use and enjoy a dwelling is a discriminatory practice. 42 USC § 3604(f)(3)(B). The Appellate Division added that a landlord does not have to provide a reasonable accommodation if it puts other tenants at risk, but should consider whether such risks can be minimized. Criticizing the Housing Court for its failure to consider whether, with ongoing supportive services and suitable monitoring, the tenants can continue to live an orderly existence in the apartment without harming or affecting their neighbors, the Appellate Division remanded the matter for a hearing to determine whether the accommodations proposed by the guardian are reasonable, whether they will curtail the risk of the nuisance recurring, and whether there should be a permanent stay of eviction.

Matter of New York Found. for Senior Citizens v Hamilton, _AD3d_, 2019 N.Y. App. Div. LEXIS 2126, 2019 NY Slip Op 02044 (1st Dept., 2019)

In an appeal by a non-party landlord in an ongoing Article 81 guardianship proceeding, the Appellate Division affirmed an order granting the guardian's motion to vacate a so-ordered stipulation of settlement entered into in a previous holdover proceeding. Highlighting the Housing Court's failure to allocute the tenant before he signed the stipulation, and the detailed evidence of the tenant's incapacity that was subsequently presented in the Article 81 proceeding, the Appellate Division held that the tenant lacked the capacity to enter into the stipulation. The Appellate Division further rejected the landlord's reliance on the Housing Court guardian ad litem's acquiescence to the stipulation, noting: (1) that the GAL (who, suspecting the tenant's need for greater assistance, ultimately referred him to APS) did not have the benefit of the evidence presented at the Article 81 proceeding, and (2) that, in any event, "[a] GAL is not a decision-making position; it is an appointment of assistance."

Matter of Mozelle W., 2018 N.Y. App.Div, LEXIS 8227 (2nd Dept.)

Commissioner of DSS moved for the appointment of a guardian for AIP, a tenant facing eviction for non-payment, and was granted a temporary restraining order prohibiting the landlord from pursuing the eviction proceeding until 60 days after the guardian qualified. The Landlord moved for an order directing DSS to pay the AIP's rent arrears and use and occupancy during the period of the stay. The trial court denied that motion and the landlord appealed. On appeal, the Appellate Division upheld that order, holding that there was neither a statutory nor contractual obligation requiring DSS to apply public funds to pay the landlord, a private individual.

New York Hous. Auth., Edenwald Houses v. Ramirez, 2018 N.Y. Misc. LEXIS 3784 (Civ. Ct. City of NY, Bronx Cty.)(Sanchez, Judge of Housing Ct.)

The NYCHA's petition seeking a final judgment of possession against a residential tenant, who was over 60 years old and receiving SSI, was adjourned to determine whether the earlier termination of tenancy hearing complied with the Blatch Consent Decree (97 Civ.3918, 2008 U.S. Dist. LEXIS

114684 [S.D.N.Y., 2008]), which requires the NYCHA to advise the housing court of information suggesting that a tenant may be incompetent, and enjoins the NYCHA from proceeding with a termination of tenancy hearing against an incompetent tenant unless the tenant is represented by an Article 81 guardian or by an appropriate person acting as a GAL.

Matter of Embassy House Eat LLC v. Dyan P., (1st Dept.), ___AD3d____; 2017 N.Y. App. Div. LEXIS 4451 (2017)

Appellate Division, 1st Dept., affirmed an order of Supreme Court, NY County, granting a motion , brought by the Article 81 guardian of an elderly tenant, to vacate a So-Ordered Stipulation and resulting judgment of possession and warrant of conviction, finding sufficient evidence that the tenant lacked capacity to enter into the Stipulation due to anxiety and depression. Significant to the Court was proof that the City Marshall had referred the tenant to APS within 10 months of her entering into the Stipulation.

Matter of Johnson v Bruno, _AD3d_; 2016 NY App. Div. LEXIS 5259; 2016 NY Slip Op. 05416 (3rd Dept., 2016)

In a proceeding brought by a guardian pursuant to MHL § 81.43 seeking to discover property that was allegedly being withheld by the IP's landlord, the Appellate Division reversed so much of an order of the Supreme Court as summarily awarded a money judgment to the landlord on his counterclaim seeking an award for past due rent and damages to the premises. In so doing, the Appellate Division highlighted the landlord's failure to file a verified answer as required by 81.43(b). The Appellate Division further noted that the Supreme Court had properly instructed the landlord that his avenue of recourse was to commence a separate action at law, and had even granted him permission to do so, and then inexplicitly awarded him a money judgment without hearing or receiving any evidence substantiating his counterclaim.

Bailey v. Dixon, 47 Misc.3d 1225(A); 2015 NY Slip Op 50854(U), (Civ. Ct., Kings Cty.) (Avery, J. 2015)

In a landlord tenant no lease holdover proceeding, the landlord entered into a stipulation providing for a possessory and monetary judgement with only one of the two tenants she was seeking to evict. It became apparent during the proceeding that the second tenant, a vulnerable senior citizen, was subject to elder abuse by the first. In addition to appointing a GAL, directing the GAL to commence an Article 81 proceeding and directing HRA to take immediate steps to protect the senior, the court issued an interim order vacating the stay of execution of the warrant of eviction against the first tenant and held that since the second tenant was not party to the previously entered into stipulation, the issued warrant of execution of eviction could not be executed against him.

<u>Matter of Drayton</u>, 127 A.D.3d 526; 8 N.Y.S. 3d 65 (1st Dept 2015)

Where guardian enters in to a stipulation with the landlord for the IP's eviction, with the intent of placing the IP in a more restrictive setting, and under the circumstances the IP was not advised of the Stipulation, there was no finding of good cause shown and there was no hearing on the issue of whether the Guardian could place the IP in a more restrictive setting, the Appellate Division, First Dept vacated the stipulation and remanded the case to the Joint Housing/Guardianship part for a hearing pursuant to the MHL 81.22.

<u>Fiduciary Trust Co., Intl. v Mehta</u>, 40 Misc.3d 1227(A) (Civ. Ct., NYCL/T)(Kraus., J.)

Months after entry of a judgment and issuance of a warrant of eviction, the housing court denied the tenant's attorney's motion for the appointment of a GAL to facilitate the tenant's move from the subject apartment, noting that such was not the function of a GAL appointed pursuant to CPLR Article 12. However, the Court stayed execution of the warrant so as to afford counsel, or the tenant, an opportunity to seek the appointment of an Article 81 guardian in Supreme Court.

<u>443 East 78th St. Realty v. Tupas</u>, NYLJ Oct 22, 2013, 0531509/13 (Civ. Ct., NY Cty, Housing Part R, 2013)(Elsner, J.H.C.)

Landlord sought to evict an elderly rent stabilized tenant who had been living in the apartment for 43 years because his clutter and other conditions in the apartment had allegedly become a hazard to other tenants. The Court awarded final judgment of possession to the landlord but held that the tenant must first be given several months to cure the situation even though this was the second such proceeding that had to be brought by the landlord and also that notice must be given to APS prior to any eviction.

<u>East 10th Street LLC v. Garcia</u>, 37 Misc3d 1224(A); 964 N.Y.S.2d 58 (Civ. Ct., NY Cty., 2012) (Krause, J.)

Respondent in a landlord tenant proceeding moved for removal of her GAL and for the court to void the Stipulation that the GAL had recommended on her behalf. The Court denied the motion reasoning that the GAL had carried out his fiduciary duty because he'd made a home visit, discussed the proposed settlement options at length with Respondent, investigated the allegations in the petition and Respondent's asserted defenses, and then after due consideration and presenting all the facts to the court endorsed the proposed settlement. The court further reasoned that even if a Respondent does not consent to a Stipulation, a GAL may still recommend that a Court accept it and the court may do so if it is in the best interests of the ward. The GAL must make an objective evaluation of the circumstances and take such action as will advance what he perceives to be the best interests of the ward. The court, citing authority , held : ".... the best wishes of the ward are relevant but not determinative." The role of the GAL was not to follow whatever wishes the ward expressed, but rather to make an independent investigation, into the facts and circumstances, including but not

limited to the ward's wishes, and then make a recommendation to the court to accept a proposal that the GAL believed was in the ward's best interests.

25 West 68th Street LLC v. Lynch and Doe, 35 Misc. 3d 138A; 951 N.Y.S. 2d 84 (Sup Ct. App. Term, 1st Dept., 2012)

Tenant appealed from that portion of an order of the Civil Court of the City of New York, New York County which denied her cross motion to dismiss a petition in a holdover summary proceeding. The Appellate Division held that the cross motion had been properly denied, inter alia, because the appointment of an Article 81 guardian for tenant after landlord's commencement of the holdover proceeding, while precluding the eviction claim from going forward without leave of the appointing court did not provide a basis to dismiss the otherwise valid holdover petition.

400 West 59th Street Partners, LLC, v. Carole Edwards, 28 Misc. 3d 93; 907 N.Y.S.2d 765 (Sup. Ct. App. Term. 1st Dept., 2010)

That an Article 81 guardian was appointed for a tenant approximately six months after the tenant entered into a stipulation which she eventually breached, did not, without more, raise a triable issue as to tenant's mental capacity at the time the parties entered into the stipulation. There was no non-hearsay admissible evidence such as medical affirmations or even an affidavit by the tenant herself as to her lack of capacity to enter in to a binding contract to overcome the presumption of competency.

Matter of Cecelia Gullas, 2009 NY Slip Op 31653U; 2009 N.Y. Misc. LEXIS 5425 (Sup. Ct. NY Cty 2009) (Madden, J.)

The court denied a motion by a respondent in an eviction proceeding to have the proceeding dismissed for lack of jurisdiction. At the commencement of the proceeding, respondent had an Article 81 guardian and the guardian was not served with the initiatory papers. Eventually, prior to any conferences or hearings taking place, the guardian was served with all notices and litigation documents. Later, respondent successfully moved to have the guardianship terminated and the court in that proceeding made the finding that there was clear and convincing evidence that respondent's ability to provide for her needs was not impaired. Moreover, respondent had actual notice of the eviction proceeding, had an opportunity to be heard and eventually was heard despite her many attempts to delay the proceedings. Therefore the court in the eviction proceeding found the motion to dismiss for lack of jurisdiction to be without merit.

Matter of Elizabeth B., 73A.D.3d 410; 901 N.Y.S.2d 20 (1st Dept, 2010)

The Appellate Division, First Department upheld an order of the trial court that: (a) denied the motion of NY Foundation for Senior Citizens Guardianship Services for a stay of eviction, (b) directed the guardian to place the IP in a shelter, (c) directed the Guardian to ensure that her heath

needs were attended to in the shelter, and (d) directed the Guardian to continue searching for suitable affordable housing for he while she was in the shelter. The trial court had noted that it was issuing this order, even though petitioner had not specified all the housing programs it had explored and its reasons for rejected them because, it concluded, the immediate problem was the IP's financial situation and her age.

31175 LLC v. Shapiro, 2008 N.Y. Misc. LEXIS 7513; 241 NYLJ 11 (Sup. Ct. NY Cty.) (Schneider, J.)

In a nuisance holdover proceeding involving a mentally and physically disabled 71 year old man, the court dismissed the co-op's petition because it found that the evidence established that respondent had a diligent guardian who was attentive to his needs and circumstances and who has responded responsibly to the complaints and concerns of the coop. Respondent was also now subject to an Assisted Outpatient Treatment order and was under considerable supervision.

Q. Power to control IP's social contacts

Matter of Rodgers B.B. (Fernando A.B.), _AD3d_, 2019 N.Y. App. Div. LEXIS 852 (2nd Dept., 2019)

On appeal from an order denying the IP's father visitation, the Appellate Division held that the trial court had providently exercised its discretion in appointing the IPs mother as his guardian with the authority to prevent the father from visiting him in light of the Court Evaluator's credible testimony that the father had threatened violence against the IP's mother.

Matter of Hultay v. Mei Wu S. , 140 A.D.3d 502; 35 NYS3d 9; 2016 N.Y. App. Div. LEXIS 4515 (1st Dept. 2017)

Appellate Division upheld an Order, issued pursuant to MHL 81.23 (b)(1), which restrained the IP's ex- wife from any having any written, phone or in-person contact with him without the guardians' prior approval, and enjoined the ex-wife from publicly disclosing certain of the IP's health and financial information, where the guardianship Order, consistent with the IP's stated desire to not have contact with his ex-wife, authorized the guardians to limit his social environment pursuant to MHL 81.22(a)(2).

IV. GUARDIANS

A. Proper guardians

(i) Preference for Family Members Unless Unfit or Conflict

Matter of Agam S.B., 2019 N.Y. App. Div. LEXIS 1383 (2nd Dept. 2019)

Where the AIP's mother's parental rights had previously been terminated due to medical and educational neglect, the trial court, after a bench hearing, appointed the AIP's non-party father and denied the mother's application to be appointed as guardian. Upon the mother's appeal, the Appellate Division affirmed. (Notably, although the facts in the Appellate Division decision and Order illustrate this point, the legal principle and related statutory provisions establishing that an unfit family member shall not be appointed are not specifically discussed therein.)

Matter of Camoia, 48 Misc.3d 1221(A); 2015 N.Y. Slip Op 51179(U)(Sup. Ct. Kings Cty. 2015)(King, J.S.C.)

Court appointed an independent guardian instead of a family member because, although the AIPs adult children were willing to assume responsibility and had done so in the past, the AIPs son's level of care had been insufficient to meet her needs and the AIPs daughter's relationship with her brother was so contentious that although otherwise qualified, the on-going conflict between the siblings rendered the daughter unable and unsuitable to serve.

Matter of Caryl S.S. (Valerie L.S.), 47 Misc.3d 1201(A); 15 N.Y.S.3d 710 (Sup. Ct. Bronx Cty., 2015)(Aarons, J.)

The court declined to appoint either of the AIP's adult children as her guardian noting: "The conduct of both the petitioner and cross-petitioner in advancing their own interests and being guided by their overriding desires to secure their own inheritance, has been unacceptable. To be sure the egregious and manipulative conduct of the cross -petitioner has been more extreme, and given his over reaching behavior, his history of financial unreliability, and his extreme disregard for the rights of the IP and the abuse of his position of family trust, he is clearly unfit to be appointed as guardian. With respect to the petitioner, her inability to reach a consensus with the cross-petitioner, her unrelenting efforts to obtain title to the [AIP's] property and trust assests, without taking into account the IP's needs or the potential effect on Medicaid eligibility, combined with the history of family discord suggests that a third party be appointed so as to avoid continuing family strife and disruption of the life of the IP.

Matter of Karen H.M., 45 Misc3d 858; 991 N.Y.S.2d 868 (Sup. Ct., Bronx Cty 2014)(Aarons, J.)

Court, finding no question as to the need for a guardian, appointed FSSY as an independent guardian after setting aside a validly executed Power of Attorney given by the AIP to one of her two daughters more than 10 years earlier. The petitioning sister has been providing primarily personal care to their mother in an apartment in her home and the cross-petitioning sister, who held the POA, had been responsible for her mother's finances. The Court, after taking testimony from several family members, found that the sister who had been holding the POA had violated her fiduciary duty by mishandling her mother's assets such that: (a) one of AIP's bank accounts for which she had oversight had been paid over to the State as unclaimed funds; (b) this sister arranged for the AIP to surrender her interest in inherited real estate to her for no consideration and she is now paying "rent" for the use of those same premises, which she is described as barely using; and, (c) her funds were used to pay for unqualified and unidentified care givers. The Court, after reviewing the entire history of the situation also found that the two sisters were unable to work cooperatively as co-guardians toward their mother's well being, as evidenced by their inability to agree on the AIP's place of abode or the timing of her medical appointments and other health care decisions, and thus appointed an independent guardian.

Matter of Marilyn A. I. (Anonymous), 106 A.D.3d 821; 964 N.Y.S. 640; 2013 N.Y. App. Div. LEXIS 3252 (2nd Dept 2013)

The Appellate Division found that the record plainly indicated that a strong dissension existed between the AIP and the petitioner, her daughter, and thus held that the trial court had not improvidently exercised its discretion in failing to appoint the petitioner as a co-guardian of the person of the AIP.

Matter of Gabr, 39 Misc. 3d 746; 961 N.Y.S.2d 736 (Sup. Ct. Kings Cty. 2013)(Barros, J.)

Although the Court ultimately concluded that the AIP had alternative resources and did not need a guardian at all, the court noted that it would have declined to appoint the petitioner, AIP's son and foreign guardian in Egypt, as the New York guardian due to: his long contentious relationship with his stepmother, AIP's wife; his disdain for her refusal to wear a veil; his relentless pursuit to divest her of any of his father's estate; his interference with her efforts to care for the AIP; the Court Evaluator's assessment that the AIP's expressed desire was to have his wife be his health care agent and attorney-in-fact; and the son's own financial bankruptcy which made him ineligible for appointment.

Matter of G.V.S, 34 Misc3d 1206(A); 943 N.Y.s.2d 792 (Sup. Ct., Bronx Cty., 2011)

Although the Court Examiner recommended an independent guardian due to contentious relationships within the family, the court appointed the AIP's daughter as his sole guardian. Due to

the daughter's contentious relationship with her brothers, and concerns of the woman with whom the AIP had been involved in a long- term relationship that she would not be permitted to see him and be involved in his care, the Court, considering the various social relationships, directed that the daughter afford them continuing access to him and keep them apprised of his health and overall medical condition.

Matter of Ella C., 34 Misc3d 1203A; 943 N.Y.S. 2d 791 (Sup. Ct., Kings Cty. 2011) (Barros, J.)

The court did not appoint any of the AIP's four adult children as her guardian and instead appointed a neutral guardian. The Court declined to appoint the one daughter, who held her power of attorney, because that daughter's single minded pursuit of realizing her goal of operating a cat sanctuary had drained the AIP financially, and in furtherance of this pursuit she had isolated her mother from and turned her against all other family members who did not support the cat sanctuary plan. Her two sons, recognizing that the animus their mother now held against them as a result of their sister's manipulations would make it impossible for them to serve and they withdrew their requests to serve. The court also declined to appoint the remaining daughter who demonstrated ambivalence and divided loyalties under all the circumstances. Moreover, this daughter was not bondable due to her own bankruptcy.

Matter of Cheryl H., 7/21/10, NYLJ 26 (col.3)(Sup. Ct. Nass. Cty.)(Diamond, J.)

An acrimonious matrimonial action with a custody component involving an autistic son, evolved into an Article 81 guardianship proceeding when the son became 22 years old. While a custody battle, the father sought to enforce his visitation rights and his right to be informed about significant developments with his son. The mother consistently restricted them, arguing that the father did not properly supervise the son. She refused him access in violation of assorted court orders directing such access to the son. When the son was 22 years old, the mother petitioned for and was granted Article 81 personal needs guardianship over her son. The order appointing her directed her to provide reports to the father and the court, established a detailed visitation schedule, and specifically found that there was no need for supervised visits for the father. Despite such order, for the next 14 months the mother continued to deny the father access, failed and refused to file court ordered reports concerning her son, and, in fact, was held in contempt and fined for each visit she refused to allow. She also refused to cooperate with a court appointed parent coordinator. She continued to refuse visits and pay fines. She also had no telephone service at home and did not respond to efforts by the parent coordinator to contact her, which she attributed to a lack of money to pay phone bills. The father eventually moved to have her removed as guardian and to be appointed as successor guardian in her stead. Despite the court noting her loving and supportive attention to her son, the court nevertheless removed her as guardian and transferred guardianship to the father, noting that the father did not pose a threat to his son, that it was in the son's best interest to have a relationship with his father, that the father was willing to allow liberal contact between the mother and son, and, that the court could no longer tolerate the mother's defiance of court orders.

<u>Nostro v Dafni Holdings et al,</u> 23 Misc3d 1128A; 889 N.Y.S.2d 506 (Sup. Ct. Kings Cty., 2009) (Rivera, J.)

A guardian who was also the sole beneficiary of the IP's estate brought suit against a third party on behalf of the IP. The third party sought to have the guardian removed and a GAL appointed for the IP in the instant case arguing that the Guardian could not be truly independent since he had a stake in the outcome of the case as the IP's only heir and thus was motivated by self interest. The court held that while it was possible that the guardian's future pecuniary interest may have been a motive for him starting the lawsuit, it was equally possible that he was pursuing the action in the IPs best interest as was his responsibility as a fiduciary. There was nothing about the prosecution of the lawsuit that would have adversely affected the IP and the fact that the guardian might someday benefit if the plaintiff was successful in the suit did not establish that a conflict of interest existed requiring that the Guardian be removed or a GAL be appointed.

<u>Matter of Joseph D.</u>, 55 A.D.3d 907; 865 N.Y.S. 2d 909 (2nd Dept 2008)

Where the power of attorney held by the appellant was not a sufficient resource for the management of the IP's property and the attorney in fact was unsuitable to serve in the capacity of guardian, the court properly appointed an independent guardian.

<u>Matter of Audrey D.</u>, 48 A.D. 3d 806; 853 N.Y.S.2d 143 (2nd Dept. 2008)

A nominated guardian must be appointed unless the court determines for good cause shown that such appointment is not appropriate. The court found that although the AIP nominated her father to be her guardian, that he was not a suitable choice because he had no plan for finding, and did not know how to acquire, adequate housing for AIP given her limited financial resources.

<u>Matter of Anonymous</u>, 41 A.D.3d 346; 839 N.Y.S.2d 78 (1st Dept., 2007)

Appellate Division upheld the trial court's determination to appoint the AIP's sons as co-guardians stating that there was no evidence that the sons were unfit to serve and that there is a preference for family members unless they are unfit or there is a conflict among family members rendering their discharge of guardianship duties problematic. The Court stated that although appellant was a person close to the AIP, she was not a family member and that therefore her differences with the sons did not amount to a conflict among family members justifying the appointment of an independent guardian.

Matter of Bell, June 11, 2007, NYLJ, p. 22, col. 1 (Sup. Ct. NY Cty.) (McCooe, J.) *aff'd* 57 A.D.3d 397; 869 N.Y.S.2d 486 (1st Dept. 2008)

Court directs appointment of independent guardian on the ground that the AIP's son, who held a Power of Attorney, had been isolating his mother from other family members to her detriment and was self dealing by converting his mother's assets to his own use, including transferring real estate to himself at a price more than1 million dollars below market value.

Matter of Nellie G., 74 A.D.3d 1065; 903 N.Y.S.2d 494 (2nd Dept 2010)

The Appellate Division reversed the trial court finding that the trial court had erred in appointing an independent guardian in the place of the AIP's daughter/attorney-in-fact. The Appellate Division reasoned that an independent guardian should be turned to only as a "last resort" and that although the daughter had engaged in certain improper real estate transactions, these transactions did not harm the AIP's interests and the daughter did not profit from them, therefore, she had not abused her authority as attorney-in-fact and was not unfit to serve as her mother's guardian.

Matter of Gladwin, 35 A.D.3d 1236; 828 N.Y.S.2d 737 (4th Dept. 2006)

In their respective wills signed in 1999, the parents of 12 children, including one disabled son, named one of his 12 siblings as his guardian and another of his 12 siblings as the alternate guardian. The trial court determined therefrom that the parents considered both parties to be acceptable guardians. The court determined that after the parents died, although the physical needs of the disabled sibling were being adequately met by the first sibling who has been living with and caring for the elderly parents and the disabled sibling that the disabled sibling's emotional and developmental needs had been severely restricted to his detriment by his socially isolated living environment. The court thus concluded that it was in the disabled sibling's best interests to live with the sibling named as alternate guardian and her family in another state, where he would have "a more socially active and enriching life through organizations and groups which are specifically set up to meet his needs," as well as unlimited access to all his siblings.

Matter of Mel S., 12 Misc.3d 1193A; 824 N.Y.S.2d 756 (Sup. Ct., Otswego Cty, 2006) (Peckham, J.)

The Court identified financial self-dealing by the daughter who was petitioning for guardianship over her mother and therefore appointed a neutral guardian of the property and appointed the daughter guardian of the person only. The specific self-dealing was that the daughter used the AIP's funds allegedly to make their home handicapped accessible for the AIP so she could visit but the evidence suggested that the work was really to make the home more comfortable for the daughter and her family and it also appeared that the AIP's condition was so debilitated that it was unlikely that she would ever leave the nursing home to visits the daughter's home in any event.

<u>Matter of Williams</u>, 12 Misc.3d 1191A; 824 N.Y.S.2d 770 (Sup. Ct., Kings Cty., 2006) (Belen, J.)

Although AIP had freely given power of attorney to her grand nephew, the court found him unfit to serve as guardian because his behavior had evidenced impropriety and self dealing. Moreover, at the hearing, the AIP had clearly and unequivocally testified that she believed her grandnephew was stealing from her and plotting to dispossess her of her home and assets and that she wanted nothing to do with him anymore. The court recited the following evidence that the grandnephew was unfit to serve: (1) he had a conflict of interest because he had a vested in the AIP's testamentary estate, a life-long reliance on his grandaunt for his own financial needs and a belief, despite all evidence to the contrary, that his grandaunt wished to continue to support him; (2) while in control of her assets, even after she had revoked the power of attorney, he wrote more than $18,000.00 in checks to himself and deposited over $6,000 meant for her account into his own account, (3) he acknowledged the disappearance of approximately $200,000.00 from the AIP's account's during the time period that he had a valid power of attorney, a matter which was being investigated by the District Attorney; (4) he had attempted to set up a situation whereby he could protect his own inheritance by causing the AIP to disinherit her developmentally disabled adult son; and (5) he had moved her into a nursing home that she did not need to be in, then moved into her apartment, removed her personalty from the apartment, refused to return her keys, diverted her mail, and barred her church friends from contacting her under the guise of helping her without her permission, based upon a power of attorney that she had validly revoked.

<u>Matter of Margaret S</u>., 2006 N.Y. Misc LEXIS 2833; NYLJ July 14, 2006, p. 23, col. 1 (Sup. Ct. Richmond Cty.) (Giacobbe, J.)

Where there was acrimony between an AIP's son and daughter, both of whom were loving adult children capable of acting as guardian, the court, finding that it would be in the best interest of the AIP to have both of her children involved, appointed the daughter as guardian of the property along with an independent co-guardian of the property and the son as guardian of the person along with an independent co-guardian of the person. The court notes that it is mindful of the history of confrontation and disagreement between the siblings and the potential for further conflict between them in their roles as guardians. The court stated that it therefore appointed independent co-guardians to exert a moderating influence.

<u>Matter of S.M.</u>, 13 Misc.3d 582; 823 N.Y.S.2d 843 (Sup. Ct. , Bronx Cty. 2006) (Hunter, J.)

Petitioner, the AIP's son sought to be appointed guardian. The petition failed to mention that he was a convicted felon. Although the Court Evaluator, who did address the conviction in her report, told the petitioner and his counsel that weeks before the hearing that Part 36 (22 NYCRR 36.2(c)) prohibited his appointment and that petitioner was not bondable, petitioner's counsel continued to advocate for his appointment. The Court, stated that *it was counsel's obligation to disclose the proposed guardian's felony conviction in the petition and during her examination of him on the*

stand. The Court proposes several amendments to Part 36 to insure that those seeking appointment as guardians have not been convicted of a crime or abuse or neglect. Ultimately, the court appoints an independent guardian.

Matter of Ardelia R., 28 A.D.3d 485; 812 N.Y.S.2d 140 (2nd Dept. 2006)

Supreme Court providently exercised its discretion in appointing an independent guardian since the record established that AIP's family members were unsuitable AIP had been admitted to the hospital after being found in her home without running water, food, electricity, or heat, malodorous and frail. She was unable to cook, and was known to wander away from her home. She had forgotten where she banked and did not know her sources of income. Although she owned a home and possessed approximately $115,000 in savings, she was delinquent on her utility bills. Upon admission to the hospital, she executed a power of attorney in favor of her brother. The record demonstrated that her brother told her to sign the document without reading it and, thereafter, withdrew funds from her bank accounts and failed to account for a substantial portion of those funds. As there was evidence of undue influence in the brother's actions to bring about the execution of the power of attorney and evidence of impropriety in his management of the AIP's property, he was providently deemed unsuitable to act as guardian. Since AIP's other two relatives were likewise unsuitable or unwilling to act as guardian. Supreme Court properly appointed an independent guardian.

In re Application of Arnold J. Mars, 13 A.D.3d 91; 785 N.Y.S.2d 451 (1st Dept 2004)

Appellate Division finds that the Court's decision not to follow the recommendation of the Court Evaluator to appoint a neutral third party was appropriate. Although the record indicated that of the AIP's children, respondent-appellant daughter played the more substantial role in seeing to his care, and that the parents preferred that she rather than petitioner son handle their financial and personal matters if they became incapacitated, the record also provided indication that respondent-appellant's interests came into conflict with those of her father when decisions respecting expenditures for her father's care arose. Accordingly, the determination that petitioner should serve as his father's guardian is supported by the evidence and is not contrary to Mental Hygiene Law. §[§[81.19[b],[d][1] and 81.17.

Matter of Wynne, 11 A.D.3d 1014; 738 N.Y.S.2d 179(4th Dept. 2004)

Although acknowledging that preference should be given to family, court appoints non-family member as guardian as being in the best interests of the AIP because the petitioner (AIPS wife) and the other the family members (AIP's siblings) have a 30 year long history of contentions and conflict involving cross- accusations that the other was stealing money from the AIP.

<u>In the Matter of the Application of GWC</u>, 4 Misc.3d 1004A; 791 N.Y.S.2d 869(Sup. Ct., Tompkins Cty. 2004)(Peckham, J.)

Where evidence showed that father of a mildly mentally retarded woman was not a nurturing parent, was not the primary caregiver during his daughter's lifetime, had no real understanding of her limitations as a mentally retarded adult, and was doling out only $10/week of her funds to her, court appoints AIP's siblings as co-guardians of the person and property, despite the fact that they had secured a Power of Attorney from her which they used to withdraw a large sum of money from am account her father maintained for her and put the money into an account in their own names. The Court found, based upon the facts adduced at hearing, the court evaluator's recommendation, and the AIP's nomination of her siblings, that these inappropriate acts we motivated by a concern for the AIP and were an effort by the siblings to help the AIP gain access to her own funds then under her father's unreasonable control.

<u>Matter of Flight</u>, 8 A.D.3d 977; 778 N.Y.S.2d 815 (4th Dept., 2004)

App. Div. affirms lower court decision appointing AIPs brother as his guardian and rejects, without discussion of the facts, the contention by petitioner that the non-family members she proposed should have been appointed instead.

<u>Matter of Kathleen FF</u>, 6 A.D.3d 1035; 776 N.Y.S.2d 609 (3rd Dept., 2004)

The guardian nominated by AIP was a family member (niece) who lived out of state. Another family member contested the niece's appointment because she was also the trustee and beneficiary of several trusts that she had set up for the AIP while holding the POA. Court finds after hearing that the niece was a proper guardian because (a) there was evidence of love between the AIP and her niece; (b) the niece was handling the financial matters of other family members as well; (c) there was no evidence of wrongdoing by the niece; and (d) the court would be monitoring the financial dealings of the guardian.

<u>Matter of Nasquan S.</u>, 2 A.D.3d 531; 767 N.Y.S. 2d 906 (2nd Dept., 2003)

Petitioner was the AIP's mother. She sought to be appointed guardian and to have the attorney appointed as co-guardian. The trial court refused to appoint the attorney as co-guardian and instead appointed a third party stranger. In reversing the trial court, the Appellate Division stated: "The case law in this firmly establishes that a stranger will not be appointed as guardian of an incapacitated person "unless it is impossible to find within the family circle, or their nominees, one who is qualified to serve."

Matter of Bertha W., 1 A.D.3d 603; 767 N.Y.S. 2d 657 (2nd Dept., 2003)

Appellate Division modifies order to eliminate appointment of non-family member co-guardian of the property stating that there is a preference for family members unless it is impossible to find a qualified family member to serve and that there was no showing that the AIP's nephew required a co-guardian to assist him in carrying our his duties.

Matter of Joseph V., 307 A.D.2d 469; 762 N.Y.S. 2d 669 (3rd Dept., 2003)

Court finds that although there is a preference for family members, court appoints independent guardian after considering factors including: the strained relationships between AIP's family members; the substance abuse problems if all the family members, the families unrealistic vies of th AIP's condition, the plans of some family members to move the AIP out of a nursing home to his detriment, some family member's disregard for the AIP's wishes to forgo life support measures and the possibility that other family members may be quick to terminate life support.

Matter of Goryeb, NYLJ, 1/6/03 (2nd Sup. Ct., Kings Cty., 2003)

Where ex-wife cross-petitioned to be named guardian, Court found that (1) she is NOT a family member entitled to the preference given to family members and (2) she had conflict of interest in that she was a creditor of the IP because the divorce agreement provided for child support that had never been paid and therefore under the prohibition of MHL §81.19 against appointing creditors, could not be appointed even thought the AIP said he wanted his ex-wife appointed.

Matter of Nellie Lopez (Salazar), 292 A.D.2d 231; 739 N.Y.S.2d 147 (1st Dept., 2002)

Mother would not be appointed guardian where she failed to properly account for expenditures on AIP daughter's behalf under infant compromise, abandoned house that she was supposed to buy to give child needed space and comfort because she felt that her own interests were not protected under the deed and also because she sought both an Art. 17-A and Art. 81 guardianship at the same time without informing both courts of the proceedings pending in the other court.

Matter of Mary "J"., 290 A.D.2d 847; 736 N.Y.S.2d 542; (3rd Dept., 2002)

Appellate Division held that where family member that AIP preferred to have as guardian was moving out of state and remaining siblings remained in local area where AIP had resided all her life, the hearing court properly appointed the two siblings as co-guardians, despite the AIP's wish to the contrary.

Matter of Zdeb, 215 A.D.2d 803; 626 N.Y.S.2d 298 (3rd Dept., 1995)

Where petitioner, AIP's daughter, had failed to satisfactorily propose definite plan for AIP to leave acute care facility after his stroke, despite repeated requests and a more than adequate opportunity to do so, and where there was ample evidence that petitioner failed to cooperate with AIP's caregivers in formulating and effectuating a discharge plan for AIP, even though there was no reason to retain him in an acute care facility, daughter was not suitable to act as guardian.

In re Sabol (Colon), NYLJ, 5/25/93, p. 25, col. 2 (Sup. Ct., Kings Cty.)(Leone, J.)

Where son visits mother in nursing home regularly but is very abusive and threatening to the nursing home staff and wants mother to return home where he intends to care for her, but evidence presented including report of guardian ad litem, indicated that son cannot adequately care for his mother in his home and refuses to assist in her care at nursing home. Court does not appoint son as guardian. Moreover, court determines that appointing an individual from fiduciary list to take on difficult problems associated with unique problems involved with managing affairs of AIP and with dealing with her son with little or no compensation would be inappropriate and appoints instead Commissioner of DSS.

Matter of Darius Ignatius (Wilber, M.), 202 A.D.2d 1; 615 N.Y.S.2d 367 (1st Dept., 1995)

Father was not suitable guardian for son where evidence of petitioner's poor judgment, included his refusal to consent to his son's surgery for a broken jaw anywhere but in Manhattan, even after he was informed that delay could be harmful to his son, and his blunt refusal before Surrogate to sign agreement with developmental center to have facility act as cooperating agency to fulfill the conditions of Surrogate's original decree that he designate an organization which would be giving him advice and counsel. Further his reiteration that he was concerned only with obtaining custody of his son further shows his unfitness for the role of guardian in view of uncontroverted evidence that treatment being received by son was vital for his well-being.

Matter of Lois "F." (Ruth "F."), 209 A.D.2d 856; 618 N.Y.S.2d 920 (3rd Dept., 1994)

Although family members are generally preferred for appointment, where petitioner mother who obviously loved AIP was incapable of providing necessary care, mother was unfit to be guardian. Court identifies "fixed delusional system" that interferes with her ability to make sound judgments, inability to lift AIP out of bed or otherwise manage her, inability to recognize AIP's needs, frequent refusal to cooperate with AIP's caregivers, and fact that testimony at hearing was unfocused, discursive and erratic, as evidence of unsuitability.

In re: Robinson, 272 A.D.2d 176, 709 N.Y.S.2d 170 (1st Dept., 2000)

Appellate Division reverses trial court's appointment of court evaluator as guardian, stating that although family is not financially sophisticated and estate is large and complex, family is the preferred guardian and they can hire financial advisor.

Matter of Bailin (Geiger), NYLJ, 5/19/95, p. 36, col. 4 (Sup. Ct., Rockland Cty.)(Weiner, J.)

Petitioner nursing home sought appointment of guardian for resident. Resident's nephew, who was attorney-in-fact and who had close, personal, relationship with AIP for many years, sought appointment as guardian of person and property. AIP's niece and other nephews were either unable or unwilling to be appointed. Nephew, however, would not make further payments toward cost of care. He also sold AIP's home and used some proceeds for his personal expenses, claiming she authorized it. Court revoked nephew's power of attorney, appointed him as guardian of person only, and appointed an attorney as guardian of property.

In re: Chase, 264 A.D.2d 330; 694 N.Y.S.2d 363 (1st Dept., 1999)

AIP suffered severe stroke which rendered him unable to communicate. In anticipation of his arrival home, petitioner, daughter, arranged for wheelchair, hospital bed, therapist, and home health-care aides to provide 24 hour care, established charge accounts at grocery store and pharmacy, made sure his bills were paid, and hired a geriatric case manager. Despite conclusions of court evaluator that portrayed petitioner as greedy daughter who was raiding assets of her incapacitated father, court should not have issued an order naming a non-family member as guardian. Daughter was appropriate and preferred guardian, evidence indicated that her care was proper, and there was no actual financial conflict of interest based on evidence.

Matter of Kustka, 163 Misc.2d 694; 622 N.Y.S.2d 208 (Sup. Ct., Queens Cty., 1994)

Court properly departed from practice of appointing next of kin or close blood relatives or nominees where it found that wife's interests were adverse to AIP's, where new wife (who was formerly AIP's housekeeper and nurse to AIP's first wife) had been found to have been withdrawing AIP's funds from bank and sending them to her relatives in Czechoslovakia.

Matter of Donald Loury (Loury), 1993 N.Y. Misc. LEXIS 633; NYLJ, 9/23/93, p. 26, col. 2 (Surr. Ct., Kings Cty.)(Surr. Leone)

Petitioner relatives, sought to become co-guardians. Court finds that both were strongly motivated to repay certain substantial loans to AIP from AIP's father. Court finds interest of relatives adverse to interest of ward, and declines to appoint petitioners despite usual practice appointing next of kin, close blood relatives or their nominees.

Matter of Pasner (Tenenbaum), NYLJ, 7/14/95, p. 29, col. 1 (Sup. Ct., Kings Cty.)(Leone. J.)

Nephew was suitable guardian for uncle where he and uncle had close relationship, had worked together, nephew was uncle's primary care giver and uncle had nominated nephew as guardian. Court also expressed preference to appoint family member, despite their status as potential beneficiary under will.

Matter of Wingate (Kern), 165 Misc.2d 108; 627 N.Y.S.2d 257 (Sup. Ct., Suffolk Cty., 1995)

Cross petition by friend of 40 years and former named power-of-attorney of AIP sought appointment as guardian of personal needs and property management was denied where cross-petitioner had previously engaged in activities with respect to AIP's assets that are colorably inconsistent with fiduciary duties. While cross-petitioner may, in fact, have at all times acted honorably and with no intent to profit at expense of IP, court's responsibility is to give primary consideration to protection of rights and interests of AIP. Moreover, to put cross-petitioner in position wherein she may be both grantor and recipient of AIP's property is to create situation in which appearance of, and potential for, actual impropriety are manifest. Any decision she might make by which she could enjoy immediate or future pecuniary benefit would be subject to scrutiny and doubt. Court should not knowingly allow state of events to evolve that will burden cross-petitioner with specter of future criticism, and create doubt and conflict about decisions intended to benefit AIP.

Matter of Priviteri (Goldstein), NYLJ, 10/29/95, p. 27, col. 3 (Bronx Sup.)(Friedman, J.)

Where petitioner for guardianship of property was AIP's presumptive heir, there was conflict of interest because guardian stood to seek to enlarge estate for his own benefit, rather than that of ward. After considering size of estate, nature and closeness of familial relationship between proposed guardian and AIP, proposed guardian's financial circumstances, and motivation of proposed guardian, court avoided appearance of impropriety and conflict of interest by appointing AIP's sister as personal needs guardian and nephew plus a co-guardian to be appointed later as her property management guardian.

Matter of Parsoff, NYLJ, 6/6/95, p. 38, col. 5 (Rockland Sup.)(Weiner, J.)

Where both AIP's daughter and husband sought appointment as guardian, and there was history of conflict between petitioners with actions pending in Family Court alleging unlawful conduct and asset misappropriation, courts appoints daughter as guardian of person, refuses to appoint husband at all because he had been uncooperative with Social Services and refused to disclose available assets, and appoints local lawyer as property guardian.

(ii) Public agencies

Matter of Marguerite N., Sup. Ct., N.Y. Cty., Unpublished Decision/Order, Index # 402768/09)(Jan. 22, 2016)(Masley, J.)(Copy available through MHLS 2nd Department, Special Litigation and Appeals Unit)

JASA petitioned to be discharged as Marguerite N.'s guardian arguing, inter alia, that JASA is a community guardian (SSL § 473-d), and that, subsequent to JASA's appointment, Marguerite N., who for more than six months had been housed at Riker's Island, had left the "community." The court refused to discharge JASA, noting that neither SSL § 473-d, nor MHL § 81.03 (which defines a "facility"), state that an incarcerated incapacitated person is considered to be outside the community, or that prison constitutes a residential or long term care facility. The Court also rejected JASA's claim that its contract with the City compelled it to petition to be discharged under the circumstances presented, noting that JASA had failed to annex to its petition any such contract.

Matter of Marian E.B., 38 A.D.3d 1204; 832 N.Y.S.2d 374 (4th Dept., 2007)

Although there had been clear and convincing evidence introduced by petitioner hospital that the AIP, one of its patients, was incapacitated and in need of a guardian, the trial court nevertheless denied the petition for the reason that the petitioner had failed to propose a person or corporation available and willing to serve. The court made that finding because a representative of DSS had testified that DSS was not willing to accept the guardianship of respondent because he did not know if DSS could 'adequately or appropriately meet every one of respondent's needs.' The Appellate Division reversed and remanded for further proceedings holding that MHL 81.08 (12) provides that the petition shall include, *inter alia,* the name of the proposed guardian, if any, and thus does not require that the petition include a proposed guardian. The court did not comment on DSS's refusal to take the case or its apparent statutory mandate to do so.

Matter of Ethan Hylton, 2005 NY Misc LEXIS 8310; 233 NYLJ 4 (Surr. Ct., Bronx County) (Surr. Holtzman)

Although not the issue in the case, this case evidences another instance in which the Public Administrator was appointed as Article 81 Guardian.

Matter of Family and Children's Association (RH), 15 Misc.3d 112A; 838 N.Y.S. 2d 339 (Sup. Ct. Nassau Cty, 2007)(Diamond, J.)

Where a not-for-profit charitable agency moved to be relieved of it's responsibility as Art. 81 guardian for a an indigent woman, alleging that it lacked the resources to provide the tremendous level of support that she needed, and further alleged that it had spent a considerable sum of its own resources to maintain the IP and her dysfunctional family, the court granted the application to be

relieved, found that even if there were sufficient funds to pay a private guardian the responsibility would overwhelm an individual guardian and that only a public entity had the ability to serve this IP and appointed the County Department of Social Services pursuant to MHL 81.19(a) (2) to be the public guardian.

Matter of Keith H., unpublished, Sup.Ct., Hamilton Cty. (Montgomery County Spec. Term) (Index # 6296–06) (Sept 18, 2006) (Sise, J.)

The Consumer Advisory Board ("CAB") formed under the Federal Court "Willowbrook Decree" to protect the class members against dehumanizing practices and violations of their individual or legal rights does not automatically have powers of a guardian under Article 81 and, did not automatically have the authority to retain counsel on behalf of a profoundly retarded class member to prosecute a tort claim for an automobile accident until, after a full Art. 81 proceeding where appropriate findings were made, it was first appointed as guardian.

Matter of Ethan Hylton, NYLJ, p. 26, 1/6/05 (Surrogate Ct, Bronx County) (Surr Holtzman)

Although not the subject of this brief case, it is worth noting that in this case, the **Public Administrator** was named the Article 81 guardian.

Matter of Patrick "BB", 284 A.D.2d 636; 735 N.Y.S.2d 731 (3rd Dept., 2001)

MHL §81.19(e) prohibits appointment of **Commissioner of OMRDD** as guardian of property where OMRDD is a creditor of AIP and there is no evidence that there no other party without a conflict of interest who could be appointed instead. Guardian must be neutral and disinterested person. Under same logic, court also holds that under NYSARC's charter, it may be also be a potential creditor and therefore, NYSARC may not be appointed special guardian.

Court also holds that neither MHL §13.29 nor §29.23 authorize the Commissioner of OMRDD to hold the funds in any other capacity short of guardianship, such as "SNT-like account".

Matter of Maria Cedano, 171 Misc.2d 689; 655 N.Y.S.2d 283 (Sup. Ct., Suffolk Cty., 1997), *reversed*, 251 A.D.2d 105; 674 N.Y.S.2d 34 (1st Dept., 1998)

Community guardian, which served as conservator for elderly woman before she was permanently placed in long-term nursing home facility, may be appointed guardian, pursuant to Article 81, until substitute guardian is located and appointed, even though **under Social Services Law §473-d,** community guardian is required to relinquish duties once conservatee entered long-term residential facility. Court notes that woman will have no one to watch over her if community guardian is relieved of its duties and its account is settled. While Article 81 authorizes court to appoint successor guardian, apparently no funding is available, and no public guardian or any other person

or entity is available, to serve as guardian for an indigent person residing in nursing home. Purpose of Article 81 is not served by current funding scheme under which community guardians must terminate services to older people who are placed in nursing homes.

Matter of Commissioner of Cayuga Cty. for Appointment of Guardian for Bessie C., 225 A.D.2d 1027; 639 N.Y.S.2d 234 (4th Dept., 1996)

Commissioner of DSS who seeks to recoup payments or resources from recipient of public assistance has conflict of interest with AIP recipient of benefits and should not have been appointed guardian of her property. A neutral, disinterested person should be appointed guardian of the property. For same reason, it was error to appoint Commissioner of DSS special guardian for purpose of exercising her right of election. Also executor and beneficiary of the estate from which AIP stood to inherit has a conflict of interest with AIP that bars his appointment as guardian of her property but there is no bar to his appointment as guardian of person.

Erlich v. Oxenhorn (Matter of Lula XX), 224 A.D.2d 742; 637 N.Y.S.2d 234 (3rd Dept., 1996), *app. dismissed*, 88 N.Y.2d 842; 644 N.Y.S.2d 683 (1996)

Where there was longstanding ill will between AIP and DSS and DSS was petitioner and therefore AIP's adversary, there was conflict of interests and it was inappropriate for court to appoint DSS as guardian.

Matter of Sutkowsky (Wallace), 270 A.D.2d 943; 705 N.Y.S.2d 786; (Sup. Ct., Onondaga Cty., 2000)
Where **commissioner of social services agency** was appointed guardian of respondent, and order directed commissioner to personally visit each of his wards four times per year, commissioner could delegate duties of guardianship to staff.

(iii) Out of State/Foreign guardians

Moore v. Highland Care Center, 2018 NYLJ LEXIS 3819 (Sup. CT. Queens CTy. (McDonald, J.)

A guardian appointed in the US Virgin Islands was, through Full Faith and Credit, found to have standing to commence a personal injury action on behalf of an IP in New York.

Goldstein v. NY & Presbytarian Hospital, 2018 NY Misc. LEXIS 3622 (Sup. Ct. NY Cty) (Madden, J.)

Because judicial proceedings in South Africa seeking the appointment of a "curator" provide due process protections similar to those afforded under MHL Article 81, including an investigation by

a "curator ad litem" with responsibilities like those of an Article 81 court evaluator, the New York court afforded comity to the South African judgment and, without the need for a de novo Article 81 proceeding and hearing, appointed the South African curator as ancillary guardian of the IP's property for purposes of prosecuting a medical malpractice proceeding on her behalf in New York. In so doing, the court additionally noted that although South African proceedings are ex parte, the curator ad litem must interview the AIP and inform him/her of the nature and purpose of the proceedings, and the court must conduct a hearing at which the AIP's presence may be required.

Matter of I.B.R, 40 Misc.3d 464; 965 N.Y.S. 2d 860 (Sup. Ct., Dutchess Cty., 2013) (Pagones, J.)

Court declined to order appointment of a limited guardianship to petitioner, who lived outside the United States and was already the AIP's attorney-in-fact handling his financial affairs. Petitioner was applying for the limited guardianship solely because one of the banks with which he had to do business would not accept the power of attorney. The court held that guardianship is a remedy of last resort and the AIP had already made arrangements for his incapacity by executing the power of attorney and all financial institutions except for one were honoring it. The court also expressed concern that since the petitioner lived in Canada the court could not exercise jurisdiction over him for enforcement purposes without complying with procedures set forth in various international conventions and treaties and thus his appointment would create practical problems and increase the cost of enforcement. Further there was a co-guardian who could incur liability for any acts or omissions by the foreign guardian.

Matter of Gabr, 39 Misc. 3d 746; 961 N.Y.S.2d 736 (Sup. Ct., Kings Cty., 2013)(Barros, J.)

Court declined to recognize a guardianship order from Egypt pursuant to MHL 81.18 because Egyptian law did not afford the AIP substantially similar due process and substantive rights as exist under MHL Article 81. The Egyptian guardianship relied primarily upon medical diagnosis as opposed to functional limitations, Egyptian law was gender biased in that only men could serve as guardians, AIP's spouse was not provided notice or opportunity to be heard in the Egyptian proceeding, and the AIP was compelled to undergo medical examinations for the purpose of providing the Egyptian court with evidence against himself.

Matter of Kathleen FF, 6 A.D.3d 1035; 776 N.Y.S.2d 609 (3rd Dept., 2004)

Court approves appointment of niece as guardian. Although it was not the main issue in the case, it is noted that the niece lived in California and the aunt lived in NY. The niece visited regularly and had already been handling her aunts financial matters as POA.

Matter of Bowers, 164 Misc.2d 298; 624 N.Y.S.2d 750 (Surr. Ct., NY Cty., 1995)

A foreign guardian of nonresident AIP who is sole distributee of estate of New York domiciliary may proceed in Surrogate's Court to obtain letters of guardianship and acquire standing to apply for letters of administration in estate. Surrogate's Court enjoys limited jurisdiction over Art. 81 proceedings where impaired person has beneficial interest in estate. Although Article 81 does not specifically confer jurisdiction on Surrogate's Court where beneficiary of an estate is neither resident of nor physically present in New York, 81.05 governing venue, provides that where AIP is not present in State, residence shall be deemed to be county in which property is located. Thus, petitioner will not be required to proceed in two courts.

Matter of Sulzberger, 159 Misc.2d 236; 603 N.Y.S.2d 656 (Sup. Ct., NY Cty., 1993)

Where AIP had resided in France for many years; and pursuant to French law, conservators of his property had been appointed, daughter of AIP, and one of the conservators appointed by French court, sought order appointing her as ancillary guardian in New York to deal with AIP's substantial financial holdings in this state. Court noted lack of guidance in statute and directs counsel for petitioner to find out whether foreign courts procedure provided same protections as NY, such as court evaluator, in order to determine whether court should honor foreign court finding of incapacity or appoint court evaluator now.

In re: Robinson, 272 A.D.2d 176; 709 N.Y.S.2d 170 (1st Dept., 2000)

Court appoints co-guardian who is living out of the country temporarily, stating that modern transportation and communication will enable him to serve adequately.

(iv) Counsel or court evaluator as guardian

Matter of GLM (Gloria Loise Meyers), NYLJ, 5/6/03, p. 19, col 2 (Sup. Ct., Kings Cty.,) (Leventhal, J.)

Court finds extenuating circumstances under **22 NYCRR 36.29(c)(10)** to appoint the court evaluator in a proceeding as the guardian for a 14 year old girl where there was $3.5 million involved, where the parents were financially unsophisticated and also divorced acrimoniously, where they both had a good relationship with the court evaluator and where the court evaluator was an experienced elder law attorney whose office was near the home of both parents and the child. Of note is that the court did not identify why he could not find someone other than the court evaluator to appoint under the circumstances.

Matter of Turner (Iluyomade a/k/a Felix), 2002 NY Slip Opinion 50062U (will not be published in official reporter); 2002 NY Misc. LEXIS 108

Although Commission on Fiduciary Appointments found abuses in guardianship appointments and said that it was improper to appoint counsel and/or court evaluators as guardians because there would be a conflict of interest when there were funds involved, but no conflict to appoint the court evaluator if there were no funds involved, the Legislature has not set up an absolute bar to such appointments. Thus, here, where indigent Nigerian AIP had stroke after start of the Art. 81 proceeding and required temporary guardian to make medical decisions, and wife and son were not competent to make such decisions due to their own limited judgment, court faced with no other options, appoints counsel and court evaluator who had developed trusting relationship with AIP to serve *pro bono*. Court expresses concern over having rules apply differently to AIPS without funds and also expresses opinion that the abuses found by the Commission on Fiduciary Appointments were not characteristic of the guardianship bar.

(v) Creditors as Guardians

Matter of Marian E.B., 38 A.D.3d 1204; 832 N.Y.S.2d 374 (4th Dept., 2007)

Although there had been clear and convincing evidence introduced by petitioner hospital that the AIP, one of its patients, was incapacitated and in need of a guardian, the trial court denied the petition for the reason that the petitioner had failed to propose a person or corporation available and willing to serve. DSS had testified that it could not accept guardianship because it could not meet all of the AIP's needs. The Appellate Division reversed and remanded for further proceedings, noting that the fact that the hospital was also a creditor of the AIP's did not automatically disqualify it from serving as guardian, citing to MHL 81.19(e).

Matter of Patrick "BB", 284 A.D.2d 636; 735 N.Y.S.2d 731 (3rd Dept., 2001)

MHL §81.19(e) prohibits appointment of **Commissioner of OMRDD** as guardian of property where OMRDD is a creditor of AIP and there is no evidence that there no other party without a conflict of interest who could be appointed instead. Guardian must be neutral and disinterested person. Under same logic, court also holds that under NYSARC's charter, it may be also be a potential creditor and therefore, NYSARC may not be appointed special guardian. Court also holds that neither MHL §13.29 nor §29.23 authorize the Commissioner of OMRDD to hold the funds in any other capacity short of guardianship, such as "SNT-like account."

(vi) Conflict of Interest, Generally

Matter of Foster, 45 Misc.3d 1225(A); 5 N.Y.S.3d 328 (Sup. Ct. Monroe County 2014) (Polito, J.)

The guardian, Catholic Family Center, petitioned to be relieved as guardian due to a potential conflict arising from the possibility of being required to remove nutrition and hydration in violation of both its and the AIP's religious and moral values. The court granted the guardian's request without a hearing, noting that noone had objected to the guardian's request and further that the court could not, in any event, compel the guardian to serve as guardian of the person if it wished to voluntarily withdraw from that role, even though it remains on as guardian of the property.

Matter of AG (Restaino), 37 Misc. 3d 586; 950 N.Y.S.2d 687(Sup.Ct.Nass. Cty 2012)(Diamond, J)

The Court appoints the petitioning nursing home as Special Guardian of the property to complete a Medicaid application and for petitioner's counsel to collect its fee frm the AIPS assets. Although the matter of any potential conflict of interest is not discussed in the opinion, the Court directs that if the Special Guardian deems it appropriate" it may establish a luxury account in the maximum allowable by DSS and may also establish an "irrevocable funeral trust " for the AIP.

Matter of A.M. v L.M., 31 Misc. 3d 1222(A); 930 N.Y.S. 2d 173 (Sup. Ct., Bronx Cty., 2011)

The Supreme Court declined to appoint the petitioner (the AIP's brother) as guardian of the AIP's person, noting that it had been demonstrated that the conflict of interest posed by the petitioner's desire to protect his financial interests (as co-owner of the house in which the AIP resides) and the interests of his children (as remaindermen of the AIP's trusts), may motivate him, inter alia, to sell her home against her wishes, to place her in a facility (which is medically unnecessary), and to refuse to provide her with needed services (such as health insurance, which the petitioner had recently refused as "too costly").

Motion of Linda Rice for Judicial Leave to Sell Real Property and to Purchase a Personal Interest in Trust Property in connection with the Accounting by Linda Rice, et. al, 2010 NY Slip Op 32795U; 2010 NY Misc LEXIS 4894 (Surr. Ct. Nassau Cty. 2010) (Riordan, J.)

In a Surrogate's Court proceeding, the Surrogate held that the Supreme Court, who had appointed an Article 81 guardian for a trust beneficiary, must approve the sale of real property held by two trusts, where the interest of the guardian, as one of the trusts' other beneficiaries, was adverse to the interest of the IP.

Matter of B.H., 26 Misc. 3d 1201A; 906 N.Y.S.2d 777 (Sup Ct Bronx Cty 2009) (Hunter, J.)

Associate of law firm handling personal injury case for AIP has conflict of interest and which disqualifies him from serving as the guardian.

Matter of Aida C. (Heckle), 67 A.D.3d 1361; 891 N.Y.S.2d 214 (4th Dept., 2009)

Court concluded that the AIP's personal assistant was improperly appointed as co-guardian of her person. Although he had been her trusted assistant and constant companion for many years, he was not salaried and was totally dependent upon her for his food, clothing and shelter and thus there was a conflict of interest. Moreover, he did what she asked him to do and did not exercise any independent judgement about caring for her.

(vii) Non-Citizens

Matter of I.V., 39 Misc. 3d 1232(A); 971 N.Y.S.2d 71 (Sup. Ct., Bronx Cty., 2013)(Hunter, J.)

"Article 81 of the Mental Hygiene Law does not expressly prohibit an illegal alien from serving as a temporary guardian for the sole purpose of commencing a personal injury action on an alleged incapacitated person's behalf."

B. Temporary Guardians and Provisional Remedies

Matter of Hultay v. Mei Wu S. , 140 A.D.3d 502; 35 NYS3d 9; 2016 N.Y. App. Div. LEXIS 4515 (1st Dept. 2017)

Appellate Division upheld an Order, issued pursuant to MHL 81.23 (b)(1), which restrained the IP's ex- wife from any having any written, phone or in-person contact with him without the guardians' prior approval, and enjoined the ex-wife from publicly disclosing certain of the IP's health and financial information, where the guardianship Order, consistent with the IP's stated desire to not have contact with his ex-wife, authorized the guardians to limit his social environment pursuant to MHL 81.22(a)(2).

Matter of CW, 2016 NY. Misc. LEXIS 1934 (Sup.Ct. Dutchess Cty.) (Pagones, AJSC)

Upon petition and detailed allegations by APS that the AIP was being subjected to physical, emotional and financial abuse by a purported caregiver who held Power of Attorney ("POA") and a health care proxy ("HCP"), the AIP consented to the appointment of a Part 36 guardian, thus rendering her a Person in Need of Guardian ("PING"), absent a finding of incapacity. Upon the request of AIP's counsel for provisional remedies under MHL 81.23 to protect the AIP, the court

revoked the POA and HCP and issued an Order of Protection ("OOP"), noting that although MHL 81.23 refers only to alleged incapacitated persons ("AIP") and incapacitated persons ("IP") but not PINGs, and further, does not make specific reference to OOPs as a form of provisional remedy, the statute does reference injunctions, and the legislative intent of MHL Article 81 to protect vulnerable adults who have fallen victim to abuse dictates the issuance of an OOP as an injunction against further contact with the PING in this case.

Matter of Caryl S.S. (Valerie L.S.), 47 Misc.3d 1201(A); 15 N.Y.S. 3d 710 (Sup. Ct. Bronx Cty. 2015)(Aarons, J.)

The court appointed an independent temporary guardian where, and the inception of the case, the cross -petitioner was in control of the AIP's liquid assets and bills and there were credible allegations of his mismanagement and undue influence. Toward that end the parties did not wish to further delay the proceedings with the appointment of a Part 36 Temporary Guardian unfamiliar with the case and all parties agreed to appoint the Court Evaluator, a CPA who was well versed in the circumstances and allegations of this complex matter. The Court therefore executed an order extending the duties of the Court Evaluator to include management of the AIP's funds during the pendency of the proceedings and directed the cross petitioner to turn over the funds under his control.

Matter of Carl Ginsberg v Annie Larralde, 2/19/09 NYLJ 39 (col 2) (1st Dept. 2009)

While traveling in France, the AIP had a stroke and was hospitalized. Upon the petition of the French hospital to a French court, the French court found that the AIP was in need of a guardian. Thereafter, the NY court accepted the findings of the French Court and appointed a temporary guardian in NY without holding a hearing and without appointing a Court Evaluator. On appeal by the AIP, the Appellate Division held that the NY court had not erred by accepting the findings of the French court without a hearing or appointment of a Court Evaluator in NY.

Matter of M.R. v H.R., 2008 N.Y. MISC.. LEXIS 4347; 240 N.Y.L.J. 8 (Sup. Ct. Bronx Cty. 2008) (Hunter, J)

Temporary guardians had been appointed for the primary reason of placing the AIP in a nursing home over his objection and did so place him prior to trial. They further intended to transfer him to another facility. MHLS counsel for the AIP sought discharge of those temporary co-guardians prior to trial and the Court Evaluator asserted that she had reviewed the AIP's medical records in the nursing home and saw no evidence of incapacity or need for placement in the nursing home. The court discharged the temporary co-guardians stating that it was *ultimately for the jury to decide whether the AIP required a guardian with power over the person to place him in a nursing home*. The court further ordered that the temporary co-guardians turn over to the AIP all of his bankbooks, documents, wallet and other personal effects.

"Contempt Fines Mount Against Attorney who Acted as Guardian for Former Judge," by Daniel Wise, 1/1/2007 NYLJ 1 (col. 4)

Interesting article highlighting the danger of appointing consecutive temporary guardians who are not required by statute to file annual reports.

Matter of Nelly M., 46A.D.3d 904; 848 N.Y.S.2d 705 (2nd Dept. 2007)

Supreme Court appointed a temporary guardian without affording the attorney in fact notice and an opportunity to be heard. The attorney in fact appealed. The Appellate Division held that since the trial court subsequently made the appointment permanent after a hearing on notice to the appellant the error complained of has been rendered academic.

Matter of Carol C., 41 A.D.3d 474; 837 N.Y.S. 2d 321 (2nd Dept., 2007)

The Appellate Division held that the Supreme Court, Kings County, had providently exercised its discretion in authorizing the temporary guardian to sell the AIP's brownstone and in authorizing her to purchase a new residence for the AIP, noting that it was not reasonable for the AIP to continue to reside therein. The Appellate Division also upheld, as a provident exercise of discretion, the Supreme Court's determination that no just cause existed which would have warranted the temporary guardian's removal, noting that the temporary guardian had adequately fulfilled her responsibilities.

Matter of Astor, 13 Misc.3d 862; 827 N.Y.S.2d 530 (Sup. Ct., NY Cty. 2006)

A bank that had been appointed as a temporary guardian moved for an order expanding its powers to include the power to do extensive discovery concerning recent questionable transfers of the AIP's assets and to commence litigation to recover misappropriated assets if appropriate. The court denied the motion on the grounds that "the relief sought appear[ed] overly zealous and premature" The court further reasoned that the temporary guardians had been appointed for the limited purpose of paying the AIPs bills and marshaling her assets to preserve the status quo until the underlying issues in the guardianship processing were determined. Finally, the court also pointed out that there was no evidence that the assets were at risk of dissipation or waste or that the parties thought to have misappropriated her assets any longer had access to the AIP's funds.

Matter of Grace "PP", 245 A.D.2d 824; 666 N.Y.S.2d 793 (3rd Dept., 1997), *lv. to app. denied,* 92 N.Y.2d 807; 678 N.Y.S.2d 593 (1998)

Temporary guardian was appointed, with specific limited power to place AIP in a nursing home.

Matter of Wingate (Longobardi), 166 Misc.2d 986; 637 N.Y.S.2d 1010 (Sup. Ct., Suffolk Cty., 1996)

It is not necessary for court to appoint temporary guardian to withdraw funds and write checks against checking account. Court evaluator is appointed to protect property of AIP from waste, misappropriation or loss. Consistent with the authority established in section 81.09 (e), court evaluator may take necessary steps to preserve property of AIP, including management of the checking account.

C. Special Guardians

Matter of Alice Zahnd, 27 Misc3d 1215A; 910 N.Y.S.2d 762 (Sup. Ct. Suff. Cty. 2010) (Luft, J.)

Court appointed a special guardian with powers relating to a particular piece of real property that was allegedly in violation of the town code. The court found that because the petitioner town had not requested any further powers relating to the AIP's overall needs, the court was constrained in detailing the powers appropriate for the AIP. The court therefore, appointed the Special Guardian not only to deal with the property at issue but also to investigate and identify any additional needs and to make the appropriate application to the court for such powers.

Matter of Lambrigger, NYLJ, 5/31/94, p. 37, col. 1 (Sup. Ct., Suffolk Cty.)(Luciano, J.)

Court denies petition for guardianship of AIP, who had suffered massive stroke that left her with severe physical disabilities, holding that mental and physical disabilities are not co-extensive, noting that AIP has not lost any cognitive abilities and is fully competent to make her own decisions, including with matters such as property management. However, court did appoint special guardian to help AIP "manifest and give effect to her own decisions." Special guardian has no substituted judgment power and may not make any decision without consulting with and explaining transaction to AIP, who loses no rights to conduct her own affairs as result of order.

Matter of Patrick "BB", 267 A.D.2d 853; 700 N.Y.S.2d 301 (3rd Dept., 1999)

Although case was mooted out, facts show instance where Supreme Court appointed special guardian who was directed to increase AIP's personal account, establish burial account for respondent, and pay balance of funds to petitioner, after deducting expenses and compensation for special guardian.

Matter of Gambuti (Bowser), 242 A.D.2d 431; 662 N.Y.S.2d 757 (1st Dept., 1997)

Involuntary commitment to nursing home by special guardian is not authorized. Protective arrangements and transactions as contemplated by Art. 81 are far less intrusive and therefore

mechanism for appointment of special guardian under section 81.16 (b) inadequately addresses liberty concerns of AIP in context of involuntary commitment. Appointment of full guardian is required for nursing home placement.

Matter of Wingate (Mascalone), 169 Misc.2d 701; 647 N.Y.S.2d 433 (Sup. Ct., Queens Cty., 1996)

Court revoke attorney-in-fact's power-of-attorney where attorney-in-fact refuses to sell AIP's cooperative apartment to render her Medicaid eligible and enable her to remain in nursing center, and appoints special guardian to effectuate sale, since attorney-in-fact, as agent for principal AIP, has not exercised utmost good faith toward AIP.

Matter of Luby, 180 Misc.2d 621; 691 N.Y.S.2d 289 (Sup. Ct., Suffolk Cty., 1999)

Court finds that nursing home should have applied for special guardian rather than take power-of-attorney from resident where purpose of powers was for nursing home to be paid.

In re: Phlueger, 181 Misc.2d 294; 693 N.Y.S.2d 419 (Surr. Ct., NY Cty., 1999)

Court appoints special guardian even thought there was also general Art. 81 guardian appointed, where there may have been conflict of interest on specific issue.

Matter of Janczek, 167 Misc.2d 766; 634 N.Y.S.2d 1020 (Sup. Ct., Ontario Cty. 1995)

Court appointed Commissioner of Social Services as a special guardian, pursuant to §81.16 (b) for limited purpose of providing adult protective services, pursuant to Social Services Law §473, in form of arranging for visiting nurse or other home health care services and arranging regular medical examinations by AIP's current physician. Although AIP's life could perhaps have been extended by placement in adult care facility, a special guardian for these limited purposes was appointed to permit her to return to her home and enjoy quality of life which she has previously experienced with her friends and family.

D. Protective Arrangements/Single Transactions

Matter of Adele Y., 35 Misc. 3d 1226A; 953 N.Y.S.2d 548 (Sup.Ct. Bronx Cty . 2012) (Hunter, J.)

Application by MHLS for an order approving a protective arrangement or single transaction order pursuant to MHL 81.16 placing a profoundly disabled individual's funds into the NYSARC pooled trust is granted where this individual received a substantial SSA retroactive payment that rendered her Medicaid ineligible until the funds would be placed in an SNT or pooled trust.

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

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 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. See, Article: NYLJ, 1/25/10 - Trusts and Estates "John D.: Appointing Monitor Not in Keeping With Legislative Intent of Article 81" -- arguing that this decision is: "not in keeping with the legislative intent of Article 81 of the Mental Hygiene Law, and is the first step onto the slippery slope of invasion of the personal property rights of an Alleged Incapacitated Person wrought solely in an attempt to assist in the enforcement of a distributive award granted to an ex-spouse."

E. Nomination and Consent to Appointment of Guardian

Matter of Arline J. (James J.--Gerilynn F.), _AD3d _; 2019 NY Slip Op 05532 (2nd Dept., 2019)

A woman and her late husband established a trust of which they were co-trustees. After the death of her husband, the woman transferred real property that had been in the trust to herself. When the woman's stepson (the trust remainderman) petitioned for the appointment of a guardian for her, she agreed to become a Person in Need of Guardian ("PING"), with no finding of incapacity. Thereafter, the stepson petitioned for the woman's removal as trustee arguing, inter alia, that she was unfit to serve as she was a PING. The Appellate Division affirmed the trial court's denial of the stepson's removal petition, noting, inter alia, that the guardianship order had been entered upon the woman's consent based upon evidence that she had functional limitations that rendered her unable to manage certain aspects of her affairs; that the stepson consented to this order, and did not at that time seek her removal as trustee; and that the stepson failed to demonstrate that subsequent to the issuance of the guardianship order, the woman's condition had worsened and that she had become incapacitated.

Matter of CW, 2016 NY. Misc. LEXIS 1934 (Sup.Ct. Dutchess Cty.) (Pagones, AJSC)

Upon petition and detailed allegations by APS that the AIP was being subjected to physical, emotional and financial abuse by a purported caregiver who held Power of Attorney ("POA") and a health care proxy ("HCP"), the AIP consented to the appointment of a Part 36 guardian, thus rendering her a Person in Need of Guardian ("PING"), absent a finding of incapacity. Upon the request of AIP's counsel for provisional remedies under MHL 81.23 to protect the AIP, the court

revoked the POA and HCP and issued an Order of Protection ("OOP"), noting that although MHL 81.23 refers only to alleged incapacitated persons ("AIP") and incapacitated persons ("IP") but not PINGs, and further, does not make specific reference to OOPs as a form of provisional remedy, the statute does reference injunctions, and the legislative intent of MHL Article 81 to protect vulnerable adults who have fallen victim to abuse dictates the issuance of an OOP as an injunction against further contact with the PING in this case.

Matter of JS, 24 Misc.3d 1209A; 899 N.Y.S.2d 60 (Sup. Ct. Nass. Cty. 2009)(Diamond, J.)

Court ratified the 'clearly expressed' choice of an elderly man to have his long time neighbor and friend be his guardian, despite his dementia, where it was clear that he had a trusting relationship with his neighbor who had been voluntarily caring for him and was not abusing that trust.

Matter of Audrey D., 48 A.D.3d 806;853 N.Y.S.2d 143(2nd Dept. 2008)

A nominated guardian must be appointed unless the court determines for good cause shown that such appointment is not appropriate. The court found that although the AIP nominated her father to be her guardian, that he was not a suitable choice because he had no plan for finding, and did not know how to acquire, adequate housing for AIP given her limited financial resources.

Matter of Williams, 12 Misc.3d 1191A; 824 N.Y.S.2d 770 (Sup. Ct., Kings Cty. 2006)(Belen, J.)

The court declined to honor the AIP's nomination of two individuals as her co-guardians because: (1) the first nominee was disqualified under MHL §81.19 (e) since she was the Director of Social Work at the nursing home that had recently provided care to her, even though the AIP was no longer a resident of the nursing facility and even though the statute made no reference to former caregivers; (2) the second nominee, the AIP's attorney, had been nominated only to serve as a co-guardian along with the first disqualified nominee, and (3) the VERA Institute guardianship project was available to serve in the alternative and had done a good job as Temporary Guardian. The court made this appointment even though the AIP objected to the Vera Institute continuing to act as guardian because the Court found that the aspects of their prior service that she objected to concerning her lack of access to her own funds appeared to have already been remedied.

In the Matter of the Application of GWC, 4 Misc. 3d 1004A; 791 N.Y.S.2d 269 (Sup. Ct., Tompkins Cty, 2004) (Peckham, J.)

Court allows mildly mentally retarded individual with IQ of 50 to nominate her siblings as her own co-guardians upon finding that the nominees are fit and their appointment is in the best interest of the AIP.

Matter of Nasquan S., 2 A.D.3d 531; 767 N.Y.S.2d 906 (2nd Dept. 2003)

Petitioner was the AIP's mother. She sought to be appointed guardian and to have the attorney appointed as co-guardian. The trial court refused to appoint the attorney. As co-guardian and instead appointed a third party stranger. In reversing the trial court, the Appellate Division stated: "The case law in this state firmly establishes that a stranger will not be appointed as guardian of an incapacitated person "unless it is impossible to find within the family circle, or their nominees, one who is qualified to serve". [Note: calling this "nomination" may be a misnomer; See, MHL §81.17 (nomination is done by the AIP).]

Matter of Loccisano, 216 NYLJ 42 (1996); 1996 NY Misc. LEXIS 597 (Sup. Ct., Suffolk Cty.)(Prudenti, J.)

Court allows AIP to select own guardian of person finding that person selected was suitable but declines to appoint selected person as guardian of property finding certain improprieties in selected person's past behavior toward AIP's funds.

F. Breach of fiduciary duty/removal/sanctions

Matter of Ida M., AD3d ; 2019 NY App. Div. LEXIS 2875; 2019 NY Slip Op 02878 (2nd Dept., 2019)

The Appellate Division held that the Supreme Court had providently exercised its discretion in denying the petitioners' motion to remove the guardian pursuant to MHL § 81.35, noting that their conclusory allegations did not provide a basis therefor.

Matter of Kornicki, NYLJ, Sept 4, 2018, 2018 NYLJ LEXIS 2904 (Sup. Ct., Nassau Cty.) (Diamond, J.)

In light of long standing animosity between an IP's two daughters, a 2007 Order appointing only one of them as Personal Needs Guardian expressly provided that the Guardian/daughter (hereinafter "Guardian") was required to consult with her non-Guardian sister (hereinafter "sister") regarding any major medical decisions for their mother. In violation of that Order, the Guardian failed both to inform her sister that their mother had been transferred to hospice, and to consult with her regarding any treatment therein. When the IP died, the Guardian notified Chambers, the Court Examiner, the Property Guardian and her sister of the IP's death. Although there was no express language in the 2007 Order requiring the Guardian to notify her sister regarding the funeral/burial arrangements, Chambers specifically advised the Guardian of her obligation under "Peter Falk's Law" (incorporated in 2016 into MHL 81.16 [c][4]-[6]), to inform all parties of the same. The Guardian, however, failed to inform the parties until after the burial was completed. The sister subsequently moved for

sanctions under 22 NYCRR 130-1.1 (a) for, inter alia, violations of both clear mandates imposed upon the Guardian. The Court found that the Guardian's actions served no purpose other than to cruelly and maliciously injure her sister emotionally, and issued sanctions of $15,000, plus an additional $5,000 in attorney fees.

Matter of Albert K. (D'Angelo), 96 AD3d 750; 946 NYS2d 186 (2nd Dept. 2012)

The Appellate Division affirmed the trial court's decision to: (a) impose a surcharge against the guardian, (b) deny the guardian's commission and attorney fees, and (c) direct the Guardian to personally pay the Court Examiner's fee at an amount in excess if the statutory guidelines set forth in 22 NYCRR 806.17(c) but reversed the trial's court decision to deny the Public Administrator's application for the guardian to also pay 9% interest on the sums surcharged. The "covert self dealing" engaged in by this guardian included: the guardian appointing and paying his own wife to serve as the geriatric care manager, that care manager continuing to provide and manage home health aides while the IP was in a nursing home without prior court approval, preparing a Will for the IP naming himself as executor, which will was witnessed by his own wife and mother, and bequeathing the IPs entire $3 million estate to a trust for which he would serve as trustee. The court also held that the Court Examiner's fees in excess of the statutory guideline schedule was justified by the "extraordinary circumstance" of the covert nature of the guardians's self dealing.

UPDATE - Attorney/Guardian was subsequently disbarred, pursuant to Judiciary Law § 90, for this course of conduct. **Matter of D'Angelo, _AD3d _, 2017 NY App. Div LEXIS 9346; 2017 NY Slip Op 09277; 2016-01326, NYLJ 1514920943NY201601326, at *1 (2nd Dept., Decided December 29, 2017)**

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Matter of Patricia H. (Anthie B.), 46 Misc.3d 1207(A); 7 N.Y.S.3d 244 (Sup. Ct. Suff. Cty. 2015) (Leis, III, J.S.C.)

Court takes the extreme measure of holding the guardian in criminal and civil contempt for her "willful and defiant" disobedience of seven of the Court's directives contained in various court orders concerning her responsibility to file a final accounting and turnover the guardianship funds to the executor of the IP's estate. The guardians was directed to pay the counsel fees of the executor who was compelled to bring the proceeding to secure the funds of the estate and further, directed to appear in court for sentencing on the criminal contempt charges.

Matter of Solomon R., 123 AD3d 934 ;999 N.Y.S.2d 435 (2nd Dept. 2014)

Upon appeal by a nonparty from an order denying his motion to, inter alia, have the guardian removed and a constructive trust imposed on certain of the AIP's funds, the Appellate Division upheld the trial court's denial of the motion reasoning that appellant's allegations of misconduct did not warrant the guardian's removal because the allegations were either conclusory or focused upon only minor deficiencies in the guardian's performance that had not significantly prejudiced the AIP's interests.

Martin v Ability Beyond Disability, 2014 N.Y. Misc LEXIS 5094; 2014 NY Slip Op 33021(U) (Sup. Ct., Westchester Cty.) (Giacomo, J.S.C.)

The incapacitated person died, and was buried, without notice to his family, at a cemetery that was not of their choosing, necessitating their exhumation and reburial of the IP' body. Subsequently, the family commenced an action seeking monetary damages against both the facility in which the IP resided, and his Article 81 guardian. The plaintiffs asserted two causes of action against the guardian. The plaintiffs' first cause of action was a common law negligence claim seeking monetary damages for loss of sepulcher. The plaintiffs' second cause of action was based upon their claim that they had suffered emotional damages due to the guardian's failure to comply with the provisions of Article 81 (by failing to notify them of the IP's death, failing to consult with them regarding the IP's care, failing to afford the IP the greatest amount of independence possible, failing to visit the IP, and by failing to file annual reports). The guardian moved to dismiss the complaint, arguing that litigation cannot be commenced against him, as guardian, without first seeking permission from the Court; that the plaintiffs lacked standing to assert claims based upon his alleged failure to comply with the provisions of Article 81; and that Article 81 provides guardians with immunity from any such claims. The Court denied that branch of the guardian's motion which sought to dismiss the first cause of action, noting that it would grant the plaintiffs permission to assert their potentially viable claim seeking damages for loss of sepulcher, *nunc pro tunc*. However, the Court granted that branch

of the guardian's motion which sought to dismiss the plaintiffs' second cause of action seeking damages for the guardian's alleged failure to comply with the provisions of Article 81. In so doing, the Court noted that the plaintiffs did not possess standing to assert that cause of action insofar as the guardian owed no independent duty to them. The Court added that the available remedy was not an action seeking damages against the guardian, but rather a motion pursuant to MHL § 81.35 to remove him for misconduct. Moreover, any penalty for the guardian's alleged failure to file annual reports would be the reduction of his fees.

Matter of Alice D., 113 A.D.3d 609; 979 N.Y.S.2d 77(2nd Dept., 2014)

Appellate Division held that the Supreme Court erred by partially granting a guardian's cross motion for an award of costs and the imposition of sanctions relating to two separate actions that the IP's daughter had commenced against him in other courts and/or under other index numbers, noting that, according to 22 NYCRR 130-1.1 sanctions could only be imposed by the guardianship court in a proceeding before that court Furthermore, the Supreme Court erred by awarding, without a hearing, compensation to the guardian in view of the existence of an issue of fact as to the propriety of his actions on behalf of his ward. Finally, the Appellate Division noted that the Supreme Court erred in awarding legal fees to the guardian's attorney when it was unclear that the legal services he provided were not duplicative of compensation awarded to the guardian, who was also an attorney. Accordingly, the Appellate Division remanded the matter back to the Supreme Court for further proceedings.

In re: Final Accounting of Garcia (Anita B.), 39 Misc3d 1228(A); 972 N.Y.S. 2d 143 (Sup. Ct. Suff. Cty., 2013) (Leis, J.)

Where the Guardian failed to comply for over twelve years with the Court's directives to file a final account without justification and beyond explanation, coupled with the Guardian's conduct in paying himself from estate funds, most of which payment was not authorized by the Court, as well as paying himself legal fees for the sale of the decedent's cooperative apartment, also without Court approval, the Court to forwarded a copy of its decision to the Grievance Committee and held the Guardian personally chargeable with the fees to be awarded to the Referee who had to be appointed to take and state the final account on behalf of the Guardian, resulting in unnecessary fees to the guardianship estate.

Matter of J.F., 100 AD3d 890; 954 N.Y.S. 2d 182 (2nd Dept. 2012)

Co-Guardians appealed from so much of an Order denying their motion to vacate so much of an order confirming a the report of a Court Examiner and imposing a surcharge upon them for a certain sum. The Appellate Division held, inter alia, that Supreme Court had properly disallowed certain disbursements made by the co -guardians on the grounds that those disbursements had not been substantiated with documentary evidence.

Matter of Albert K. (D'Angelo), 96 AD3d 750; 946 NYS2d 186 (2nd Dept. 2012)

The Appellate Division affirmed the trial court's decision to: (a) impose a surcharge against the guardian, (b) deny the guardian's commission and attorney fees, and (c) direct the Guardian to personally pay the Court Examiner's fee at an amount in excess if the statutory guidelines set forth in 22 NYCRR 806.17(c) but reversed the trial's court decision to deny the Public Administrator's application for the guardian to also pay 9% interest on the sums surcharged. The "covert self dealing" engaged in by this guardian included: the guardian appointing and paying his own wife to serve as the geriatric care manager, that care manager continuing to provide and manage home health aides while the IP was in a nursing home without prior court approval, preparing a Will for the IP naming himself as executor, which will was witnessed by his own wife and mother, and bequeathing the IPs entire $3 million estate to a trust for which he would serve as trustee. The court also held that the Court Examiner's fees in excess of the statutory guideline schedule was justified by the "extraordinary circumstance" of the covert nature of the guardians's self dealing.

In the Matter of Carl R., 93 A.D.3d 728; 939 N.Y.S.2d 879 (2nd Dept 2012)

In a proceeding pursuant to Mental Hygiene Law 81.33 for a final accounting, the trial court directed that the guardian/trustee be surcharged for certain payments made from the ward's assets and ordered that the guardian/trustee pay the court examiner's fees. The Appellate Division affirmed the surcharge of the Guardian for expenditures of guardianship funds used to pay for certain construction work at the home owned by the Guardian's wife which was being rented to the IP, as, inter alia, the Guardian failed to prove that these expenditures were for previously approved work at the house, and failed to sufficiently substantiate the expenditures with documentary evidence. However the Appellate Division reversed the trial court' order that the Guardian personally pay the fees of the court examiner, holding that while a court may deny or reduce compensation which would otherwise be allowed when a guardian fails to discharge his duties satisfactorily (citing MHL § 81.28[b];§ 81.32[d][2]), there is no provision permitting the court to require a guardian to personally pay court examiner fees (cf. Mental Hygiene Law § 81.32[f], 81.33[e]).

Matter of Gilvary, 93AD3d 148; 938 NYS2d 589 (2nd Dept., 2012)

Appellate Division, inter alia, censured the interim guardian, an attorney, for professional misconduct due to his issuance of several checks to himself and to his ward's caretaker (by signing the former guardian's name thereto) from the guardianship account, to which, due to his inability to obtain a bond, the bank did not grant him access.

Matter of Carmen H., 90 A.D.3d 1049; 935 N.Y.S. 2d 516 (2nd Dept. 2011)

The Appellate Division upheld the Supreme Court's declination to remove the guardian based solely upon the movant's conclusory allegations of misconduct.

Matter of Jones (Josephine R.), 31 Misc3d 1239A; 930 N.Y.S.2d 175 (Sup. Ct., Kings Cty., 2011) (Spodek, J.)

The guardian for an incapacitated woman who received ongoing proceeds from a sizeable medical malpractice settlement entered into two self serving mortgage agreements; one to a borrower whose poor credit rating and substantial personal debt prevented her from obtaining conventional financing at a standard rate and another to someone who had a business relationship with the guardian's wife which enabled the guardian's wife to pay off their personal home equity line of credit. For over a year thereafter, the guardian repeatedly failed to collect the payments due to the AIP on one of the mortgages. Following the Court's suspension of the guardian, and the removal of the Court Examiner, the Court held a hearing to determine the propriety of the guardian's investment decisions for the two mortgages. At the conclusion thereof, the Court rebuked the guardian for his decision to invoke his right against self incrimination in order to avoid answering the Court's questions, and criticized the guardian for failing to first obtain court authorization for each transaction, and for failing to using the services of a Court ordered appraiser. The Court rejected the guardian's claim that his "investments" were justified under the prudent investor standard, citing, inter alia, the guardian's failure to diversify the guardianship assets, his decision to make the investment in the first place under all the circumstances, his subsequent failures to collect the payments due to the IP, to impose penalty fees, to accelerate the loan, or to foreclose on the property, and his decision to lower the applicable interest rates for no consideration, thereby depriving the IP of guaranteed income at the higher contractually obligated rate. In light of the guardian's "pattern of unconscionable conduct and self-dealing to advance his own financial interests and personal profit" the Court surcharged him $650,000 at 9% interest.

Matter of Jones (Lantigua), 31 Misc. 3d 1205A; 929 N.Y.S. 2d 200 (Sup. Ct., Kings Cty., 2011) (Barros, J.)

The co-guardian and trustee for a severely disabled child who had received at $684,700 lump sum net settlement of his wrongful life action was denied commissions and surcharged $501,425.67 for breach of his fiduciary duty to the child by, inter alia: (1) deliberately purchasing a dilapidated home for the child, from the estate of one of his former wards (for whom he also served as closing attorney), for significantly more than what he had affirmed the house was worth; (2) entering into a contract, without prior court approval, with his business associate, to renovate the home; (3) renting from this same business associate, for the child's use during construction, a $1,200 a month dilapidated, vermin-infested apartment that was not handicapped-accessible (in violation of the guardianship order and judgment which limited the child's rent obligation to $300 a month); (4) failing to call this business associate to task when he proved utterly incapable of creating a handicapped-accessible home; and (5) failing to create a supplemental needs trust for the child, which resulted in the child's loss of his medicaid and SSI income.

Matter of Joshua H. (Anonymous), 80 AD3d 698; 914 NYS2d 914 (2nd Dept. 2011)

Appellate Division holds that Supreme Court did not improvidently exercise its discretion in

surcharging the appellant, who was former counsel to guardian, former successor guardian and trustee of SNT, for all money taken by her, in as much as no compensation was due her in light of her failure to complete her duties.

Matter of Beverly YY., 79 AD3d 1442; 913 N.Y.S.2d 392 (3rd Dept., 2010)

Appellate Division rejected the petitioner's contention that it was error, as a matter of law, for the Supreme Court to have denied her cross-motion seeking the guardians' removal without first having conducted a hearing, noting that the petitioner had failed to come forward with evidence to substantiate her conclusory allegations of misconduct.

Matter of Perl, 77 AD3d 525; 910 N.Y.S.2d 52 (1st Dept., 2010)

The Appellate Division denied that branch of the AIP's motion, pursuant to MHL § 81.36(a)(1) which was to terminate the guardianship, noting that although the AIP was able to handle her considerable monthly allowance, she was vulnerable to exploitation and was not able to manage the entirety of her wealth. The Court also denied that branch of the AIP's motion, pursuant to MHL § 81.35, which was to remove the guardian for cause, noting that the guardian had acted diligently to protect the AIP's interests, and that any deficiencies in his filing of accounts was relatively minor, and could be remedied in ways other than his removal.

Juergens v. Juergens, 2008 NY Slip Op 30991U; 2008 N.Y. Misc. LEXIS 10629 (Sup. Ct. Nassau Cty. 2008) (Brandveen, J.S.C.)

Supreme Court granted attorney fees and sanctions against the plaintiff under 22 NYCRR 103.1.1 for bringing frivolous litigation. The plaintiff against whom the sanctions were assessed was the second wife of the IP who was presently engaged in a divorce proceeding against the IP. She filed a Verified Complaint for, *inter alia*, a *prima facie* tort against the plaintiff and breach of duty to the IP against the IP's daughter who was his Article 81 guardian. The Complaint alleged that while the daughter was his Temporary Guardian she abused her position by misappropriating her father's assets in an unspecified way. The defendant daughter, who was by the time of this proceeding the full plenary guardian, argued that the plaintiff lacked standing because she was alleging harm to the IP not herself and that only the guardian was in a position to pursue a civil action on behalf of the IP, that the claim lacked specificity and that the allegation of *prima facie* tort fell because it lacked a showing of intention infliction of harm and sole motivation of malevolence by the defendant.

Matter of Cheryl H., 7/21/10, NYLJ 26 (col.3)(Sup. Ct. Nass. Cty.)(Diamond, J.)

An acrimonious matrimonial action with a custody component involving an autistic son, evolved into an Article 81 guardianship proceeding when the son became 22 years old. While a custody battle, the father sought to enforce his visitation rights and his right to be informed about significant developments with his son. The mother consistently restricted them, arguing that the father did not properly supervise the son. She refused him access in violation of assorted court orders directing

such access to the son. When the son was 22 years old, the mother petitioned for and was granted Article 81 personal needs guardianship over her son. The order appointing her directed her to provide reports to the father and the court, established a detailed visitation schedule, and specifically found that there was no need for supervised visits for the father. Despite such order, for the next 14 months the mother continued to deny the father access, failed and refused to file court ordered reports concerning her son, and, in fact, was held in contempt and fined for each visit she refused to allow. She also refused to cooperate with a court appointed parent coordinator. She continued to refuse visits and pay fines. She also had no telephone service at home and did not respond to efforts by the parent coordinator to contact her, which she attributed to a lack of money to pay phone bills. The father eventually moved to have her removed as guardian and to be appointed as successor guardian in her stead. Despite the court noting her loving and supportive attention to her son, the court nevertheless removed her as guardian and transferred guardianship to the father, noting that the father did not pose a threat to his son, that it was in the son's best interest to have a relationship with his father, that the father was willing to allow liberal contact between the mother and son, and, that the court could no longer tolerate the mother's defiance of court orders.

Matter of Candace C., 27 Misc.3d 1221(A);910 N.Y.S.2d 7611 (Sup Ct., Dutchess Cty., 2010)(Pagones, J.)

IP moved to have her mother removed as co-guardian of her person and to evict her from the premises in which they both resided. The court granted the petition. In so doing, the court noted that the appointing court had clearly been aware that the mother had been convicted of a felony, and had appointed her nevertheless. The court continued that the record provided ample evidence that the mother failed to fulfill her fiduciary duties, and also added that the hostility between the mother and daughter, which included corporal punishment, together with their chaotic lifestyle and mutual substance abuse, supported removal.

Matter of Carol S., 68 A.D.3d 1337; 890 N.Y.S.2d 209 (3rd Dept. 2009)

After the IP died, the Guardian of her Property attempted to prepare a Final Accounting but was unable to complete it because she discovered that the Guardian of the Person had either removed or secreted the IPs property and would not turn it over. The trial court issued many orders directing the turnover but the Guardian of the Person failed and refused to comply. Eventually, the trial court held her in contempt and of its previous orders and as a penalty, directed the Guardian of the Person to pay the counsel fees and costs incurred by the Guardian of the Property in seeking to compel compliance with the orders. The Guardian of the Person appealed unsuccessfully.

Matter of Rebecca P., 24 Misc. 3d 1222A; 899 N.Y.S.2d 62(Sup Ct. NY Cty. 2009) (Hagler, J.)

Court denied application by IP's mother to remove her daughter's guardian for cause. The court found that the record was replete with evidence that the guardian was fulfilling his responsibility as a property guardian, which included bringing litigation against the IP's mother and her family. The

court found that the motion for removal was designed by the IP's mother to interfere with his effective performance as the guardian and, if granted would benefit the mother to the detriment of the daughter.

Matter of Joshua H., 62 A.D.3d 795;880 N.Y.S.2d 645 (2nd Dept 2009)

The trial court did not abuse its discretion by removing a guardian/SNT trustee. She had, in fact, or had claimed, to have misunderstood an order allowing her to pay herself a guardianship commission and had improperly removed funds from the IP's SNT to pay herself as guardian. After the Court Examiner recommended that a court hold a hearing on issue, the court directed her to put the money back and she continued to refuse to do so.

Matter of Joos, 24 Misc.3d 980; 881 N.Y.S.2d 613 (Sup. Ct. King Cty. 2009)(Barros, J.)

Even though there was no interested party filing an objection to the settlement of the final account, the court, stating that it is not a "rubber stamp," denied legal fees and commissions to the guardian/counsel to guardian upon findings of self dealing, overreaching and, in particular, marshaling the assets of a newly formed trust into the guardianship estate to inflate the corpus of the guardianship estate which had the effect of inflating the fees to the guardian.

Nostro v Dafni Holdings et al, 23 Misc.3d 1128A; 889 N.Y.S.2d 506 (Sup. Ct. Kings Cty. 2009) (Rivera, J.)

A guardian who was also the sole beneficiary of the IP's estate brought suit against a third party on behalf of the IP. The third party sought to have the guardian removed and a GAL appointed for the IP in the instant case arguing that the Guardian could not be truly independent since he had a stake in the outcome of the case as the IP's only heir and thus was motivated by self interest. The court held that while it was possible that the guardian's future pecuniary interest may have been a motive for him starting the lawsuit, it was equally possible that he was pursuing the action in the IPs best interest as was his responsibility as a fiduciary. There was nothing about the prosecution of the lawsuit that would have adversely affected the IP and the fact that the guardian might someday benefit if the plaintiff was successful in the suit did not establish that a conflict of interest existed requiring that the Guardian be removed or a GAL be appointed.

Matter of Francis M., 58 A.D.3d 937; 870 N.Y.S.2d 596 (3rd Dept. 2009)

The Appellate Division ruled that the trial court had not abused its discretion under §81.35 in finding just cause for removal of a guardian as being in the best interests of the ward. Although the guardian was attentive to his ward's physical needs and kept adequate account of the financial matters, there was evidence on the record that the guardian had used his powers to treat his ward in ways that were demeaning, belittling and condescending and that ward was uncomfortable interacting with him.

Matter of Pryce, 2008 Misc. LEXIS 7504; 241 NYLJ 3 (Sup. Ct., Queens Cty, 2008) (Thomas, J.)

Court denied motion by IP's mother, the natural guardian of the person of her minor daughter, to have the independent financial co-guardian removed. The only basis for removal that she advanced was that after the mother had misappropriated funds belonging to her daughter, and after the financial co-guardian had reported this to the court and taken other steps to protect the wards remaining assets, that the guardian had not assisted the mother to track down the risky investments she had made.

Matter of Mary Alice C., 56 A.D.3d 467; 867 N.Y.S.2d 138 (2nd Dept., 2008)

The Appellate Division affirmed the trial court's refusal to remove a special guardian., noting that although a guardian may be removed for failure to comply with an order, misconduct or for any other cause which to the court shall appear just (MHL 81.35), in this case, there was no more than conclusory allegations of misconduct to provide a basis for the guardian's removal.

Matter of Lillian A. (Wells), 56 A.D.3d 767; 868 N.Y.S.2d 695(2nd Dept. 2008)

A single individual served as both temporary guardian and as the attorney for the IP during the same period, which period ended when she was discharged as temporary guardian. The individual submitted affirmations to the court seeking reimbursement for the legal as well as non-legal services she performed. After her appointment as temporary guardian ended, and even after the IP died, the individual continued to disburse funds from the Guardianship account to herself and others. The trial court directed the appellant to return to the estate the funds that had been disbursed without authorization after her appointment had terminated. Because she had failed to properly exercise her role as temporary guardian the court denied her request to be compensated for her role as Temporary Guardian, although it did pay part of her fee for the legal services rendered. Appellate Division affirmed.

Matter of Phillips, 20 Misc. 3d 1111(A); 867 N.Y.S.2d 20 (Sup. Ct., Kings Cty., 2008) (Ambrosio, J.)

The guardian was an attorney who had been suspended from the practice of law as a result of her breach of fiduciary duty to the IP in this matter. She was deemed to have breached her fiduciary duty by, inter alia: (1) paying herself substantial counsel fees that were not court ordered and to which she was not entitled; (2) paying herself a substantial "brokers commission" that was not court ordered and which actually related to an auction of the IP's real estate conducted by the court; (3) dissipating substantial guardianship assets as a result of her failure of due diligence by using them to renovate property that she did not realize were no longer owed by the IP's estate; (4) utilizing guardianship funds to pay her personal mortgage; (5) failing to account for the balance of the down payment from the sale of such IP's real estate; (6) failing to maintain appropriate financial records; (7) hiring her own family members to provide services to the IP without notifying and seeking authorization from

the court; (8) failing to obtain a bond and further failing to inform the court that she was not bondable; (9) failing to pay the IP's taxes and incurring significant penalties and more. The court not only denied her fee application but further surcharged her for the dissipation of the IP's assets that she caused.
(Note: This guardian was ultimately disbarred for these actions, See, Matter of Taylor, NYLJ, M-3994, Nov. 25, 2013 , Vol 250 - No. 102 at p. 7)

Matter of S.M., 13 Misc.3d 582; 823 N.Y.S.2d 843 (Sup. Ct., Bronx Cty. 2006) (Hunter, J.)

Petitioner, the AIP's son sought to be appointed guardian. The petition failed to mention that he was a convicted felon. Although the Court Evaluator, who did address the conviction in her report, told the petitioner and his counsel that weeks before the hearing that Part 36 (22 NYCRR 36.2(c)) prohibited his appointment and that petitioner was not bondable, petitioner's counsel continued to advocate for his appointment. The Court, stated that *it was counsel's obligation to disclose the proposed guardian's felony conviction in the petition and during her examination of him on the stand*. The Court proposes several amendments to Part 36 to insure that those seeking appointment as guardians have not been convicted of a crime or abuse or neglect. Ultimately, the court appoints an independent guardian.

Matter of Candace C., 27 Misc. 3d 1221A; 910 N.Y.S.2d 761(Sup Ct., Dutchess Cty., 2010)(Pagones, J.)

IP moved to have her mother removed as co-guardian of her person and to evict her from the premises in which they both resided. The court granted the petition. In so doing, the court noted that the appointing court had clearly been aware that the mother had been convicted of a felony, and had appointed her nevertheless. The court continued that the record provided ample evidence that the mother failed to fulfill her fiduciary duties, and also added that the hostility between the mother and daughter, which included corporal punishment, together with their chaotic lifestyle and mutual substance abuse, supported removal.

In the Matter of Marilyn F., 31 A.D.3d 760, 818 N.Y.S.2d 467 (2nd Dept 2006)

Where MHLS moved to have Self Help Community Services, removed as guardian, and the IP's brother-in-law substituted, the Appellate Division, describing the specific facts of this case as "particularly challenging," found that Self Help had adequately fulfilled its responsibilities as guardian by "stabilizing the living conditions and financial situation of the IPs, thereby enabling them to avoid eviction from their rent stabilized apartment and to continue living independently within their means."

Columbia Memorial Hospital v. Barley, 16 A.D.3d 748; 790 N.Y.S.2d 576 (3rd Dept.,2005)

Plaintiff hospital sues IP and her guardian DSS to recover payment for medical services rendered. Plaintiff alleges in a motion for summary judgement that IP's home was transferred to her brother

without fair consideration and alleges that the guardian was in breach of its fiduciary duty to the IP for failing to prevent the fraudulent transfer. Court finds that plaintiffs claim against the guardian for breach of fiduciary duty should have been dismissed because plaintiff did not plead that the guardian had a fiduciary duty to plaintiff. Court states that plaintiff can however, raise the issue in the Article 81 court and in the context of whether DSS breached its duty to the IP.

Matter of Cuban (Carmen Castro), NYLJ, 11/4/03 (Sup. Ct., Queens Cty.) (Thomas,J)

Co-guardian A is sanctioned for contempt of court, incarcerated for 7 days and directed to pay attorneys fees for Co-guardian B of $15,000 for impeding Co-guardian B's access to the IP (their mother) to provide for her medical care. Co-guardian A concealed the legal authority to act of Co-guardian B to EMT technicians.

Matter of Turner (Williams), 307 A.D.2d 828; 763 N.Y.S.2d 571 (1st Dept., 2003)

Where a guardian, who was satisfactorily performing his duties, sought to resign, the costs associated with the resignation proceeding such as the accountant's fees for the final accounting and the fee for the court evaluator (GAL) may be paid from the IP's funds. Such expenses may only be assessed against the guardian personally if he is being removed because he failed to perform his duties or is being removed for cause.

In re Estate of Mary Gustofson, 308 A.D.2d 305; 764 N.Y.S.2d 46 (1st Dept., 2003)

Removal was not appropriate where guardian, a relative, was not self dealing but was having some difficulty filing reports that were satisfactory to the Court Examiner that were free of accounting errors and where guardian failed to seek prior approval to pay management fees to a brokerage house.

Matter of Charles Butin, 301 A.D.2d 193; 750 N.Y.S.2d 619 (2nd Dept., 2002)

Attorney disbarred for various abuses and breaches of fiduciary duty related to his roles in several Article 81 proceedings in which he arranged an incapacitated person's finances in such as way as to be able to make unauthorized payments to himself.

Matter of D.S., NYLJ, 10/31/01, Sup. Ct., Suff. Cty. (Berler, J.)

Where guardian is an attorney, guardians may not represent the IP in a lawsuit against IP- Guardians is sued in his representative capacity and a conflict of interest and appearance of impropriety exits. Also, guardian cannot "negotiate with himself" to arrive at a fair fee.

Matter of Gerald J. Friedman, NYLJ, 12/28/01 (Sup. Ct., NY Cty.)(Lowe, J.)

Court finds no breach of fiduciary duty where:

(1) guardian created trust and named himself trustee because there was no self dealing-trust expressly provided that if trustee was the same person as the guardian, there could be no double fees paid-also inclusion in trust of exculpatory clause wasn't a breach of the guardian's duty

(2) guardian was overzealous and intrusive in protecting the ward by being intrusive and by exceeding the authority granted to him-his action were motivated by desire to protect IP not increase fees paid to him.

Reliance Insurance Company of New York v. Chemical Bank, NYLJ, 9/5/96, p. 21, col. 1, (Sup. Ct., NY Cty.)

Guardian withdrew and misused IP's funds. Plaintiff insurance company, as surety, sued bank alleging breach of contracts and fiduciary duty with IP. Court entered summary judgment for bank and entered default judgment against former guardian, holding that although funds belonged to IP, there was never contractual relationship between bank and IP, only with guardian. Therefore, there was no breach of contract. There was also no breach of fiduciary duty because 1) there is no fiduciary relationship between bank and IP as "relationship of debtor to creditor that exists between a bank and its customer does not change merely because the funds on deposit are those of a fiduciary," as well as fact 2) that bank had no concrete reason to believe that money was being misappropriated.

Matter of Wingate (Mascalone), 169 Misc.2d 874; 647 N.Y.S.2d 433 (Sup. Ct., Queens Cty., 1996)

Court finds breach of fiduciary duty by attorney-in- fact, revokes power of attorney and appoints special guardian in Article 81 proceeding where AIP is unable to make any type of decisions regarding her property management based on fact that she resides in nursing center and suffers from Alzheimer's disease and dementia, and attorney-in-fact refuses to sell AIP's cooperative apartment to render her Medicaid eligible and enable her to remain in nursing home.

Matter of Heagney, NYLJ, 4/24/00, p. 21 (Sup. Ct., Westchester Cty.)(Friedman, JHO)

Court found that although guardian did not violate fiduciary duties towards IP, because of "negligence and sloppiness" in not filing required designations and in not filing annual reports, no fee was to be awarded.

Matter of Morris Honig, 213 A.D.2d 229; 623 N.Y.S.2d 862, (1st Dept., 1995)

Burden of proof lies with conservator to prove that he did not breach fiduciary duty.

Matter of Luckert, NYLJ, 4/15/97, p. 25, col. 3 (Sup. Ct., Nassau Cty.)(Rossetti, J.)

AIP's next-door neighbor served as her guardian. However, court removes guardian and replaces

with temporary guardian because of "questionable conduct" including removing personal effects from and changing locks on ward's home, and making personal use of ward's car, all without court authorization. Removed guardian also "was instrumental in having AIP execute power-of-attorney naming her (the guardian) as attorney-in-fact. This document was executed, strangely enough, one day before guardian swore in court to ward's incapacity. Combination of inappropriate conduct led to court order of removal, as well as an order to turn over all of ward's personal effects, keys, and records to newly appointed temporary guardian.

Matter of Bomba, 180 Misc.2d 977; 694 N.Y.S.2d 567 (Sup. Ct., Queens Cty., 1990)

Court examiner submitted order requesting hearing to determine whether guardian should be removed, questioning whether guardian had properly reimbursed herself, without court order, for disbursements for photocopying, fax transmissions, local travel expenses, United Clerical Service, and telephone charges. Court found that evidence of misconduct did not rise to level necessary to warrant guardian's removal. However, disbursements for which guardian reimbursed herself were disallowed. Reimbursements questioned were characterized by court as routine, incidental costs incurred by guardian, which were expected to be absorbed in guardian's statutory commission. Court noted that statutory references to "reasonable and necessary expenses" had not been construed to encompass general administrative fees incurred by guardian, but rather pertained to actual expenditures made by guardian, which were necessary to collect, preserve, and distribute estate property.

Matter of Nicks, NYLJ, 1/29/98, p. 25, col. 1; p. 32, col. 6 (Sup. Ct., Nassau Cty.)(Rossetti, J.)

TOUCH INC., a not-for-profit corporation that assists disabled indigent persons, was appointed guardian. It failed to file its reports on time and to cooperate with the ward's residence in pursuing Medicaid. After residence and court examiner sought to remove it as guardian, TOUCH resigned. It sought an order settling its final account. Court denied compensation to the TOUCH and surcharged it to partly reimburse the court examiner for services required by guardian's omissions.

Matter of Arnold "O." 226 A.D.2d 866; 640 N.Y.S.2d 355 (3rd Dept., 1996) *lv. to app. denied,* 88 N.Y.2d 810, 649 N.Y.S.2d 377 (1996)*, related proceeding,* 256 A.D.2d 764, 681 N.Y.S.2d 627 (3rd Dept., 1998)

Motion to remove guardian which was part of lengthy dispute between guardian, and IP's family is denied and sanctions are levied against petitioner for maliciousness of motion and harassment of guardian, with whom family disagreed as to control of IP.

Matter of Boice, 226 A.D.2d 908; 640 N.Y.S.2d 681 (3rd Dept., 1996)

Where implied contract existed because guardians accepted services from care facility for ward (son) after NYS transitional funding terminated, but guardians failed to pay for services, petition to remove

them as guardians was denied but they were ordered to pay outstanding bill.

G. Discharge/Termination/Resignation

Matter of Angeliki K. (Fanny K.), _AD3d_, 20202 NY App. Div. LEXIS 2863 (2nd Dept., 2020)

The Appellate Division held that Supreme Court should not have sua sponte terminated the guardianship without a hearing because a guardianship may be terminated only on application of a guardian, the IP, or any other person entitled to commence a proceeding, and only then upon notice and hearing. In any event, the evidence submitted in support of the motion that returned the matter to court demonstrated that the IP still required a guardian to maintain her property.

Matter of Banks (Richard A.), _Misc.3d_, 2019 NY Slip Op 29121, 1 (Sup. Ct., NY Cty., 2019)

The court granted the motion of Richard A., a "person in need of a guardian," to terminate the guardianship over his person/property. Previously, in 2017, the court had accepted Richard A.'s consent to the guardianship based on the exigent circumstances that then existed in Richard A.'s life (he was debilitated and confined to a wheelchair due to a spinal injury, suffered from depression, and was an alcoholic). In 2019, Richard A. sought to withdraw his consent and have the guardianship terminated, asserting that his condition had improved, and that he wished to regain control of his finances. The guardian opposed the motion but declined to make a new application seeking a determination of incapacity. The court rejected both the guardian's use of this procedure and its substantive claim that the court need only consider whether the guardianship is "necessary." In so doing, the court noted that the procedure utilized by the guardian circumvented many of the safeguards and processes expressly outlined in Article 81 (including, inter alia, the requirement that the petitioner serve upon Richard A. an order to show cause advising him of his rights [to counsel, a jury trial, etc.], together with a detailed petition). The court further held that in order to continue the guardianship once Richard A. withdrew his consent, it was required to determine not only that the guardianship is "necessary" but also that Richard A. is "incapacitated." Neither Richard A.'s abuse of alcohol, nor his mental illness are sufficient to establish that he is incapacitated. Even assuming, arguendo, that the court is authorized to continue the guardianship solely upon a finding of necessity, the evidence did not support any such finding. Richard A.'s situation is different than it was when the guardian was initially appointed: His physical condition has greatly improved, and he is currently able to care for his daily needs without assistance.

Matter of Raphael R., 2019 N.Y. App. Div. LEXIS 429 (2nd Dept. 2019)

Upon a determination of incapacity made when the IP was eighteen years old, a guardian was appointed to manage the funds in his infant compromise settlement. Six years later, the IP moved to have his guardian discharged, claiming that he was no longer incapable of managing his own funds. The guardian opposed and, after a hearing, the trial court denied the motion. On the IP's appeal, the Appellate Division, citing MHL 81.36(d), determined that the record lacked clear and convincing evidence that the IP was incapacitated and in need of a guardian, reversed the order, and

remitted the matter for further proceedings to effectuate the termination of the guardianship. (Note - the decision is devoid of any facts concerning this specific IPs functioning.)

Matter of Marguerite N., Sup. Ct., N.Y. Cty. Unpublished Decision/Order, Index # 402768/09)(Jan. 22, 2016)(Masley, J.)(Copy available through MHLS 2nd Department, Special Litigation and Appeals Unit)

JASA petitioned to be terminated as guardian of Marguerite N., a 77 year old woman who, subsequent to JASA's appointment, had been arrested for having allegedly assaulted the director of property management at her supportive housing complex. The court refused to discharge JASA, rejecting its argument that JASA is a community guardian (SSL § 473-d), and that Marguerite N., during her incarceration on Riker's Island, had left the "community." The court also rejected JASA's request to be discharged based on the risk posed by Marguerite N.'s "propensity for violence." In so doing, the court: noted that Marguerite N. was presumed innocent of the charges related to the assault; highlighted the lack of evidence that Marguerite N. had a history of belligerent behavior and/or that JASA had sought to have her treated for such; emphasized that JASA has extensive experience with aggressive clients; and pronounced that "a propensity for violence per se should not be a bar to the appointment of a guardian." The court also noted that Marguerite N., "elderly and alone" was no more able to provide for her needs than when she was first adjudicated incapacitated and, in fact, had even more of a need for a guardian since then due to JASA's surrender of her supported apartment (in settlement of a housing proceeding), and her current lack of a home. The court noted that there were no other reasons that would support JASA's discharge pursuant to MHL § 81.35.

Application of DC, ____Misc3d___; 32 N.Y.S. 3d 484; 2016 NY App. Div. LEXIS 4504 (1st Dept. 2016)

Supreme Court's jurisdiction over a guardianship proceeding is not extinguished when the court discharges a guardian, therefore, an application under CPLR Art 78 to prevent the court from conducting further proceedings on the original application after a guardian had been discharged on consent of the parties was denied.

Matter of Regina L.F., 132AD3d 1344 ; 18 N.Y.S. 3d 487 (4th Dept 2015)

Pursuant to MHL 81.36 (c), a guardian may not be discharged without a hearing, therefore, where the guardian did not resign voluntarily, the trial court's order discharging a guardian, issued absent a hearing, was reversed and the guardian was reinstated.

Matter of Helen S., 130 AD3d 834; 13 N.Y.S. 3d 516 (2nd Dept 2015)

Guardian moved to have the court appointed geriatric care manager removed. IP cross moved pursuant to MHL 81.35 to have the Guardian removed. The IP testified that her Guardian "yelled"

and "screamed" at her and threatened her and that she becomes nervous and upset when she sees her Guardian. The Court, based on this testimony and its own observations, noted the deteriorated relationship between the Guardian and the IP and found that just cause existed to remove and replace the guardian.

Matter of Foster, 45 Misc.3d 1225(A); 2014 N.Y. Misc. LEXIS 5166 (Sup. Ct. Monroe County 2014) (Polito, J.)

The guardian, Catholic Family Center, petitioned to be relieved as guardian due to a potential conflict arising from the possibility of being required to remove nutrition and hydration in violation of both its and the AIP's religious and moral values. The court granted the guardian's request without a hearing, noting that noone had objected to the guardian's request and further that the court could not, in any event, compel the guardian to serve as guardian of the person if it wished to voluntarily withdraw from that role, even though it remained on as guardian of the property.

Matter of Perl, 77 A.D. 3d 525; 910 N.Y.S. 2d 52 (1st Dept., 2010)

The Appellate Division denied that branch of the AIP's motion, pursuant to MHL § 81.36(a)(1) which was to terminate the guardianship, noting that although the AIP was able to handle her considerable monthly allowance, she was vulnerable to exploitation and was not able to manage the entirety of her wealth. The Court also denied that branch of the AIP's motion, pursuant to MHL § 81.35, which was to remove the guardian for cause, noting that the guardian had acted diligently to protect the AIP's interests, and that any deficiencies in his filing of accounts was relatively minor, and could be remedied in ways other than his removal.

In the Matter of Yehuda C., 63 A.D.3d 923; 882 N.Y.S.2d 179(2nd Dept. 2009)

The appellants had been granted guardianship of their incapacitated son in a proceeding in Kings County. All of the child's property, including a sizable medical malpractice settlement, was placed in an SNT. The guardians then moved their family to Israel for religious reasons and later petitioned for, and were granted, guardianship of the person and property of their son by the Family Court in Israel. Upon subsequent application to the Supreme Court in kings County to terminate the guardianship and SNT, Supreme Court denied the application. On appeal, the Appellate Division held that there was no longer a need for a New York guardianship and that it would be impractical and unnecessary for a New York court and Court Examiner to provide duplicate supervision of the guardianship of a child in a foreign land but that while the guardianship of the person and property of the child should be terminated, there was no basis for the termination of the SNT.

Matter of Turner (Williams), 307 A.D.2d 828; 763 N.Y.S.2d 571 (1st Dept., 2003)

Where a guardian, who was satisfactorily performing his duties, sought to resign, the costs associated with the resignation proceeding such as the accountant's fees for the final accounting and the fee for the court evaluator (GAL) may be paid from the IP's funds. Such expenses may only be assessed

against the guardian personally if he is being removed because he failed to perform his duties or is being removed for cause.

Matter of Marvin W., 306 A.D.2d 289; 760 N.Y.S.2d 337 (2nd Dept. 2003)

App. Div. reverses order of Supreme Court that denied, without hearing, IP's application to terminate the guardianship. Court holds that MHL §81.36(c) requires that a hearing be held, that the burden of proof is on the person opposing termination of the guardianship, and that the standard of proof is clear and convincing evidence that the guardian's authority should not be terminated.

Matter of Alexandre Penson, 289 A.D.2d 155; 735 N.Y.S.2d 51 (1st Dept., 2001)

Where evidence showed that IP was now living independently with his wife in Florida, understands his limitations and has sought the advice of an attorney and financial consultants in formulating a plan that both secures his financial future and affords him a current level of independence and self-determination, guardian was discharge and IP was restored to capacity status. A trust find created in NY by the guardian was dissolved and the funds were transferred to a Florida trust created by the IP. Since the transfer would take place prior to an accounting of the NY trust, certain reserves were properly withheld pending the final accounting to satisfy possible claims against the NY trust for legal fees and health care expenses. The court noted that the IP could meet his needs in Florida without these reserve funds.

Matter of Donald F.L., 242 A.D.2d 536; 662 N.Y.S.2d 75 (2nd Dept., 1997)

Courts refusal to remove guardian unless IP appear for psychological evaluation by court-appointed psychiatrist and for deposition was not improper. Further, there was insufficient evidence to support finding that IP had become able to provide for his personal needs or manage his affairs.

Matter of Warshawsky, NYLJ, 1/9/95, p. 30, col. 4 (Sup. Ct., Kings Cty.)(Leone. J.)

IP petitioned for discharge of guardian on ground that he was no longer incapacitated. Two employees of nursing home said his condition had improved enough for discharge, and friend said she would assist him with cooking and shopping at home. However, psychiatrist and guardian said he still required nursing home care. Court discharged guardian finding that IP was capable of exercising the power that had guardian's authority.

Matter of Lee "I" (Murphy), 265 A.D.2d 750, 697 N.Y.S.2d 385 (3rd Dept., 1999)

IP seeks to have guardian discharged but court finds clear and convincing evidence that IP still in need of guardian.

H. Multiple wards

Matter of Hammons (Hazel E., Nancy E., Neil E.), 164 Misc.2d 609, aff'd 237 A.D.2d 439; 656 N.Y.S.2d 875 (2nd Dept., 1997)

Court appoints single guardian for dysfunctional family of three, including aging fragile parents and adult daughter, even though daughter is not providing assistance into them in the home and is preventing others from helping them as well.

I. Compensation

Matter of Ruth S. (Stein), 181 AD3d 943 (2nd Dept., 2020)

The Appellate Division affirmed an award of additional compensation for extraordinary services and counsel fees to the guardian, and rejected the appellant's contention that the Supreme Court had been required to conduct a hearing before making the award, noting that the fees awarded by the court had been supported by affidavits or affirmations of services, and were reasonable.

Matter of Helen S., 2019 N.Y. App. Div. 1406 (2nd Dept. 2019)

A previously removed guardian moved to settle her account, to recover past legal fees and disbursements , and to receive guardianship commissions for "extraordinary services." The trial court's Order settling account awarded her only partial legal fees and disbursements, declined to award commissions for "extraordinary services", and refused, even after reargument, to order several months of previously ordered monthly stipends that the guardian had not taken as they were earned. The trial court reasoned that it has broad discretion to order fees and "where a guardian acts in a dual capacity, it is the guardian's burden in seeking fees for additional services to demonstrate that those services were not performed in the role as guardian," and that she had failed to meet that burden. The Appellate Division affirmed, holding that the trial court had providently exercised its broad discretion in awarding fees, but that it should not, upon reargument, have adhered to its original failure to direct payment of the several months of monthly stipend not taken when earned.

Matter of Ruby T. (Carrion), _AD3d_, 2018 NY App. Div. LEXIS 8216 (2nd Dept., 2018)

The Appellate Division reversed an order in which the trial court directed a guardian to pay from her own funds the fees generated by the accountant that the guardian had retained to prepare her final account. In so doing, the Appellate Division noted that the trial court had

not found that the guardian failed to satisfy her duties.

Matter of Alexander B.P. (Hafner); 2018 N.Y. App. Div. LEXIS 6678 (2nd Dept.)

Appellate Division reverses order directing petitioner hospital to pay the $500/mo. guardian 's fee, holding that although not prohibited by statute, it was an abuse of the trial court's discretion to impose this expense on the petitioner "given that the petitioner was successful and there was no evidence that the proceeding was commenced in bad faith".

Matter of Spanos (Bax), 57 Misc.3d 1223(A); 2017 N.Y. Misc. LEXIS 4598; 2017 NY Sip Op 51640(U) (Sup. Ct., Queens Cty.) (Siegal, J.S.C.)(2017)

The guardian moved to renew his application for fees, based upon the Appellate Division's recent Decision and Order in Matter of Yolanda T.M. (Spanos), 147 AD3d 765 (2nd Dept., 2017). The Supreme Court denied the motion, noting, inter alia, that the Law Revision Commission Comments to MHL § 81.28(a) make clear that the guardianship court retains the discretion to adopt any compensation plan it deems appropriate. The court continued that it had balanced the interests of the IP's estate/beneficiaries against the guardian's right to fair compensation, and had concluded that calculating the guardian's commission in strict compliance with SCPA § 2307, as the Appellate Division had done in Matter of Yolanda T.M. (Spanos),would result in a windfall to the guardian.

Matter of Spanos (Bax), ___Misc3d___; 2016 N.Y. Misc. LEXIS 5130 (Sup. Ct., Queens Cty.) (Siegal, J, S. C.)(2016)

Guardian performed substantial services on behalf of the IP, including traveling to the Netherlands to facilitate the move of the IP from his home in Queens to a "guided living 'facility in the Netherlands. The guardian also successfully negotiated a settlement agreement wherein the IPs ex-wife relinquished her interest in their jointly owned real property, which the Guardian then sold with approval of the court. The Guardian also arranged for guardianship in the Netherlands and thereafter resigned his position in NY with court approval. During the period of the guardianship, the Guardian was paid an annual Commission. Subsequent to the IPs death, the Guardian submitted a proposed Order settling the Final Account wherein he requested Commissions in excess of $40,000, presumably under a plan established pursuant to MHL 81.28. The Court approved only $16,000 as a statutory commission pursuant to SCPA 2307 and the guardian moved to reargue. The Court denied the motion to reargue stating that to pay the additional commissions would amount to 'double dipping" and that the Court had discretion and was not obligated to pay the guardian pursuant to the scheme established under MHL 81.28. Finally, the Court reminded the Guardian that he could have applied for reasonable compensation for extraordinary services rendered in connection with his trips to the Netherlands but that the Guardian had not yet made such application.

Matter of Spanos (Bax), 57 Misc.3d 1223(A); 2017 N.Y. Misc. LEXIS 4598; 2017 NY Sip Op 51640(U) (Sup. Ct., Queens Cty.) (Siegal, J.S.C.)(2017)

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In re Garcia, ___AD3d____; 2017 N.Y. App. Div. LEXIS 4321 (1st Dept.)(2017)

Although the initial guardianship order provided that a co-property guardian would be compensated pursuant to SCPA 2309, the Appellate Division held that the trial court had the discretion to change the method of computing his compensation basing it on the services he had actually rendered, rather than the value of the trust assets. The Appellate Division further held that trial court was not obliged to find malfeasance to make the change.

Matter of Goldstein,, __AD3d___; 2017 N.Y. App. Div. LEXIS 425; (1st Dept. 2017)

An Article 81 guardian appealed from an order setting and limiting his fees. He had served as the Temporary Guardian for approximately 5 weeks and as plenary guardian for an additional three weeks, which appointment terminated shortly thereafter upon the death of the IP. The IP's assets were in excess of $33 million. The order appointing a Temporary Guardian did not specify the method of compensation. The order appointing a plenary Guardian directed compensation in accordance with the sliding fee schedule set forth in SCPA 2307. As part of the Final Accounting the Guardian sought compensation based on his hourly rate for the time he served as Temporary guardian, which the court reduced only slightly and that order is not was not appealed from. The Guardian's claim for compensation for his services as plenary guardian pursuant to the sliding scale schedule came to nearly $700,000 for his three weeks of service. The Executor of the estate challenged the claim as excessive and a "windfall" and the trial court limited the compensation to $100,000. On appeal by the Guardian, the 1st Dept. looked to the language and legislative history of MHL 81.01(a) and held that despite the guardian's meritorious service and the absence of any malfeasance, it was within the trial court's discretion to limit the award to that which was reasonable and justifiable, held that the lower court had not abused its discretion and upheld the order limiting compensation to $100,000.

Matter of Rebecca R., (Sup Ct. Westchester Cty) (Murphy, J. 2016)(unpublished decision - copy available through Director's office of MHLS, 2nd Dept.)

Upon objection by counsel for Petitioner to the guardian's Final Accounting, the court held that

FSSY, the guardian, was not permitted to prioritize its commissions and the fees of its own attorney over the fees of Petitioner's counsel fees and those of MHLS as counsel to respondent. The Court ordered FSSY to reimburse the guardianship estate and pay Petitioner's attorney and MHLS from the funds, on a pro-rata share of the assets.

Matter of Uriel R ., 133 AD 3d 859; 19 N.Y.S. 3d 441 (2nd Dept. 2015)

Attorney claimed entitlement to attorney fees and commissions for work he performed as a co-guardian over a 4 years period. The trial court, absent explanation, denied all compensation. On appeal, the Appellate Division acknowledged that generally the trial court must provide a clear written explanation for its award, or lack thereof, but held that in this instance, despite the absence of such written explanation, the attorney has submitted no proof as to the work he performed or its reasonable value and thus has failed to meet even his threshold burden of establishing that he was owed compensation. The Appellate Division upheld the trial court's denial of fees without remitting the matter back to the trial court to establish the a reasonable award. (It should be noted that although not mentioned in the text of the decision, the attorney requesting compensation in this case had been previously disbarred and has pled guilty to grand larceny for defrauding dozens of disabled clients he was supposed to be serving as guardian.)

Matter of Hyman; 102 AD3d 683; 958 N.Y.S. 2d 164 (2nd Dept. 2013)

In addition to awarding a commission for services rendered as guardian of the person or property, reasonable compensation may be awarded in an appropriate case for extraordinary services rendered and for services rendered by an accountant. Where the guardian acted in a dual capacity, it is the guardian's burden, in seeking fees for additional services, to demonstrate that those services were not performed in his or her capacity as guardian.

Matter of Verna Eggleston v. Jennifer D., 88 A.D. 3d 706; 930 N.Y.S. 2d 608 (2nd Dept., 2011)

Noting that the Supreme Court did not explain the basis for its award of a "Legal Fee" to the temporary guardian, who, although an attorney, was acting as the IP's guardian, and further noting that the IP had submitted evidence demonstrating issues of fact as to the propriety of the temporary guardian's actions on her behalf and the accuracy of his accountings, the Appellate Division, inter alia, deleted the provisions of the Supreme Court's order which awarded the temporary guardian fees, and remitted the matter back to that court for a hearing to determine what, if any, fees were due to him.

Matter of Soledad P., Sup. Ct., Bronx Cty.) NYLJ 5/9/01, p.27 (Sherman, J.)

A guardian of an incapacitated person's property, who was also an attorney, sought the retroactive approval of "legal fees" that she had paid to herself, without court approval, for the preparation and filing of annual inventories and accounting on behalf of her ward. In denying the application and directing the guardian to return the fees, the Supreme Court first reasoned that the Surrogate's Court

Procedure Act barred lawyer fiduciaries from taking advances on fees without seeking prior authorization. The court continued that "the preparation and filing of accountings is a routine duty and obligation of all guardians, of all abilities and educational backgrounds," for which a guardian is compensated by her commissions. Though the court stated that if the guardian personally prepared tax returns for her ward, she could seek additional compensation for this task, which was "beyond the scope of the routine duties of a guardian," the court suggested that rate of compensation therefor should be that of an accountant, which is often significantly lower than that of an attorney.

Estate of Ida Davis, 4/12/11 N.Y.L.J. 33, (col. 4) (Surr Ct., Queens Cty.)(Surr. Kelly)

Citing SCPA § 1804, which allows a fiduciary to retain a reserve to satisfy, inter alia, contingent or unliquidated claims, Surrogate grants a petition to set aside approximately $10,000 representing commissions and legal fees for services rendered to the decedent by her Article 81 guardian, to be paid upon the guardian's production of an order, issued by the guardianship court, fixing the same.

Matter of Joshua H., 80 AD3d 698; 914 NYS2d 914 (2nd Dept. 2011)

The Appellate Division, Second Department, affirmed a determination of the Supreme Court to surcharge Grace N., due to her failure to complete her duties as, inter alia, the IP's guardian, and trustee of his supplemental needs trust. In so doing, the Court noted that "[i]t is within the discretion of the Supreme Court to determine what, if any, compensation is due to a fiduciary of an incapacitated person or an attorney representing such a fiduciary."

Matter of Nellie G., 74 A.D.3d 1065; 903 N.Y.S.2d 494 (2nd Dept 2010)

The Appellate Division reversed so much of an order of the Supreme Court which directed that the guardian's compensation be paid from the AIP's assets. In so doing, the Appellate Division noted that the subject order was contrary to the Appellate Division's own order, in a related 2009 appeal which held that the appointment of a guardian had been improvident, and that the guardian's compensation was to be paid by the petitioner. The Appellate Division explained its earlier directive to hold the petitioner responsible for the guardian's compensation in this case, stating: "Where a guardianship petition is dismissed in whole or in part, there is no statutory authority for fixing who is responsible for the guardian's compensation. Thus, the courts must determine on a case-by-case basis the party responsible for the compensation based, *inter alia*, on whether the petition was brought in good faith, and the relative merits of the petition." Furthermore, the Appellate Division reversed, as inappropriate, the Supreme Court's award of $43,791.26 to the guardian, as for additional compensation, reasoning that the record did not support an award that was separate and apart from the compensation the guardian had already received for legal services performed on behalf of the AIP.

<u>Matter of Phillips</u>, 20 Misc. 3d 1111(A); 867 N.Y.S.2d 20 (Sup. Ct., Kings Cty., 2008) (Ambrosio, J.)

The guardian was an attorney who had been suspended from the practice of law as a result of her breach of fiduciary duty to the IP in this matter. She was deemed to have breached her fiduciary duty by, inter alia: (1) paying herself substantial counsel fees that were not court ordered and to which she was not entitled; (2) paying herself a substantial "brokers commission" that was not court ordered and which actually related to an auction of the IP's real estate conducted by the court; (3) dissipating substantial guardianship assets as a result of her failure of due diligence by using them to renovate property that she did not realize were no longer owed by the IP's estate; (4) utilizing guardianship funds to pay her personal mortgage; (5) failing to account for the balance of the down payment from the sale of such IP's real estate; (6) failing to maintain appropriate financial records; (7) hiring her own family members to provide services to the IP without notifying and seeking authorization from the court; (8) failing to obtain a bond and further failing to inform the court that she was not bondable; (9) failing to pay the IP's taxes and incurring significant penalties and more. The court not only denied her fee application but further surcharged her for the dissipation of the IP's assets that she caused.
(Note: This guardian was ultimately disbarred for these actions, See, Matter of Taylor, NYLJ, M-3994, Nov. 25, 2013 , Vol 250 - No. 102 at p. 7)

<u>Matter of Family and Children's Association, (Muller)</u>, (Sup Ct., Suff Cty.) (Sgroi, J.) Index # 2378/04, 6/10/08, (unpublished)

Family and Children's Association ("FCA"), a not-for-profit, moved to be relieved as guardian because, DSS, citing 18 NYCC 36–4.6., refused to pay FCA the court ordered fee of $150/mo from the NAMI. FCA argued that because it received no charitable funding, it therefore lacked the financial resources to provide continued services to the IP. The court held that there was no legal obligation for FCA to continue to serve without compensation and that the only entity that could lawfully be required to serve without compensation was the DSS itself pursuant to 18 NYCRR 457.1(d)(9), (10)(ii). The court ultimately did relieve FCA, but, instead of appointing DSS, without explanation, appointed an independent private attorney. There was no provision made for payment of fees to the Successor Guardian.

<u>Matter of Family and Children's Association</u>, 15 Misc. 3d 1129(A); N.Y.L.J. 26, (Col. 1) (May 11, 2007) (Sup. Ct. Nassau Cty.)(Diamond, J.)

Court upheld the claim of the Department of Social Services that an order directing that the guardian be paid $250/mo from the IP's Social Security check, which amount was to be counted against the NAMI, was a violation of 11 NYCRR 360-4.6..2002.

Matter of Stratton (Heinrich), 2001 N.Y. Misc. LEXIS 1348; 225 N.Y.L.J 119 (Sup. Ct., NY Cty. 2001)(L. Miller, J.)

The court denied the guardian's application for her fees to be paid on an hourly basis where the order appointing her recited that her fees were to be paid according to SCPA 2309 and her efforts on behalf of the IP appeared to the court to be "overly zealous" and duplicative of the services provided by the staff of the assisted living facility into which she had placed him. The court emphasized that her role as guardian was to oversee that the staff at the assisted living facility was meeting her ward's needs but not to actually provide the services.

Matter of Newbold, 2007 NY Misc LEXIS 389; 237 N.Y.L.J. 28(Sup. Ct., Queens Cty.) (Thomas, J.)

Where guardian's request for compensation equaled one third of the IP's total assets, the Court reduced the fee. The court stated that it was required to consider the following factors: (a) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problem presented; (b) the attorneys's experience, ability and reputation, (c) the amount involved and the benefit flowing to the ward as a result of the attorneys services, (d) the fees awarded in similar cases; (e) the contingency or certainly of compensation, (f) the results obtained ; and (g) the responsibility involved. In its analysis, the court identified 4 categories of compensable activities by the guardian: (1) Simple duties (opening the guardianship account, inventorying the assets, filing the commission and bond, filing the initial accounting) to be compensated pursuant to the formula set by SCPA 2307; (2) Duties which, although not unusually difficult or requiring extraordinary skill, consumed an unusual or inordinate amount of time and provides a benefit to the IP (in this case procuring the IP's lapsed pension and securing her health insurance) to be compensated at the rate set by County Law Sec. 722 (b); (3) Duties which require unique experiences or skills either in a legally or financially complicated matter or in an acrimonious matter where the guardians is met with continued resistance, to be compensated with fee awards commensurate with counsel for the parties in the action; and (4) matters which are actual legal services or accounting services, also to be compensated with fee awards commensurate with counsel for the parties in the action.

Matter of E.H., 13 Misc.3d 1233(A); 831 N.Y.S.2d 352 (Sup. Ct., Bronx Cty., 2006)(Hunter, J.)

Court orders that Integral Guardianship Services, a not-for profit social service agency, be compensated in the amount of $ 450.00 per month, to be deducted from the IP's $600/mo. Social Security benefits and held that such sum be deemed excluded from available income for the purpose of the Medicaid calculation of net available monthly income ("NAMI"), because such expenditure was necessary to insure the medical and physical well-being of the IP.

Matter of William J.J., 32 A.D.3d 517; 820 N.Y.S. 2d 318 (2nd Dept 2006)

In the 9th Judicial District, one judge sits in the Guardianship Accounting Part ("GAP") to review and confirm the reports of the Court Examiners in all of the counties of the 9th District. When

confirming the Court Examiner's report the instant case, the GAP judge, in two orders, also: (1) added the requirement that the guardian be required to file a bond even though the appointing judge who issued the Order and Judgment had dispensed with a bond; (2) deleted the provision of the Order and Judgment providing that the guardian could draw an annual salary as compensation from the assets of the IP and added that the guardian was required to obtain prior court approval before taking a Commission, and, (3) curtailed the power granted in the Order and Judgment that allowed the guardian to retain professional services of attorneys and accountants etc. with the IP's funds without prior court approval. The Appellate Division held that the GAP judge had exceeded his authority under MHL §81.32 to alter the guardian's compensation because such compensation can only be altered if the guardian had violated MHL 81.32(c); that the GAP judge exceeded his authority when he modified the guardian's powers to pay the professional fees without prior court approval because that power was reserved to the appointing judge, and even the appointing court could not act *sua sponte*, but only upon application of the guardian, the IP or any other person entitled to commence a proceeding and only then upon notice and hearing; and that the GAP judge has also erred in directing the filing of the bond in the absence of such provisions in the original Order and Judgment.

In re Guardianship (Formerly Committee) for the benefit of W.J., 9 Misc. 3d 657; 802 N.Y.S.2d 897 (Sup.Ct., Rensselaer County, 2005) (Ceresia, J.)

A corporate committee was appointed in 1961 for a ward who was receiving VA benefits. In 2005, it moved to be compensated under MHL Art 81 claiming that the work it was doing was in the nature of trustee work and that it should therefore be compensated under SCPA 2309, as set forth in Art 81. The VA and counsel for the ward opposed, claiming that the fiduciary appointment was made pursuant to MHL Art 79 governing veterans and not Art 78 which was repealed in 1992 when Art 81 was enacted in its place. The corporate committee argues in the alternative that if it is to be compensated under Art 79, that it be compensated for "extraordinary services". The court finds that: (1) under the 2004 amendments, Art 81 no longer makes reference to SCPA 2809 as a method for calculating guardians' compensation and that each compensation determination is based upon the specific facts of each case; (2) that the original proceeding was commenced by the VA and under the Civil Practice Act and that CPA §§ 1384-k which governed compensation at that time is now part of MHL Art 79; (3) that MHL Art 79 is still in effect and supercedes other guardianship sections that may be inconsistent and that therefore, this guardianship is governed by MHL Art 79. The Court further found that "the long duration of the guardianship and/or the size of the estate, in and of themselves, were not "extraordinary service" nor was the fact that the services involved "on-going property management responsibilities [in a] highly regulated financial industry [with] a high standard of professional conduct and significant reporting requirements. "

In re Proceeding of Alfreda Kenny, Guardian of the property of Shirley I. Ellman, 7 A.D.3d 423; 777 N.Y.S.2d 432 (1st Dept., 2004)

Where order appointing guardian provided that she (1) be paid in accordance with SCPA 2307(2) reimbursed for all reasonable disbursements and (3) that she could retain an accountant and pay up

to $15,000 for that purpose, App Div found that in the absence of any finding of wrong doing, that she should be paid under items (1) and (2) but that she would be denied certain disbursements for (a) photocopying expenses because she did not prove that they reflect her actual costs, (b) faxing because she did not show that there was no markup for long distance faxes, and (3) for messengers and overnight delivery services because she did not prove that they were used only when time was of the essence.

Matter of Turner (Williams), 307 A.D.2d 828; 763 N.Y.S.2d 571 (1st Dept 2003)

Where a guardian, who was satisfactorily performing his duties, sought to resign, the costs associated with the resignation proceeding such as the accountant's fees for the final accounting and the fee for the court evaluator (GAL) may be paid from the IP's funds. Such expenses may only be assessed against the guardian personally if he is being removed because he failed to perform his duties or is being removed for cause.

Matter of a Trust Created by Rose BB, 303 A.D.2d 873; 757 N.Y.S.2d 132 (3rd Dept., 2003)

In calculating guardians commissions, MHL81.28 specifically recognizes that court may be guided by, among other things, SCPA 2307 (fiduciaries commissions) or SCPA 2309 (trustees commissions).

Matter of Gerald J. Friedman, NYLJ, 12/28/01 (Sup. Ct., NY Cty.)(Lowe, J.)

Where the guardian, who was himself an attorney, hired attorneys to perform virtually all of the legal work for the IP and the only work done solely by the guardian could have been done by a non-lawyer, it was improper for the court to have compensated him at his legal billing rate. Justice Lowe, a Supreme Court justice, who was substituted for the prior Sup. Ct justice who recused himself, opens decree and sends matter of disgorgement of fees already paid to a referee.

Matter of Livingston, 2001 NY Misc LEXIS 570; 2001 NY Slip Op 40311U (Sup. Ct., Queens Cty. 2001) (Thomas, J.)

Guardian, who was an attorney, submitted request for disbursements and legal fees from IP's estate, in addition to her request for a commission. The court states that she is entitled to her commission under SCPA §2307. The guardian included hours spent defending herself in an action by the court examiner to have her removed. She also included hours spent preparing the initial report, annual reports and final account, as well as faxing postage, phone bills and photocopying expenses. Court denies all but basic commission saying that commission covers same and application for fees evidenced avarice.

Matter of Arnold "O.", 279 A.D.2d 774; 719 N.Y.S.2d 174 (3rd Dept., 2001)

In very complicated case, where guardian of person and property was an attorney who also

performed legal services for IP and was also the trustee of an SNT, the guardian was properly paid fees separately for the guardianship services, the trustee services and the legal services to the extent that no services were double billed. Also, it was not improper to reimburse guardian at the same rate for his services as guardian of the person and guardian of the property.

In re Crouse (Lindsay), 276 A.D.2d 451; 715 N.Y.S.2d 395 (1st Dept., 2000)

Under Mental Hygiene Law §81.28, the compensation paid to a guardian "may be similar" to the compensation of a trustee under SCPA §2309. However, the reference to SCPA §2309 is only a guideline and a court retains the discretion to adopt a compensation plan it deems appropriate in a particular case. Here, App. Div. refused to disturb the determination that the value of the ward's literary property rights and her residence should be excluded from the commission base and that commissions based on $4,430,750.81 in assets, rather than $5,560,850.81, constituted fair and reasonable compensation. While trial court found that the guardians faithfully discharged their duties, the value of their efforts is not necessarily related to the dollar value of the ward's assets. In any event, the guardian of an incompetent is the mere custodian of the incompetent's property and is not entitled to commissions on the value of unsold real estate.

Tootsie v. Cottrell, NYLJ, 4/10/01, p. 17 (Sup. Ct., NY Cty.)(Bransten, J.)

Where guardian was discharged and later found to have been negligent and have breached her fiduciary duties, by failing to take guardianship course, failing to file interim and annual reports for several years, failing to amend bond to cover after acquired property, and failing to maximize assets in estate, court denied commissions even though no real damage to estate occurred.

Matter of Beane (Spingarn), NYLJ, 7/2/01, p. 17 (Sup. Ct., NY Cty.)

Guardian's fee was calculated under SCPA 2309 (1) allowing for 1% of all principal paid out; disbursements were also allowed under SCPA 2309(1).

Matter of Nicks, NYLJ, 1/29/98, p. 25, col. 1, p. 32, col. 6 (Sup. Ct., Nassau Cty.) (Rossetti, J.)

TOUCH INC., a not-for-profit corporation that assists disabled indigent persons, was appointed guardian. It failed to file its reports on time and to cooperate with the ward's residence in pursuing Medicaid. After the residence and court examiner sought to remove it as guardian, TOUCH resigned. It sought an order settling its final account. Court denied compensation to the company and surcharged it to partly reimburse the examiner for services required by the guardian's omissions.

Matter of Bomba, 180 Misc.2d 977; 694 N.Y.S.2d 567 (Sup. Ct., Queens Cty., 1990)

Court examiner was assigned to review guardian's reports. Court examiner submitted order requesting hearing to determine whether guardian should be removed. Court examiner questioned whether guardian had properly reimbursed herself, without court order, for disbursements for

photocopying, fax transmissions, local travel expenses, United Clerical Service, and telephone charges. Court found that evidence of misconduct did not rise to level necessary to warrant guardian's removal. However, disbursements for which guardian reimbursed herself were disallowed. Reimbursements questioned were characterized by court as routine, incidental costs incurred by guardian, which were expected to be absorbed in guardian's statutory commission. Court noted that statutory references to "reasonable and necessary expenses" had not been construed to encompass general administrative fees incurred by guardian, but rather pertained to actual expenditures made by guardian, which were necessary to collect, preserve, and distribute estate property.

Matter of Haberstich (Lya Sher), 169 Misc.2d 543; 646 N.Y.S.2d 937 (Surr. Ct., NY Cty., 1996)

Compensation must be determined case by case, based upon responsibilities of guardian, nature and extent of assets and anticipated duration of guardianship. Where guardian must marshal assets and make investments that can be readily liquidated for period that is expected to be short in duration, such fiduciary is acting more like personal representative and compensation plan should reflect this. Where guardianship is expected to last a long time and holds substantial assets, guardian's duties more resemble those of trustee because of increased degree of sophistication required to develop an investment strategy and concomitant exposure. Under such circumstances, guardian should be compensated like trustee for responsibility for long-term ongoing property management and distribution to ward. However, court is not limited to choosing either rate fixed for trustees or that fixed for executors or administrators. §81.28 permits court in its discretion to devise any compensation plan it deems reasonable after considering whether guardian's duties more resemble those of a trustee or of an executor.

Matter of Daisy Pope, NYLJ, 1/12/99, p. 25, col. 3 (Sup. Ct., NY Cty.)

Court examiner was assigned to review guardian's reports. Court examiner submitted order requesting hearing to determine whether guardian should not removed. Court examiner questioned whether guardian had properly reimbursed herself, without court order, for disbursements for photocopying, fax transmissions, local travel expenses, United Clerical Service, and telephone charges. Court found that evidence of misconduct did not rise to level necessary to warrant guardian's removal. However, disbursements for which guardian reimbursed herself were disallowed. Reimbursements questioned were characterized by court as routine, incidental costs incurred by guardian, which were expected to be absorbed in guardian's statutory commission. Court noted that statutory references to "reasonable and necessary expenses" had not been construed to encompass general administrative fees incurred by guardian, but rather pertained to actual expenditures made by guardian, which were necessary to collect, preserve, and distribute estate property.

<u>Matter of Maria Cedano</u>, 171 Misc.2d 689; 655 N.Y.S.2d 283 (Sup. Ct., Suffolk Cty., 1997), 251 A.D.2d 105, *reversed*, 674 N.Y.S.2d 34 (1st Dept.,1998)

Where JASA had served as Conservator (pre–Art 81) for a ward under the Soc Serv Law 473-c Community Guardianship Program and the ward was later admitted to a nursing home and removed from the community, Soc Serv Law 473- prohibited JASA from continuing to serve as guardian, even for a brief period until another guardian could be found. Trial court's order compelling JASA to remain as guardian was reversed on appeal.

<u>Matter of Heagney</u>, NYLJ, 4/24/00, p. 37, col. 5 (Sup. Ct., Westchester Cty.)(Friedman, JHO)

Court found that although guardian did not violate fiduciary duties towards IP because of "negligence and sloppiness" in not filing required designations and in not filing annual reports, no fee was to be awarded.

<u>Matter of Nicks</u>, NYLJ, 1/29/98, p. 25, col. 1 (Sup. Ct., Nassau Cty.)(Rossetti, J.)

Where guardian was removed for failure to carry out duties properly, guardian's fees for past service were denied.

<u>Matter of Skinner (Lyles)</u>, 171 Misc.2d 551; 655 N.Y.S.2d 311 (Sup. Ct., NY Cty., 1997), *aff'd in part, rev'd in part*, 250 A.D.2d 488; 673 N.Y.S.2d 122 (1st Dept., 1998)

Court may not direct petitioner hospital to pay indigent IP's guardian's fee.

J. Co-Guardians

<u>Matter of Karen H.M.</u>, 45 Misc3d 858; 991 N.Y.S. 2d 868 (Sup. Ct., Bronx Cty 2014)(Aarons, J.)

Court, finding no question as to the need for a guardian, appointed FSSY as an independent guardian after setting aside a validly executed Power of Attorney given by the AIP to one of her two daughters more than 10 years earlier. The petitioning sister has been providing primarily personal care to their mother in an apartment in her home and the cross-petitioning sister, who held the POA, had been responsible for her mother's finances. The Court, after taking testimony from several family members, found that the sister who had been holding the POA had violated her fiduciary duty by mishandling her mother's assets such that: (a) one of AIP's bank accounts for which she had oversight had been paid over to the State as unclaimed funds; (b) this sister arranged for the AIP to surrender her interest in inherited real estate to her for no consideration and she is now paying "rent" for the use of those same premises, which she is described as barely using; and, (c) her funds were used to pay for unqualified and unidentified care givers. The Court, after reviewing the entire history of the situation also found that the two sisters were unable to work cooperatively as co-guardians

toward their mother's well being, as evidenced by their inability to agree on the AIP's place of abode or the timing of her medical appointments and other health care decisions, and thus appointed an independent guardian.

Matter of Margaret S., 236 NYLJ 9; 2006 N.Y. Misc. LEXIS 2833 (Sup. Ct., Richmond Cty.)(Giacobbe, J.)

Where there was acrimony between an AIP's son and daughter, both of whom were loving adult children capable of acting as guardian, the court, finding that it would be in the best interest of the AIP to have both of her children involved, appointed the daughter as guardian of the property along with an independent co-guardian of the property and the son as guardian of the person along with an independent co-guardian of the person. The court notes that it is mindful of the history of confrontation and disagreement between the siblings and the potential for further conflict between them in their roles as guardians. The court stated that it therefore appointed independent co-guardians to exert a moderating influence.

Matter of Bertha W., 1 A.D. 3d 603; 767 N.Y.S.2d 657 (2nd Dept., 2003)

Appellate Division modifies order to eliminate appointment of non-family member co-guardian of the property stating that there is a preference for family members unless it is impossible to find a qualified family member to serve and that there was no showing that the AIP's nephew required a co-guardian to assist him in carrying our his duties.

Matter of Cuban (Carmen Castro), NYLJ, 11/4/03 (Sup. Ct., Queens Cty.) (Thomas,J)

Co-guardian A is sanctioned for contempt of court, incarcerated for 7 days and directed to pay attorneys fees for Co-guardian B of $15,000 for impeding Co-guardian B's access to the IP (their mother) to provide for her medical care. Co-guardian A concealed the legal authority to act of Co-guardian B to EMT technicians.

Matter of Mary "J"., 290 A.D.2d 847; 736 N.Y.S.2d 542 (3rd Dept., 2002)

Appellate Division held that where family member that AIP preferred to have as guardian was moving out of state and remaining siblings remained in local area where AIP had resided all her life, the hearing court properly appointed the two siblings as co-guardians, despite the AIP's wish to the contrary.

Matter of Priviteri (Goldstein), NYLJ, 10/29/95, p. 27, col. 3 (Bronx Sup.)(Friedman, J.)

Where petitioner for guardianship of property was AIP's presumptive heir, there was conflict of interest because guardian stood to seek to enlarge estate for his own benefit, rather than that of ward. After considering size of estate, nature and closeness of familial relationship between proposed guardian and AIP, proposed guardian's financial circumstances, and motivation of proposed

guardian, court avoided appearance of impropriety and conflict of interest by appointing AIP's sister as personal needs guardian and nephew plus a co-guardian to be appointed later as her property management guardian.

In re: Robinson, 272 A.D.2d 176; 709 N.Y.S. 170 (1st Dept., 2000)

Court appoints co-guardian who is living out of the country temporarily, stating that modern transportation and communication will enable him to serve adequately.

K. Defacto Guardians

Matter of April-Buxton Sinclair, 1 Misc.3d 903A; 781 N.Y.S.2d 628 (Surr. Ct.,Westchester Co. 2003)

Surrogate's Court during probate proceeding compels defacto guardian to account for activities with respect to descendent's assets during decedent's lifetime. Contains the quote: "It is well settled that this court may deem a person to be a defacto fiduciary, even though he or she never qualified or was authorized to act in a fiduciary capacity of that person undertook to duties and responsibilities ordinarily assumed by a fiduciary ..." citations omitted.

L. Whether a Power is a Personal or Property Power

Matter of Mary XX, 33 A.D.3d 1066; 822 N.Y.S.2d 659 (3rd Dept. 2006)

Petitioner, guardian of the IP's person but not property, moved for a compulsory accounting by the trustees of the IP's funds. The trust provided that during the IP's lifetime the trustees were to pay the income to the IP and, in their discretion, to pay the principal as needed "to provide adequately and properly for the support, maintenance, welfare and comfort of [the IP]." The order appointing petitioner as guardian of the person authorized her to direct the trustees to pay for the IP's care and maintenance and to examine all the relevant circumstances, including the opinion of treating health professionals, the existing financial circumstances, and the existing physical environment as to what may be the best place for...[IP] to reside and the best arrangements for her continued care and treatment. The trustees, however, refused to provide petitioner with financial documents when she requested same, therefore, petitioner commenced a proceeding for a compulsory accounting in order to fulfill her obligation as guardian. Supreme Court denied the requested relief, holding that petitioner's powers as guardian of the person were limited to making demands of the trustees for payment of expenses and that the guardian of the person had no powers relative to the financial assets of the IP. The Appellate Division reversed finding that petitioner had made a sufficient showing that the requested accounting is necessary in order to carry out her duties as guardian citing four factors that justify ordering a compulsory accounting and explaining why they were met on these facts: (1) a fiduciary relationship, (2) entrustment of money or property, (3) no other remedy,

and (4) a demand and refusal of an accounting. The Appellate Division also noted that authorizing the accounting was not giving the guardian of the person powers over the property because petitioner was not given the power to manage the financial but only information to exercise those particular, limited powers conferred upon her in the guardianship order.

M. Rights and Immunity of Guardians

Scott v Thayer, 160 AD3d 1175 (3rd Dept., 2018)

The deceased IP's son appealed from an order that granted the decedent's guardian summary judgment dismissing the son's defamation action seeking damages for statements the guardian purportedly made about him to the IP's treating physicians. The Appellate Division upheld the grant of summary judgment, noting: (1) that the guardian had the power to make health care decisions for the IP; (2) that the statements allegedly made by the guardian to the IP's treating doctor, explaining why the son should not be allowed to be involved in making decisions about the IP's care, were protected by the qualified common interest privilege; and (3) that the son had not tendered sufficient evidence of malice to defeat the privilege.

Martin v Ability Beyond Disability, 2014 NY Slip Op 33021(U); 2014 N.Y. Misc LEXIS 5094 (Sup. Ct., Westchester Cty.) (Giocomo, J.S.C.)

The incapacitated person died, and was buried, without notice to his family, at a cemetery that was not of their choosing, necessitating their exhumation and reburial of the IP' body. Subsequently, the family commenced an action seeking monetary damages against both the facility in which the IP resided, and his Article 81 guardian. The plaintiffs asserted two causes of action against the guardian. The plaintiffs' first cause of action was a common law negligence claim seeking monetary damages for loss of sepulcher. The plaintiffs' second cause of action was based upon their claim that they had suffered emotional damages due to the guardian's failure to comply with the provisions of Article 81 (by failing to notify them of the IP's death, failing to consult with them regarding the IP's care, failing to afford the IP the greatest amount of independence possible, failing to visit the IP, and by failing to file annual reports). The guardian moved to dismiss the complaint, arguing that litigation cannot be commenced against him, as guardian, without first seeking permission from the Court; that the plaintiffs lacked standing to assert claims based upon his alleged failure to comply with the provisions of Article 81; and that Article 81 provides guardians with immunity from any such claims. The Court denied that branch of the guardian's motion which sought to dismiss the first cause of action, noting that it would grant the plaintiffs permission to assert their potentially viable claim seeking damages for loss of sepulcher, *nunc pro tunc*. However, the Court granted that branch of the guardian's motion which sought to dismiss the plaintiffs' second cause of action seeking damages for the guardian's alleged failure to comply with the provisions of Article 81. In so doing, the Court noted that the plaintiffs did not possess standing to assert that cause of action insofar as the guardian owed no independent duty to them. The Court added that the available remedy was not an action seeking damages against the guardian, but rather a motion pursuant to MHL § 81.35 to

remove him for misconduct. Moreover, any penalty for the guardian's alleged failure to file annual reports would be the reduction of his fees.

Cangro v. Rosado, 42 Misc. 3d 1227(A); 2014 N.Y. Misc. LEXIS 672 (Sup. Ct., NY Cty 2014) prior 111 A.D.3d 422, 974 N.Y.S.2d 248, 2013 N.Y. App. Div. LEXIS 7219 (N.Y. App. Div. 1st Dep't, 2013)

Sanctions for frivolous litigation were levied against plaintiff for her third meritless lawsuit against her former guardian who was discharged eight (8) years ago. She had also inappropriately sued other litigants and has been sanctioned. The court noted that "the sheer volume of plaintiff's vexatious litigation tactics, demands such action by this court, as plaintiff's actions severely impact her victims and drain the already diminished judicial resources of the many courts in which she has commenced such frivolous litigation."

Frank Demartino v. Guardian Robert Kruger, Esq., Unpublished Memoranda, Orders and Judgments (EDNY 7/24/09) (09-CV-119(JBW), 09-CV-305 (JBW), 09-CV-2578 (JBW)

Plaintiff, the son and former Attorney- in -Fact for his father, the IP, sued his father's Guardian in Federal Court for alleged violations of his father's due process rights after unsuccessfully appealing State Court orders, all related to the Guardian's alleged breach of fiduciary duty in settling certain litigation against the IP. The Federal Court found that the Plaintiff lacked standing to assert his father's rights, that the plaintiff was engaging in frivoulous litigation and that the guardian was immune from suit, and thus denied plaintiff's motion for summary judgement and awarded costs, disbursements and fees to the Guardian.

V. PROCEDURAL MATTERS

A. Petitions and petitioners

Matter of Michael B. (Famulari), 2019 N.Y. App. Div. LEXIS 1580 (2nd Dept., 2019)

The Appellate Division affirmed an Order that denied a motion to dismiss an Article 81 petition. The motion alleged that the petition was conclusory and lacked the factual specificity required by MHL 81.08 (a)(4), (5). In upholding the appealed Order, the Appellate Division reasoned that, to the extent that the petition was conclusory and otherwise deficient, the court evaluator's reports remedied any pleading defects and delineated the grounds for the appointment of a guardian.

REDACTION RULE: On March 1, 2015 , the Administrative Board of the Courts has approved the adoption of a new rule - section 202.5(e) of the Uniform Rules of the Supreme and County Courts (22 NYCRR 202.5(e)) - requiring attorneys to omit or redact certain confidential personal information from court filings in Supreme and County Court. This rule became effective on January 1, 2015; compliance is voluntary through February 28, 2015, and mandatory thereafter. It covers

both e-filed and paper-filed cases. Proceedings in Surrogate's Court or proceedings pursuant to Article 81 of the Mental Hygiene Law are excepted from Rule 202.5(e).

Matter of K.B., 20 Misc3d 12119(A); 2016 NY Slip Op 50161(U); 2016 N.Y. Misc. LEXIS 429 (Sup. Ct. Dutchess Cty. 2016)

Petition dismissed for pleading opinion rather than meaningful facts sufficient to meet the pleading requirements set forth in MHL 81.08. Although the petition was dismissed, the prayer for costs, fees and expenses was denied.

Matter of Harold W.S., 134 AD3d724; 22 N.Y.S. 3d 73 (2nd Dept 2015)

A nursing home concerned with the welfare of a resident falls within the scope of the statutory definition of those parties who are permitted to commence a proceeding pursuant to MHL 81.06(a)(6), even where the petitioner alleges that the AIP was incapable of arranging to pay his nursing home bill. That allegation did not deprive Supreme Court of subject matter jurisdiction.

Matter of Dandridge (Aldo D.), 120 AD3d 1411; 933 N.Y.S. 2d 125 (2nd Dept. 2014)

During the pendency of a guardianship proceeding , the AIP's caretaker took him out of state and married him. Despite clear evidence of his incapacity introduced at trial, including evidence that he has no recollection of marrying, on appeal by the non-party purported wife, the Appellate Division remanded the matter to the trial court because AIP's counsel had never been amended to seek such relief and the purported wife argued that she therefore lacked notice that voiding of the marriage would be a possible consequence of the guardianship proceeding.

Matter of Brice (Wilks), 42 Misc3d 1231(A); 988 N.Y.S.2d 521 (Sup. Ct. Kings Cty. 2014) (King, J.)

Petitioner, the AIP's granddaughter, who had an estranged and hostile relationship with the AIP, which included an Order of Protection against her, petitioned pro se for the appointment of a guardian for her grandmother in which she sought, inter alia, to stay the AIP from serving as Executor of her deceased husband's estate. The court found among other things that the petition had been alleged only upon information and belief and contained no first hand allegations as to the AIP's ability to meet her own needs. Further, petitioner had no witnesses and planned to make out her case with only the the AIP"s testimony. AIP's counsel objected on the grounds that such testimony would violate her 5th amendment rights against self-incrimination and the court sustained that objection and dismissed the petition. The Court then set the Court Evaluator's fees and directed that they be paid solely by the Petitioner. Petitioner advised the Court Evaluator that she had no funds to pay the fee and thereafter the Court Evaluator moved the court to have the fee paid by the AIP or split between the AIP and the petitioner. The court, finding that the petitioner had brought the proceeding to "settle a score" with the AIP, refused to apply the fee splitting or fee shifting options, stating that fee shifting was designed to discourage frivolous guardianship petitions and

petitions motivated by avarice and bad faith. The court found that this petition had been brought in bad faith, that the AIP had already been burdened by the unnecessary cost of hiring her own counsel and that therefore, petitioner was responsible for the entire fee.

Cheney v. Wells, 23 Misc. 3d 161; 877 N.Y.S.2d 605 (Surr Ct., NY Cty. 2008)(Surr. Glenn)

Counsel for a defendant in a civil action sought to withdraw from representation, asserting an inability to communicate with the client and an inability to carry out her employment effectively as required by DR 2-110. This was the fourth such counsel who sought to withdraw for the same reason. The court opined that this defendant was likely incapable f managing the litigation and unable to appreciate the consequences of that incapacity, which included the loss of her homes and over 3 million dollars, and that a proceeding under MHL Art 81 should be held to determine whether she was in need of a limited property guardian to manage the litigation on her behalf. The court granted the fourth counsel's motion to withdraw contingent upon her commencement of an Art 81 proceeding, even though such a petition would necessarily require release of confidential communications between the attorney/petitioner and her former client, the now AIP. In assessing whether it would be ethical to permit the attorney to serve as the petitioner, the court held that the NY Code of Professional Responsibility did not provide sufficient guidance and therefore it looked to the ABA Model Rules of Professional Responsibility and the Restatement and determined that there was no ethical impediment to such a petition.

Matter of M.R. v. H.R., 2008 N.Y. MISC. LEXIS 4347; 240 NYLJ 8 (Sup. Ct. Bronx Cty, 2008) (Hunter, J.)

Where petition failed to comply with the requirement of MHL 81. 07(c) that it be printed in 12 point or larger bold typeface, upon objection by the AIP's MHLS counsel, the court directed the petitioners to re-file the order to show cause using the proper tye face, without payment of any fees and without service of process upon on the interested parties.

Matter of EBV, 15 Misc.3d 1118A; 839 N.Y.S.2d 432 (Sup. Ct. Nassau Cty. 2007) (O'Connell, J.)

The court substituted petitioners rather than discontinue the matter at the request of the petitioner where the original petitioner was the AIP's adult daughter and the court a found that her continuation in her role as petitioner was causing strained family relations. The court found that the AIP was not objecting to the substitution, that it was not prejudicial to her, that there was a continued need to pursue the guardianship, and that the substitute petitioner, the hospital, had been participating in the proceeding since its inception; that the hospital was a proper petitioner under law and finally, that the case did not turn on the identity of the petitioner.

Matter of Marian E.B., 38 A.D.3d 1204; 832 N.Y.S.2d 374 (4th Dept., 2007)

Although there had been clear and convincing evidence introduced by petitioner hospital that the

AIP, one of its patients, was incapacitated and in need of a guardian, the trial court denied the petition for the reason that the petitioner had failed to propose a person or corporation available and willing to serve. The Appellate Division reversed and remanded for further proceedings holding that MHL 81.08 (12) provides that the petition shall include, inter alia, the name of the proposed guardian, if any, and thus does not require that the petition include a proposed guardian.

In the Matter of The Application of Joseph Meisels (Grand Rebbi Moses Teitelbaum); 10 Misc.3d 659; 807 N.Y.S. 2d 268 (Sup. Ct. Kings Cty., 2005)(Leventhal, J.)

An Article 81 petition was brought for guardianship over the Grand Rabbi of The Satmar sect. He had previously appointed one of his sons and his longtime personal secretary as HCP and POA. The petition alleged that the Rabbi was disoriented, in need of round the clock assistance and was in poor health but there was no allegation that he was not receiving the care he needed. The court allowed the petitioner to submit additional affirmations and considered them as if the pleading had been amended to include them. In fact, the Court visited the Rabbi at home and noted that he has a butler who sleeps in his room, an intercom system linked to his room, a personal secretary, a personal paramedic, a chauffeur and cook and other staff to meet his needs. The judge spoke to the Rabbi who told him that he was satisfied with his care. Since there were no allegations that he was at risk due to his limitations, and since the facts clearly established that he was in fact not at risk and that all his needs were met, the court concluded that there was no showing of a need to commence a guardianship proceeding and dismissed the petition.

Matter of J.G., 8 Misc.3d 1029A; 806 N.Y.S.2d 445 (Sup. Ct , Bronx Cty., 2005) (Hunter, J.)

"A person otherwise concerned with the welfare of the person alleged to be incapacitated" under MHL §81.06 cannot be an attorney representing the AIP in a personal injury suit. As the attorney in the personal injury suit, the petitioner is privy to confidential information that he cannot divulge unless his client waives the attorney client privilege. (*See also* under Counsel -

Matter of D.G., 4 Misc.2d 1025A; 798 N.Y.S.2d 343 (Sup. Ct., Kings Cty, 2004) (Leventhal, J.)

The law firm acting as counsel for the petitioner in an Art 81 proceedings was the same firm acting as counsel for the AIP in a simultaneously filed medical malpractice suit. This law firm had obtained the AIP's medical records in connection with the med mal suit before commencing the Art 81 proceeding. The law firm failed to disclose this conflict in its petition, or to the Court Evaluator or to counsel for the AIP in the Art 81 proceeding. Moreover, during the proceedings, the petitioner wanted to terminate its relationship with the firm in the Art 81 proceeding and also wanted to consent to a cousin's appointment as Guardian and the law firm tried to discourage the petitioner from consenting to the cousins appointment, presumably because the cousin, as Guardian, could then decide to hire new counsel for the med mal case. The court finds violations of DR5-105(a) and also DR5 101 in that the law firms independent judgement was compromised by both its dual allegiances and its own financial interests.)

Matter of Mary "J.", 290 A.D.2d 847; 736 N.Y.S.2d 542 (3rd Dept. 2002)

Specificity in pleading requirement of MHL §81. 08 was met where the petition "detailed the nature and extent of the [AIP's] physical and mental disabilities through statements of her doctor and social worker at the nursing home and asserted that despite these conditions and the assistance necessary [the daughter seeking to care for the AIP and whom the AIP wanted to have care for her] had refused to allow a social worker to conduct [a home visit]".

Matter of Beritely (Luberoff), NYLJ, 12/8/95, p. 25, col. 1 (Sup. Ct., Suffolk Cty.) (Luciano, J.)

Conservator sought to convert MHL Art. 78 conservatorship into guardianship. Court found petition deficient for not describing functional level of man, who had bi-polar disorder. Court evaluator's testimony and report, however, proved guardian was needed. Court named co-guardians for property and allowed AIP's elderly mother to resign as co-conservator and become co-guardian of personal needs.

Matter of Onondaga Cty. Department of SS (Parker), 162 Misc.2d 733; 619 N.Y.S.2d 238 (Sup. Ct., Onondaga Cty., 1994)

Petition denied for failure to comply with pleading provisions of §81.08 requiring petition to include, *inter alia*, a description of AIP's functional level, specific factual allegations as to personal actions and/or financial transactions or other occurrences which demonstrate that person is likely to suffer harm and approximate value and description of financial resources of person. Here, petition did not contain any detailed information as required by that section and did not set forth any meaningful facts pertaining to the AIP's functional level. The only information provided was physician's note that person does not understand his medical condition and that his ability to manage his own affairs is impaired. Also petition is devoid of any specific factual allegations as to the personal actions or financial transactions of person which illustrate that he is likely to suffer harm. Also, the AIP's refusal to divulge his financial resources may have been indication of awareness as opposed to incapacity.

Matter of Staiano, 160 Misc.2d 494; 609 N.Y.S.2d 1020 (Sup. Ct., Suffolk Cty., 1994)

Although Article 81 and its predecessors do not mention cross petitions, legitimacy of cross-petition as pleading has been implicitly acknowledged. In addition, because cross-petitions are allowable in MHL Art. 77 proceedings, it seems reasonable to conclude that use of cross-petition in guardianship proceeding is also permissible procedure where cross-petition raises issues as to which court clearly has jurisdiction.

Matter of Rochester General Hospital (Levin), 158 Misc.2d 522; 601 N.Y.S.2d 375 (Sup. Ct., Monroe Cty., 1993)

Representative of hospital other than CEO, such as V.P. of administration, is authorized to commence proceeding as "a person otherwise concerned with the welfare of the person alleged to be incapacitated."

Matter of Petty (Levers), 256 A.D.2d 281; 682 N.Y.S.2d 183 (1st Dept., 1998)

Petition is deficient where it consists of conclusory allegations of incapacity without specific factual allegations.

B. Service and Returns of Petitions and Orders to Show Cause

(i) Proper and timely Service

Matter of Anthony Rose, 26 Misc.3d 1213A; 907 N.Y.S.2d 104 (Sup.Ct. Dutchess Cty) (Pagones, J.)

Upon motion by counsel for AIP, the court declined to dismiss the petition under CPLR 3211(a) (10) as jurisdictionally defective. Petitioner had failed to serve the AIP's wife, mother father, sister and the local Department of Social Services from which the AIP was receiving benefits. Petitioner did serve the petition on those parties upon receiving the motion papers. The court held that this failure of service was not a jurisdictional defect and declined to dismiss the petition on those grounds, although it did ultimately dismiss the petition on other grounds.

Matter of Theodore T., 28 A.D.3d 488; 813 N.Y.S.2d 733 (2nd Dept. 2006)

Appellate Division reverses trial court's denial of motion to dismiss OSC which was made returnable on a date that was 12 days late pursuant to former §81.07.

Matter of Harry G., 12 Misc. 3d 232; 820 N.Y.S.2d 426 (Sup. Ct., Nassau Cty., 2006) (Asarch, J.)

Respondents, AIP's ex-wife, who held the POA and HCP, and the AIP's son was served with Notice of Petition and thereafter requested from petitioner's counsel a copy of the petition, alleging that there was information or allegations therein that affected their property rights and that they were therefore entitled to full and specific notice, an opportunity to be heard and an opportunity to confront their accusers in court. AIP's counsel refused to turn it over, both to protect his rights in the Art 81 proceedings as well an his rights in the long resolved matrimonial proceeding that the wife sought to reopen. (A) A constitutional challenge to MHL 81.07 (g)(2) was not decided because the respondent had failed both to specifically brief the alleged constitutional infirmities and also because she to failed to give notice of the challenge to the Attorney General pursuant to Exec Law §71.

However, the court did observe that she had in fact been given notice of the proceeding including the court date, was entitled to be present on that date with her own counsel and was able to determine her desired level of involvement in the proceeding. (B) Also the court held that the specific provisions of Article 81 supercede the general directions of CPLR 403(b) since MHL 81.07 as amended is clearly inconsistent with general provisions of CPLR 403.

Matter of Margot Lipton, 303 A.D.2d 915; 757 N.Y.S.2d 424 (4th Dept., 2003)

Failure of proper service upon all parties named in MHL 81.07 resulted in vacating of appointment of guardian.

Matter of Hammons (McCarthy), 168 Misc.2d 874; 645 N.Y.S.2d 392 (Sup. Ct., Queens Cty., 1996)

Court improperly fashioned alternate method of service other than personal delivery pursuant to§81.07 (d)(2)(i) because AIP's lifestyle of living and sleeping among stray cats in his apartment and walking throughout neighborhood to feed stray cats has made him difficult individual for the process server to locate. Statute requires proof that AIP knew service was being attempted and was affirmatively evading service before an alternate method of service can be authorized.

Matter of Kautsch/Matter of Barrios Paoli, 173 Misc.2d 736; 662 N.Y.S.2d 388 (Sup. Ct., Queens Cty., 1997)

Petitioner sufficiently demonstrated that AIP refused to accept service, thereby authorizing court to grant alternate method of service other than personal delivery pursuant to §81.07 (d)(2)(i) where process server spoke with AIP who was behind locked door, AIP refused to buzz server through when he stated that he had papers to be served and when process server returned on two following days, no one answered bell. AIP's refusal to open door when process server stated that he had papers to be served constitutes refusal.

Matter of Nixon (Corey), NYLJ, 6/4/96, p. 25, col. 1 (Sup. Ct., Suffolk Cty.)(Luciano, J.)

Where AIP had been secreted, and essential obstacle to commencement of Art. 81 proceeding was petitioner's inability to locate and serve AIP court concludes that remedy may be found by combining Article 81 proceeding with *sua sponte* habeas corpus proceeding in which party secreting AIP is directed to produce AIP before Court in order to allow inquiry as to whether she is being unlawfully restrained, detained or confined.

Matter of Staiano, 160 Misc.2d 494; 609 N.Y.S.2d 1021 (Sup. Ct., Suffolk Cty., 1994)

Once jurisdiction has been secured over AIP by proper service, service of all other papers is governed by CPLR 2103, which authorizes service by mail on a party's attorney, thus, service of cross-petition may be made upon AIP's counsel and not AIP.

(ii) Notice of Petition

a. Validity of Constitutionality and statutory arguments

<u>Matter of Harry G.</u>, 12 Misc.3d 232; 820 N.Y.S.2d 426 (Sup. Ct., Nassau Cty., 2006) (Asarch, J.)

Respondents, AIP's ex-wife, who held the POA and HCP, and the AIP's son was served with Notice of Petition and thereafter requested from petitioner's counsel a copy of the petition, alleging that there was information or allegations therein that affected their property rights and that they were therefore entitled to full and specific notice, an opportunity to be heard and an opportunity to confront their accusers in court. AIP's counsel refused to turn it over, both to protect his rights in the Art 81 proceedings as well an his rights in the long resolved matrimonial proceeding that the wife sought to reopen. (A) A constitutional challenge to MHL 81. 07 (g) (2) was not decided because the respondent had failed both to specifically brief the alleged constitutional infirmities and also because she to failed to give notice of the challenge to the Attorney General pursuant to Exec Law §71. However, the court did observe that she had in fact been given notice of the proceeding including the court date, was entitled to be present on that date with her own counsel and was able to determine her desired level of involvement in the proceeding. (B) Also the court held that the specific provisions of Article 81 supercede the general directions of CPLR 403(b) since MHL 81.07 as amended is clearly inconsistent with general provisions of CPLR 403.

b. Who is entitled to the Petition?

<u>Matter of David J.D.(Azzi)</u>, 2016 N.Y. App.Div. LEXIS 5309 (4th Dept.. 2016)

AIP's siblings had been given notice of the Article 81 proceedings. Further, they held a financial stake in the outcome of the guardianship proceeding because a finding of incapacity might have resulted in the reversal of a transaction from which they had benefitted financially. Therefore they were both "interested parties" in the proceeding, and also were "aggrieved parties" who had standing to appeal.

<u>Matter of Harry G.</u>, 12 Misc.3d 232; 820 N.Y.S.2d 426 (Sup. Ct., Nassau Cty., 2006) (Asarch, J.)

Respondents, AIP's ex-wife, who held the POA and HCP, and the AIP's son was served with Notice of Petition and thereafter requested from petitioner's counsel a copy of the petition, alleging that there was information or allegations therein that affected their property rights and that they were therefore entitled to full and specific notice, an opportunity to be heard and an opportunity to confront their accusers in court. AIP's counsel refused to turn it over, both to protect his rights in the Art 81 proceedings as well an his rights in the long resolved matrimonial proceeding that the wife

sought to reopen. While court states that it has a policy of NOT automatically turning over the petition in such circumstances, it did so in this case because it was clear that the ex-wife and son already had all of the information in the petition, having been the petitioners in a prior Article 81 proceeding that had to be discontinued because the AIP was living out of State.

(iii) Withdrawal of Petition

Matter of Marie H., 42 A.D.3d 782; 839 N.Y.S.2d 857 (3rd., Dept 2007)

A pro se petitioner obtained counsel after the proceeding had begun. Subsequently the newly obtained attorney, in open court with the petitioner present, stipulated to withdraw the petition. The petitioner then moved pro se to vacate the stipulation alleging collusion between the Court Evaluator and the AIP's granddaughter. Finding no such collusion, the trial court denied the motion and the petitioner appealed. On appeal, the court found no evidence of the collusion and affirmed.

C. Jurisdiction and Venue

Matter of Bednarek v. Ingersoll, 2019 N.Y. Misc. LEXIS 411 (Sup. Ct., Chemung Cty.) (Guy, J.)

Petition seeking an accounting was filed by the IP's daughter against the IP's other daughter who was the IP's agent under a Power of Attorney. The petition further sought to have the Power of Attorney revoked and a determination as to the propriety of certain transactions undertaken by the agent-daughter. The agent-daughter argued that the Article 81 court lacked jurisdiction over her because she was merely "a person entitled to notice" and not a "party" in that proceeding. The Court held that the agent-daughter's formal appearance by counsel and active participation in the guardianship proceeding rendered her subject to the Court's jurisdiction in the Article 81 proceeding, despite her not having been named as either a petitioner or respondent in that proceeding.

Application of DC, ____Misc3d___, 32 N.Y.S. 3d 484; 2016 NY App. Div. LEXIS 4504 (1st Dept. 2016)

Supreme Court's jurisdiction over a guardianship proceeding is not extinguished when the court discharges a guardian, therefore, an application under CPLR Art 78 to prevent the court from conducting further proceedings on the original application after a guardian had been discharged on consent of the parties was denied.

James v. State of New York, 2013 U. S. Dist. LEXIS 64579 (EDNY)(2013) (Pohorelsky, M.J.)

Plaintiff, who had been adjudicated incapacitated in an Article 81 proceeding in State court filed a *pro se* complaint in Federal court challenging the State court proceedings, including the results of unsuccessful appeals taken through the state court system that had failed to establish her theory that the guardianship was part of a conspiracy to deprive her of certain property. She filed the matter in

Federal Court *pro se* because her Article 81 guardians declined to prosecute the case on her behalf. The Federal Court held that: (1) this was in effect another appeal of the state court determinations and as such is prohibited by the Rooker-Feldman doctrine; (2) it was not obliged to appoint a *guardian ad litem* for her in Federal court since there was no substantial claim that could be brought in Federal Court which lacked subject- matter jurisdiction; and, (3) because she already had been adjudicated incapacitated and a guardian had been appointed, and there was no evidence that this guardian was violating any duty toward her, the plaintiff may not initiate or prosecute a civil action on her own. The Court added that if she wished to challenge the actions of her guardian as violative of their duty toward her, she could still do so in the State court.

Harvey v. Chemung County, 2012 US Dist LEXIS 29831 (WDNY 2012)

Plaintiff, in an action in Federal District Court alleged that NYS Supreme Court wrongly determined that she was unqualified to serve as her husband's guardian and had thereby violated both her and his civil rights. The District Court held that it lacked jurisdiction because relief could be predicated only upon a decision that the State Court was wrong and that such a finding would in effect be deciding an appeal of the judgment in the State Court guardianship proceeding which would be prohibited under the Rooker-Feldman doctrine.

Matter of Theodore T. v. Charles T., 78 A.D.3d 955; 912 N.Y.S. 2d 72 (2nd Dept., 2010)

Noting that "[t]he petitioner bears the ultimate burden of establishing that the court has personal jurisdiction over the respondent," and that "[t]he method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with," the Appellate Division affirmed so much of the Supreme Court's order in which it dismissed the petition for lack of jurisdiction due to the petitioner's use of a method of service which was not expressly authorized in the order to show cause. However, the Appellate Division remitted the matter back to the Supreme Court, noting that the court had failed to explain any of the factors upon which it had relied in ordering that the petitioner pay the fees generated by the court evaluator and by the AIP's court-appointed counsel.

In the Matter of Yehuda C., 63 A.D.3d 923; 882 N.Y.S.2d 179 (2nd Dept. 2009)

The appellants had been granted guardianship of their incapacitated son in a proceeding in Kings County. All of the child's property, including a sizable medical malpractice settlement, was placed in an SNT. The guardians then moved their family to Israel for religious reasons and later petitioned for, and were granted, guardianship of the person and property of their son by the Family Court in Israel. Upon subsequent application to the Supreme Court in kings County to terminate the guardianship and SNT, Supreme Court denied the application. On appeal, the Appellate Division held that there was no no longer a need for a New York guardianship and that it would be impractical and unnecessary for a New York court and Court Examiner to provide duplicate supervision of the guardianship of a child in a foreign land but that while the guardianship of the person and property of the child should be terminated, there was no basis for the termination of the SNT.

Estate of McLaren, 6/10/09, NYLJ, 47 (col. 1) (Surr Ct, Queens Cty) (Surr. Nahman)

A legatee under a Will petitioned to have the named executor removed and to have an Art 81 guardian appointed for him. The Surrogate denied the petition and held that under MHL 81.04(a) only the Supreme Court and the County Court in the counties outside the city of New York have the power to appoint an Article 81 guardian. The court further added that the individual for whom they sought a guardian may not be a resident of this State.

Matter of P.V., 2009 NY Misc. LEXIS 2497; 241 NYLJ 107 (Sup. Ct. NY Cty.)(Visitacion-Lewis, J.)

Petitioner wife sought the appointment of a guardian under Article 81 for her husband, an alleged incapacitated person, laying comatose in a Czech Republic hospital. A court evaluator's report recommended dismissal of the action for lack of jurisdiction. The court agreed, finding neither the petitioner or respondent have lived in New York State since 1995, thus no nexus existed between the parties and the State. Petitioner contended the existence of a Citibank joint account was the basis upon which New York courts may assume jurisdiction. The court noted as a joint account holder, petitioner had full access to such account without attaining New York State guardianship. It ruled the absence of the petitioner and respondent from the state, as well as the country, rendered it impractical and inappropriate to accord petitioner guardianship. Hence, the petition was dismissed.

Matter of Fister, 19 Misc.3d 1145A; 867 N.Y.S.2d 17(Sup. Ct., Queens Cty. 2008) (Thomas, J.)

After a hearing held in NY County upon an Order to Show Cause submitted in that county, the AIP was determined to be an IP and an Order and Judgement was entered in such county appointing a guardian for a period of three years. The guardian later moved within the three year period, by order to show cause in NY County to modify the original order to the extent of changing the term from a period of three years to an indefinite period. Another judge, to whom the order to show cause was presented, declined to sign the order, instead, issuing an order, *sua sponte,* directing that venue of the action be changed to Queens where the IP was then residing. The court in Queens County declined to accept the transferred case on the grounds that the transfer was in violation of law, holding that an action may be tried in the venue designated even though improper if there is no motion for change of venue, that the place of trial of an action shall be in the county designated by the plaintiff unless changed to another county by order *upon motion*; and that there is no basis in either MHL 81.05(a) or CPLR 510 for a court to *sua sponte* change venue. The court further held that there is absolutely no authority to change the county where an action has been brought, post judgment...and that a motion to modify an order shall be made to the judge who signed the order or judgment. The court concluded: "[i]t is utterly implausible to expect that a case should be transferred from county to county every time a ward is moved. To do so would sabotage the continuity by the court and court examiners to properly and efficiently administer a guardianship case throughout many years." See also, companion case, *Matter of Davis,* NYLJ 6/4/08, p.32, col.3. (Thomas, J.)

Matter of Peer (Digney), 50 A.D. 3d 1511; 856 N.Y.S.2d385 (4th Dept. 2008)

Upon the death of the AIP during the Article 81 proceeding, the matter should have been transferred to Surrogate's Court because ultimately that court must determine distribution of the AIP's estate.

Matter of Davis, 6/4/08, NYLJ 32 (col. 3) (Sup. Ct., Queens Cty.)(Thomas, J.)

Where the AIP resided in a facility in Queens County and petitioner filed an Article 81 petition in Supreme Court, Kings County, the court in Kings County *sua sponte* transferred the case to Queens citing MHL 81.05 (a) as authority. The Queens court held that MHL 81.05(a) provides that the proceeding must be brought where the AIP resides or is physically present but does not contain any provision for a change of venue if a matter is filed in an improper county. It also found that MHL 81.07 provides only for a change of venue in relation to convenience of the parties or witnesses, or condition of the AIP. The court held that CPLR 510 controlled and that such section provided that venue may be changed only upon motion of a party and that it was thus an abuse of discretion for the Kings County court to have changed venue *sua sponte* on the basis of it having been filed in the wrong county. Since the matter had already been delayed nearly 2 months, the court in Queens considered the petition, signed the Order to Show Cause but made the petition returnable in Kings where it has been originally commenced.

Matter of Kaminester, 17 Misc.3d 1117(A) (Sup. Ct. NY Cty 2007), *aff'd and* modified, Kamimester v. Foldes, 51 A.D.3d 528; 2008 NY App Div LEXIS 4315 (1st Dept.), *lv dismissed and denied* 11 N.Y.3d 781 (2008) ; *subsequent related case*, Estate of Kaminster, 10/23/09, N.Y.L.J. 36 (col.1)(Surr. Ct., NY Cty)(Surr. Glen)

After the death of the IP it was discovered by the Executrix of his estate that his live in girlfriend had secretly married him in Texas and transferred his property to her name in violation of a temporary restraining order that had been put into effect during the pendency of the Art 81 proceeding. These acts in violation of the temporary restraining order took place before the trial court had determined, following a hearing, whether the AIP required the appointment of a guardian. Upon the petition of the Executrix to the Court that had presided over the guardianship proceeding, the court "voided and revoked" the marriage and transactions and held the AIP's purported wife in civil and criminal contempt of court and ordered her to pay substantial fines. On appeal by the purported wife, the Appellate Division held that under the circumstances and upon the proof, the marriage had been properly annulled. In the subsequent case, arising in Surrogate's Court during the probate of the IP's Last Will, the Executrix sought a determination of the validity of the spousal right of election exercised by the purported spouse, arguing that her marriage to decedent had taken place 2 1/2 months after a Texas court had appointed a Temporary guardian, during the pendency of the NY Article 81 proceeding and 2 ½ months before the IP died. Moreover, in the earlier reported decision of Supreme Court, the court had found that there was a need for a guardian based on the IP's cognitive deficits and had posthumously declared the marriage revoked and voided due to his incapacity to marry. The purported wife argued that her property rights and marriage could not be defeated by the posthumous annulment because under DRL Sec. 7(2) a marriage involving

a person incapable of consenting to it is "voidable", becoming null and void only as of the date of the annulment in contrast to MHL 81.29(d) permitting the Article 81 court to revoke a marriage "void ab initio," a distinction critical to the purported wife's property right. The Surrogate ultimately held , based upon both statutory and equitable theories, that the marriage had been "void ab initio," thus extinguishing the purported wife's property rights, including her spousal right of election.

Matter of Lillian A., 20 Misc.3d 215; 860 N.Y.S. 2d 382 (Sup. Ct., Delaware Cty., 2008) (Peckham, J.)

An Article 81 guardian was appointed by a New York court after a bedside hearing, while the AIP was a patient in a hospital in New York. The Order provided, among other things, that the guardian had the power to change the IP's place of abode and also that the guardianship was for a limited durations and subject to being extended upon further motion at a later date. The guardian then changed the place of the IP's abode to an out-of- state nursing home. When the Order was expiring , the guardian moved in the New York court to extend his powers. The New York Court held that (1) it did have jurisdiction over the IP even though she was now out-of-state because, although the guardian had the power to transfer her abode, he did not have the power to and did not change her domicile and (2) if a judicial proceeding is begun with jurisdiction over the person it is within the power of the State to bind that party by subsequent orders in the same cause. Having established that jurisdiction existed, the court then held that because the IP was then "not present in the state" under MHL 81.11 (c)(1) the IP's presence at the hearing could be waived.

English v. Sellars et al, 2008 U.S Dist. LEXIS 4514 (WDNY 2008)

IP brought action *pro se* in Federal court to have his guardians removed. The court held that although he appeared to be arguing some deprivation of his rights as a citizen, he had not specifically alleged any procedural or substantive Federal constitutional concern with how Art. 81 was applied in his case and asserted only broadly that he had been deprived of life, liberty and property without due process of law. The Federal court therefore dismissed the claim for lack of jurisdiction.

Matter of S.A.W., June 5, 2007, NYLJ p. 23, col. 3(Sup. Ct., Rockland Cty.)(Weiner, J.)

Motion for a change of venue for a contested final accounting proceeding from the county where the AIP was in a rehab center at the start of the case to the county where the AIP was then residing 6 years later at the time of the motion was denied by the court stating that more is needed than the mere allegation that there is no longer a nexus with the original county where the court suspected that the motion was possibly forum shopping and the first court was familiar with the 6 year history of the case.

Matter of J.S.W., 15 Misc.3d 1118A; 839 N.Y.S.2d 437 (Sup. Ct. Bronx Cty. 2007)(Hunter, J.)

Where the divorce proceeding was pending in Suffolk County and the Article 81 proceeding was

pending in the Bronx, it was unnecessary for the attorney for the guardians to seek approval of the Suffolk divorce settlement from the court presiding over the Article 81 proceeding in the Bronx.

In the Matter of Loretta I., 34 A.D.3d 480, 824 N.Y.S.2d 372 (2nd Dept 2006); In the Matter of Johanna C., 34 A.D.3d 465; 824 N.Y.S.2d 142(2nd Dept 2006); and In the Matter of Annette I., 34 A.D.3d 479; 823 N.Y.S 2d 542 (2nd Dept 2006)

In a guardianship proceeding brought on because 3 allegedly incapacitated persons had allegedly been taken advantage of by a third party and, *inter alia*, coerced into signing away the deed to their home, the third party was neither named nor given notice that the court could ultimately divest her of her title to the property. Title was held by two of the AIPs and the third AIP was the child and natural heir of one of them. The Appellate Division did order that title revert back and the third party appealed on the grounds that the court lacked jurisdiction over her to so divest her of title. With respect to the appeals in the matter involving the 2 AIP's who were title holders, the Appellate Division reversed that portion of the order noting that the transactions in question were not made by persons who were yet adjudicated incompetent and for whom a guardian had already been appointed but, rather, by persons who were unable to understand the nature and consequences of their actions, rendering the transactions *voidable but not void* and concluded that granting the guardians authority to commence a turnover proceeding against the third party rather than deeming the transactions void, and enjoining any further transfer of the subject real property pending the turnover proceeding was a more appropriate course of action. In the appeal involving the child and natural heir of the title holders, the appeal was dismissed on the grounds that the non-title holding child was not aggrieved.

In the Matter of The Application of Joseph Meisels (Grand Rebbi Moses Teitelbaum), 10 Misc.3d 659; 807 N.Y.S. 2d 268 (Sup. Ct. Kings Cty., 2005) (Leventhal, J.)

An Article 81 petition was brought for guardianship over the Grand Rabbi of The Satmar sect**.** The parties wanted to bring the proceeding in the Bet Din religious tribunal but could not agree on which one so the petitioner ultimately filed in State Supreme Court. The court noted that the matter could not have been held in the Bet Din, which would have been akin to submitting it to arbitration because the case involved the capacity of an individual and not a religious matter; guardianship involves important civil liberties protected by due process, that such process includes a plenary hearing with counsel, application of the rules of evidence, the clear and convincing evidence standard, the placement of the burden of proof on the petitioner and the right to a jury. Thus, the court stated: " An Article 81 proceeding cannot be hard or determined other than by a New York State Court."

Matter of Oustinow, NYLJ, 4/8/03 (Sup. Ct., NY Cty.)(Gangel-Jacobs)

Very interesting case involving a dispute among the highest authorities of the Russian Orthodox Church fighting for control over church property and ideology under the pretext of an Article 81 proceeding for guardianship over the person and property of the AIP, Vitaly Outesnow, the Metropolitan ("Pope") of the Russian Orthodox Church in the US. At the time of the proceeding, the AIP was in Canada and petitioner was claiming that the AIP had been kidnaped and taken there

by church authorities. Court does send Court Evaluator to Canada to evaluate the circumstances. Ultimately, the court refused to hear the case for finding a lack of jurisdiction in the NY Courts because the AIP was a Canadian citizen, living in Canada where he was being adequately cared for at the time of the proceeding, with no intention of returning to NY with no property in NY. Court dismisses application without prejudice to re-file in Canada.

Matter of the Application for an Individual with a Disability For Leave to Change Her Name, NYLJ, p. 20, col 4, 4/01/03 (Civ. Ct., Richmond Cty) (Straniere, J.)

Mildly MR individuals was permitted to change her name in Civil Court without a guardian. Court was initially uncertain whether it could hear case without guardian but, after reviewing purpose of Art. 81 ultimately decides that she is not so functionally limited as to be unable to petition for her name change. Court also points out that it has no jurisdiction over guardianship and would have to refer the case to Supreme Court first and further that there is no Article 81 Part in Richmond County.

Matter of Verna HH, 302 A.D.2d 714; 756 N.Y.S.2d 300 (3rd Dept., 2003)

AIP lived in Kentucky for 10 years prior to commencement of Art 81 proceeding. Petitioner brought AIP back to NY just before filing petition. AIP moved to dismiss petition on grounds that Court in NY did not have jurisdiction over her because she was a Kentucky resident and did not have any property in NY or any contacts with NY. Lower court grants dismissal and App Div reverses stating that MHL §81.04 requires nothing more than mere presence within the state. (Court also declines to deprive NY courts of jurisdiction the grounds of *forum non-conveniens*).

Taylor v. Martorella, 192 Misc.2d 214; 745 N.Y.S.2d 901 (Sup. Ct., Kings Cty., 2002)

An Article 81 was found not to be equivalent to a guardian ad litem for the purposes of establishing venue pursuant to CPLR 503 (b). Court holds that under CPLR Art. 12, a GAL's only function is to protect the interests of the party in a particular action or proceeding where as an Art 81 guardian acts in an array of legal proceedings as fiduciaries who can sue and be sued in their respective representative capacities and made parties to a case. Since a Guardian ad Litem is not a real party in interest, his or her residence can not control the choice of venue.

Matter of Pulaski, NYLJ, 12/21/01 (Sup. Ct., Kings Cty.)(Leventhal, J.)

Parties to an Article 81 petition cross-filed Family Offense petitions in Family Court stemming from an alleged assault of the AIP and her mother by the petitioner during a visit that had been ordered by the Supreme Court in the Art. 81 proceeding. Supreme Court ordered that in the interests of justice, the Family Offense petition be transferred to the Supreme Court. The Court reasoned that it is a court of general jurisdiction with coordinate jurisdiction over Family Court matters, and that it was most familiar with the circumstances of the case.

Turner v. Borobio, NYLJ, 12/24/01, p. 17 (SDNY Bankruptcy Court)

The AIP in this Art. 81 proceeding was also involved in a bankruptcy proceeding. He removed the Art. 81 matter to bankruptcy court under 28 USC 1334 (b) claiming that the outcome of the bankruptcy proceeding depended upon the outcome of the Article 81 proceeding. The petitioner in the Art. 81 proceeding moved to have the Article 81 proceeding remanded back to State Supreme Court. The Bankruptcy Court holds that the appointment of a guardian will not affect the AIPs rights in the bankruptcy proceeding, and therefore, there is no federal jurisdiction over the Article 81 proceeding. The Bankruptcy Court therefore court grants the motion to remove the matter back to State Supreme Court.

Matter of Francis Kleinman, NYLJ, 6/5/00, p.21,col. 3 (Sup.Ct., Nassau Cty.)(Rosetti, J.)

Removal of Art. 81 proceeding at accounting stage was transferred to Surrogate's Court after death of AIP because there was an interrelationship between the Art.81 and the probate proceeding.

Estate of Leon Lianides, NYLJ, Feb. 7, 2001, p. 21 (Surr. Ct., Bronx Cty.)(Surr. Holzman)

Surrogate Court administering estate of IP holds that it lacks the jurisdiction to determine claims by decedent (IP) that prior to the IPs death, the guardian mismanaged the IPs affairs. Surrogate transfers this issues to Supreme Court that appointed the guardian.

Matter of Burns (Salvo), 287 A.D.2d 862; 731 N.Y.S.2d 537 (3d Dept., 2001)

Death of IP during proceeding on petition by guardian to confirm charitable gift by IP did not deprive Supreme Court of jurisdiction and transfer to Surrogates Court was not required.

Matter of Margaret Louise Beasley, 234 A.D.2d 32; 650 N.Y.S.2d 170 (1st Dept., 1996)

Where proposed ward has been institutionalized in facility located in Oswego County for more than 20 years, Surrogate's Court, New York County, properly rejected challenge to its jurisdiction on ground that there was no showing that proposed ward ever had capacity to express an intention to change her domicile from New York County where she was born and her parents have continuously resided. Court also properly refused to transfer venue to Oswego County upon grounds that petitioners reside in New York County, court had already expended great deal of time and effort on matter, Law Guardian, who is serving pro bono, works in New York County and has not been impeded in her tasks by location of facility in which her ward is institutionalized, the court can accept responses to written interrogatories from witnesses who are unable to appear in New York County, and appellant otherwise failed to demonstrate that convenience of material witnesses or ends of justice would be served by transfer.

Matter of Bowers, 164 Misc.2d 298; 624 N.Y.S.2d 750 (Surr. Ct., NY Cty., 1995)

A foreign guardian of nonresident incapacitated person who is sole distributee of estate of New York domiciliary may proceed in Surrogate's Court to obtain letters of guardianship and acquire standing to apply for letters of administration in estate. Surrogate's Court enjoys limited jurisdiction over Art. 81 proceedings where impaired person has beneficial interest in estate. Although Art. 81 does not specifically confer jurisdiction on Surrogate's Court where beneficiary of estate is neither resident of nor physically present in New York, 81.05 governing venue, provides that where IP is not present in State, residence shall be deemed to be county in which property is located. Thus, petitioner will not be required to proceed in two courts.

Matter of Daniel K. Le and Young, 168 Misc.2d 384; 637 N.Y.S.2d 614 (Sup. Ct., Queens Cty., 1995)

Court exercises "transient" jurisdiction over AIP who was physically present in State at time guardianship proceeding was commenced, although he did not reside and was not otherwise domiciled in state, where he returned to NY to settle personal injury suit in NY court.

Matter of Mary S., 234 A.D.2d 300; 651 N.Y.S.2d 81 (2nd Dept., 1996)

Court properly exercised jurisdiction over AIP living out of state where she had personal connections and property in this State.

Matter of Vaneria (Norman), 275 A.D.2d 221; 712 N.Y.S.2d 107 (1st Dept., 2000)

New York courts lacked jurisdiction where 19-year-old AIP lived in out-of-state developmental center and had no property within the state, even though AIP's parents lived in NY.

Matter of Shea (Buckner), 157 Misc.2d 23; 595 N.Y.S.2d 862 (Sup. Ct., NY Cty., 1993)

Supreme Court has authority, in its discretion, to grant powers to foreign guardian with respect to ward's New York property, but it is questionable whether New York court would choose to exercise such discretion where out-of-state court that appointed guardian is clearly better situated to decide whether such powers are appropriate.

Matter of Staiano, 160 Misc.2d 494; 609 N.Y.S.2d 1021 (Sup. Ct., Suffolk Cty., 1994)

Once jurisdiction has been secured over AIP by proper service, service of all other papers is governed by CPLR 2103, which authorizes service by mail on a party's attorney, thus, service of cross-petition may be made upon AIP's counsel and not AIP.

Matter of Serrano, 179 Misc.2d 806; 686 N.Y.S.2d 263 (Sup. Ct., Bronx Cty., 1998)

Foreign jurisdictions' findings of incompetency not entitled to full faith and credit, particularly when AIP is not a domiciliary of that jurisdiction.

Matter of Tracey L. Card (Siragusa), 214 A.D.2d 1022; 626 N.Y.S.2d 336 (4th Dept., 1995)

Venue lay in county where estranged AIP spouse was residing at time of filing of Art. 81 petition, not in county where marital home was located.

(i) Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (MHL Art 83) Issues

Moore v. Highland Care Center, 2018 NYLJ LEXIS 3819 (Sup. CT. Queens CTy. (McDonald, J.)

A guardian appointed in the US Virgin Islands was, through Full Faith and Credit, found to have standing to commence a personal injury action on behalf of an IP in New York.

Guardianship of John A.Q.Q., NYLJ, Jun. 1, 2018,at p. 27, col.3 (Surr. Malave-Gonzalez)(Surr. Ct. Bronx Cty)

The transfer of a New York Guardianship to Florida is granted. The Surrogate describes in detail in this decision the statutory steps followed by the petitioner.

Guardianship of John A.Q.Q., NYLJ, Jun. 1, 2018,at p. 27, col.3 (Surr. Malave-Gonzalez)(Surr. Ct. Bronx Cty)

The transfer of a New York Guardianship to Florida is granted. The Surrogate describes in detail in this decision the statutory steps followed by the petitioner.

Matter of Louise D., 47 Misc.3d 716; 3 N.Y.S.3d 918 (Surr. Ct. Nassau Cty. 2015)(Surr. McCarty III)

A New York 17A guardian moved with her ward to Florida and wanted to transfer the supervision of the guardianship to the Florida courts. She applied for and was granted guardianship in Florida and then applied in NY to either terminate or transfer the guardianship under the Uniform Guardianship and Protective Jurisdiction Act. The NY Court found that all the statutory requirements had been met, there were no objections to the transfer, that adequate arrangements existed in Florida for the ward, and that no party was seeking a hearing. The court approved the request without *sua sponte* setting it for a hearing.

Matter of B.A.M.W., 44 Misc.3d 465; 988 N.Y.S.2d 456 (Sup. Ct. Dutchess Cty., 2014) (Pagones, AJ.S.C.)

Mother and natural guardian of developmentally disabled daughter who had been appointed as a guardian by a Texas court petitioned to have the guardianship confirmed by a court in New York. The New York court dismissed the petition without prejudice to renew upon proper papers on the grounds that: first, the petition lacked a certified copy of a provisional order of transfer from the Texas court, as required by MHL 83.33(a) and further, the petitioner failed to serve the petition upon individuals listed in MHL 81.07 (e) and SCPA 1753, as required by MHL 83.33(b), The court concluded that upon proper resubmission of the papers it would then hold the hearing required by MHL 81.33(d) (1) and (2). Upon resubmission, petition was again denied. Although it now included a certified copy of the Texas order appointing a guardian it still did not include a certified copy of Texas' provisional order of transfer. (2014 N.Y. Misc. LEXIS 3135). In this decision, Justice Pagones proposes a template order granting MHL Article 83 relief to assist petitioners.
As later reported (at 2015 N.Y. Misc. LEXIS 2384), upon submission of the provisional order of transfer from Texas, the Court held a hearing under MHL 83.33(c) to determine whether or not a provisional order accepting transfer of the guardianship to New York would be appropriate. After hearing, and there being no opposition or evidence that the proposed guardian was ineligible to serve, the Court found the provisional order from Texas to be appropriate, granted a provisional order and directed petitioner to submit a Final Order in a form set forth in its decision.

D. Consolidation with the Guardianship Proceeding

In the Matter of Joseph J., 106 A.D.3d 1004; 965 N.Y.S.2d 588 (2nd Dept., 2013)

Upon motion by the guardian, the judge in a guardianship proceeding consolidated a foreclosure action and an action to quiet title pending in that same court with the guardianship proceeding. On appeal by one of the parties to one of the real property proceedings, the Appellate Division reversed that branch of the motion seeking consolidation but allowed for a joint trial of the real property proceedings. The Appellate Division held that the trial court had improvidently exercised its discretion in consolidating the foreclosure action and the actions to quiet title with the guardianship proceeding because the guardianship proceeding "concerned the issue of the IPs mental competency" and the foreclosure action and actions to quiet title concerned the mortgage on the property, and thus they did not share common questions of law or fact, that would make consolidation appropriate.

E. Counsel

(i) Appointment and disqualification

Matter of S.B. (E.K.), _Misc.3d_; 2019 NY Slip Op 29368 (Sup. Ct., Chenumg Cty.)(2019)
(earlier related decisions: Matter of S.B. [E.K.], 60 Misc.3d 735 [Sup. Ct., Chemung Cty.][2018],

reversed, Matter of Elizabeth T.T. [Suzanne Y.Y. - Elizabeth Z.Z.], 177 AD3d 20 [3rd Dept., 2019])

The Supreme Court had appointed as the AIP's Article 81 attorney the attorney who previously drafted and executed a power of attorney in which the AIP designated her daughter, E.I. as her attorney-in- fact. The AIP's other daughter, S.B., subsequently filed a proceeding, inter alia, seeking to invalidate the POA, alleging that E.I. had isolated the AIP, that the POA was the product of undue influence, and that E.I. had otherwise breached her fiduciary duties. The court denied the attorney's motion to intervene in that proceeding, noting that his presence as a party was not necessary for it to determine the validity of the POA. The court expressed concern that the attorney needed direction as to whether he could properly rely on the attorney-in-fact to guide his strategy in defending the AIP against the guardianship. Citing N.Y.C.R.R. 1200.0, Rule 1.14(a) (which requires an attorney representing an individual with diminished capacity to maintain a conventional relationship with the client as far as reasonably possible), and MHL § 81.10 (which states that the role of counsel is to ensure that the AIP's point of view is presented to the court), the court reminded the attorney that insofar as the AIP had consistently expressed her opposition to the guardianship, he could make decisions and pursue a litigation strategy that honored that perspective without reliance on decisions made by the AIP's attorney-in-fact. Further citing to cases where the court must determine whether counsel retained by the AIP was chosen freely and independently, the court noted that although the subject attorney had not been retained by the attorney-in-fact, he had given the court the impression that he had either relied on her, or planned to rely on her, to control his strategy as the AIP's advocate. The court admonished that this would essentially allow the attorney-in-fact, who allegedly isolated the AIP from S.B., exerted undue influence in the creation of the POA, and breached her fiduciary duty to the AIP, to impermissibly direct the AIP's counsel. Ultimately, however, the court disqualified the attorney because he would be called as a witness to attest to the circumstances regarding the creation and execution of the contested POA.

Matter of Mazzeo, NYLJ, Jan. 29, 2018 at 32 (Sup. Ct. Nassau Cty., Diamond, J.)

When a court appointed attorney for the AIP refused to sign a consent to change attorney, the AIP moved, by private counsel, to substitute the court appointed counsel with such private counsel. The Court denied the motion for substitution and directed the court appointed counsel to remain on the case, reasoning that preventing exploitation was the statutory purpose of Art 81, and that it was not convinced that private counsel was freely and independently retained by the AIP without the undue influence of family members.

Matter of David J.D.(Azzi), 2016 N.Y. App.Div. LEXIS 5309 (4th Dept. 2016)

Appellate Division reversed and remitted an Order of the Surrogates Court appointing a temporary and ultimately a plenary guardian on the grounds that the Surrogate had failed to advise the AIP of his right to independent counsel, had failed to so appoint independent counsel for the AIP and had proceeded in the face of a potential conflict of interest to the detriment of the AIP who was being represented by the same law firm that was representing the petitioner in both the guardianship proceeding and a related Federal action concerning the whether the AIP had sufficient capacity to

have signed away rights to certain property he had inherited.

Matter of Camoia, 48 Misc.3d 1221(A); 2015 N.Y. Slip Op 51179(U)(Sup. Ct. Kings Cty. 2015)(King, J.S.C.)

Court declined to appoint counsel for an AIP stating that the AIPS Due process rights would not be violated because appointment of counsel is not mandatory in every guardianship and in the instant case none of the statutory circumstances warranting appointment were present.

In re Strasser, 129 AD3d 457; 11 N.Y.S.3d 125 (1st Dept., 2015)

The Appellate Division found the motion court to have properly disqualified an attorney from representing the co-guardians of a ward because, while there was no actual conflict and while the co-guardians executed waivers, there was clearly a potential conflict that could impermissibly place the attorney in a position that would give the appearance that he was representing conflicting interests. This attorney had also previously represented the ward in the original proceeding and his current representation of the co-guardians were substantially related, the interests of the ward and the co-guardians were materially adverse due to their mutual financial dependence on the ward, their related competing financial interests under the terms of a certain trust, and their status as beneficiaries under the ward's Will. In a dissent, one Justice opined that the fact of the attorneys prior representation of the ward would disqualify him from representing the co- Guardians but that there was nothing to prevent another attorney from representing both co-guardians since they both had a primary aligned interest in their fiduciary duty to the IP.

Matter of Caryl S.S. (Valerie L. S.), 47 Misc. 3d 1201(A); 15 N.Y.S.3d 710 (Sup. Ct. Bronx Cty. 2015) (Aarons, J.)

The Court disqualified the AIP's retained counsel and petitioners counsel. As for AIP's counsel, the court found that the evidence did not support the conclusion that the AIP, who had evidenced severe memory problems and confusion at her preliminary bedside hearing, had freely and independently chosen her. The Court added that it was troubled by the fact that the attorney, who had no prior relationship with the AIP, had been brought into the situation by the AIP's son, who allegedly exerted undue and improper influence over the AIP and transferred large amounts of money to himself, and who refused to allow the AIP to speak to the Court Evaluator and failed to bring the AIP to Court despite a clear direction to do so. Regarding disqualification of Petitioner's counsel, the court disqualified her because she had previously represented the AIP in the preparation of two wills and a trust, might be called as a witness and also had an inherent conflict.

Matter of Kiriakoula C., 112 AD3d 821; 976 N.Y.S.2d 666 (2nd Dept. 2013)

A non-party attorney appealed from an order of Supreme Court removing him as counsel to the AIP in an Article 81 proceeding. The Appellate Division dismissed his appeal holding that the order was not appealable as of right as it did not decide a motion made on notice, no application was made for

permission to appeal and under the circumstances of the case, the Appellate Division declined to grant leave to appeal on its own motion.

Matter of Gulizar N.O., 111 AD3d 749; 974 N.Y.S. 2d 801 (2nd Dept. 2013)

Appellate Division reverses and order and judgment appointing a guardian, on the law, and remits the matter back to the Supreme Court for the appointment of counsel to represent the AIP, and for a new hearing on the petition, noting that there was no evidence that the AIP made an informed decision to refuse the assistance of counsel.

Appointment of Guardian, Jean Rose, 12-4041, NYLJ 1202624201187, at *1 Sup. UL., Decided Sept 13, 2013)

The AIP's mother sought to be appointed guardian of her person and property. The AIP had been diagnosed with an inoperable malignant brain tumor allegedly resulting in significant deterioration in her cognitive capacity and overall functioning. Counsel was assigned for the AIP Although not alleged in the petition, it was revealed at a conference that the petitioner/mother's counsel had previously overseen the execution of a Power of Attorney from the AIP to her mother. Counsel for the AIP requested the petitioner/mother's counsel to withdraw from representing the petitioner/mother, but he refused. The court noted that the petitioner/mother's counsel executed the power of attorney stating he believed that the AIP had been competent at the time, yet two months later drafted a petition on the mothers behalf for the appointment of a guardian after the AIP expressed her wish to give her Power of Attorney to her boyfriend. Mother's counsel alleged that he had had no attorney-client relationship with the AIP , but the court believed otherwise, noting he had in fact given he legal advise and thus should not have undertaken to represent the mother and that he should have withdrawn as counsel when requested to do so.

Matter of Barbara P., 8/6/2010, NYLJ, 40 (col 3.)(2nd Dept. 2010)

Appellate counsel was incorrectly assigned pursuant to Judiciary Law § 35 to represent an AIP in an appeal from an order issued under MHL Article 81. The Appellate Division later corrected itself to reflect that the appointment should have been made under MHL 81.10 and County Law 18-B.

Cheney v. Wells, NYLJ 11/5/08 (Surr Ct., NY Cty. 2008)(Surr. Glenn)

Counsel for a defendant in a civil action sought to withdraw from representation, asserting an inability to communicate with the client and an inability to carry out her employment effectively as required by DR 2-110. This was the fourth such counsel who sought to withdraw for the same reason. The court opined that this defendant was likely incapable of managing the litigation and unable to appreciate the consequences of that incapacity, which included the loss of her homes and over 3 million dollars, and that a proceeding under MHL Art 81 should be held to determine whether she was in need of a limited property guardian to manage the litigation on her behalf. The court granted the fourth counsel's motion to withdraw contingent upon her commencement of an Art 81

proceeding, even though such a petition would necessarily require release of confidential communications between the attorney/petitioner and her former client, the now AIP. In assessing whether it would be ethical to permit the attorney to serve as the petitioner, the court held that the NY Code of Professional Responsibility did not provide sufficient guidance and therefore it looked to the ABA Model Rules of Professional Responsibility and the Restatement and determined that there was no ethical impediment to such a petition.

Matter of Winston, 21 Misc.3d 1123A;873 N.Y.S.2d 509 (Sup Ct. NY Bronx Cty 2008)(Roman, J.)

An attorney who represented the AIP in the past would be disqualified from representing a party adverse to him as the petitioner in an Article 81 proceeding.

Matter of Keith H., unpublished, Sup. Ct., Hamilton Cty. (Montgomery County Spec. Term) (Index # 6296–06) (Sept 18, 2006) (Sise, J.)

The Consumer Advisory Board ("CAB") formed under the Federal Court "Willowbrook Decree" to protect the class members against dehumanizing practices and violations of their individual or legal rights does not automatically have powers of a guardian under Article 81 and, did not automatically have the authority to retain counsel on behalf of a profoundly retarded class member to prosecute a tort claim for an automobile accident until, after a full Art. 81 proceeding where appropriate findings were made, it was first appointed as guardian.

Matter of Williams, 12 Misc.3d 1191A; 824 N.Y.S.2d 770 (Sup. Ct., Kings Cty., 2006) (Belen, J.)

Petitioner's attorney should have disqualified himself from representing the petitioner due to a conflict of interest. He had previously represented the AIP when he prepared a Will and a Power of Attorney giving petitioner control of her finances. Additionally, although having established an attorney-client, confidential relationship with the AIP and even having met with her and having been notified by her that she believed the petitioner was stealing from her, he undertook to represent petitioner in a proceeding adverse to the AIP to declare her incompetent and nullify her revocation of the power of attorney that he prepared.

Matter of Edward G.N., 17 A.D.3d 600; 795 N.Y.S.2d 244 (2nd Dept. 2005)

Appellate Division reverses Order and Judgment appointing a guardian, on the law, without costs or disbursements, denies the petition and dismisses the proceeding finding that the trial court erred in failing to appoint counsel for the AIP as there was no evidence that the Court Evaluator explained to the appellant his right to counsel, determined whether the appellant wished to have legal representation, or evaluated whether counsel should be appointed in accordance with. Mental Hygiene Law § 81.10 (*see* Mental Hygiene § 81.09[c][2] and [3]; *Matter of Wogelt,* 223 A.D.2d 309, 314, 646 N.Y.S.2d 94).

Matter of D.G., 4 Misc.3d 1025A; 798 N.Y.S.2d 343 (Sup Ct, Kings Cty., 2004) (Leventhal, J.)

The law firm acting as counsel for the petitioner in an Art 81 proceedings was the same firm acting as counsel for the AIP in a simultaneously filed medical malpractice suit. This law firm had obtained the AIP's medical records in connection with the med mal suit before commencing the Art 81 proceeding. The law firm failed to disclose this conflict in its petition, or to the Court Evaluator or to counsel for the AIP in the Art 81 proceeding. Moreover, during the proceedings, the petitioner wanted to terminate its relationship with the firm in the Art 81 proceeding and also wanted to consent to a cousin's appointment as Guardian and the law firm tried to discourage the petitioner from consenting to the cousins appointment, presumably because the cousin, as Guardian, could then decide to hire new counsel for the med mal case. The court finds violations of DR5-105(a) and also DR5 101 in that the law firms independent judgement was compromised by both its dual allegiances and its own financial interests. (See also under Petitions and petitioners– **Matter of J.G., NYLJ, August 17 2005, p. 1, Col. 4 (Sup. Ct , Bronx Cty) (Hunter, J.); 8 Misc 3d 1029A; 806 NYS2d 445.** "A person otherwise concerned with the welfare of the person alleged to be incapacitated" under MHL §81.06 cannot be an attorney representing the AIP in a personal injury suit. As the attorney in the personal injury suit, the petitioner is privy to confidential information that he cannot divulge unless his client waives the attorney client privilege.)

Matter of Application of St. Luke's Hospital Center (Marie H.), 159 Misc.2d 932; 607 N.Y.S.2d 574 (Sup. Ct., NY Cty., 1993); *modified and remanded*, 215 A.D.2d 337; 627 N.Y.S.2d 357 (1st Dept., 1995); *aff'd*, 236 A.D.2d 106; 640 N.Y.S.2d 73, (1st Dept., 1996), *aff'd*, 89 N.Y.2d 889, 653 N.Y.S.2d 257 (1996)

Where Article 81 petition for indigent AIP, seeks power to transfer AIP to nursing home or to make major medical or dental treatment decisions without consent, responsibility of paying for assigned counsel falls upon locality under Article 18-B, rather than State pursuant to Judiciary Law §35.

Matter of Wogelt/Matter of Lichenstein, 223 A.D.2d 309; 646 N.Y.S.2d 94, (1st Dept., 1996); *on remand sub nom*, In re: Lichtenstein, 171 Misc.2d 29; 652 N.Y.S.2d 682 (Sup. Ct., Bronx Cty., 1996)

Court's failure to appoint counsel for AIP when it became apparent that AIP contested appointment of the guardian and opposed move to different nursing home, as well as failure to notify AIP on record of purpose and possible consequences of proceeding, her right to be represented by counsel, and fact that court would appoint counsel if she so desired resulted in reversal of appointment of guardian.

In re: DOE, 181 Misc.2d 787; 696 N.Y.S.2d 384 (Sup. Ct., Nassau Cty., 1999)

Appointment of counsel for AIP in Article 81 proceeding does not extend to unrelated proceedings.

(ii) Counsel and other fees

a. Responsibility for payment of counsel fees

(i) AIP's funds

Matter of Ralph C. (Cavigliano), _AD3d_, 2019 NY Slip Op 06335, (4th Dept., 2019)

The Appellate Division reversed so much of an order and judgment as denied the guardian's motion seeking reimbursement for the counsel fees it incurred in connection with the guardianship, noting that MHL § 81.44 (e), relating to proceedings upon the death of an IP, provides that a guardian may retain guardianship property equal in value to the claim for administrative costs, liens and debts, and that these include reasonable counsel fees. The court remitted the matter to the Supreme Court to fix a reasonable award of counsel fees.

Matter of Buttiglieri, 2018 N.Y. App. Div. LEXIS 648 (4th Dept. 2018)

Order directing Petitioner to pay fees for AIP's counsel and MHLS as Court Evaluator reversed and vacated on appeal. The Court reasoned that MHL 81.09(f) provides that Petitioner may only be compelled to pay when the AIP dies before disposition, or when the petition is denied or dismissed. Here, the AIP was found to be in need of a guardian and there was no evidence of bad faith on the Petitioner's part. The Court further explained that it is now well settled that the Court should direct payment in these circumstances under County Law 18-B, but did not address how the Court Evaluator should be paid.

Matter of Judith T. (Rosalie D.T.), _Misc.3d_, 2017 N.Y. Misc LEXIS 5095*; 2017 NY Slip Op 27421 (Cty. Ct., Nassau Cty.,) (Knobel, A.C.C.J.)

The court denied the petition brought by the daughter of the AIP, a highly intelligent retired schoolteacher who desired to move to Manhattan and volunteer at the American Museum of Natural History. In so doing, the court noted that the petitioner failed to establish by clear and convincing evidence that the AIP did not adequately understand and appreciate the nature of the physical limitations caused by the stroke she had eight years earlier, and that she was unable to provide for her personal and financial needs. The court noted that the AIP understandably desires to have a productive, useful and happy life, and to not be held back her physical disabilities, or the fears and wishes of her daughters, or the husband that she was then seeking to divorce. The court ordered the petitioner to pay the AIP's counsel fees, but ordered that the petitioner and the AIP each pay one half of the court evaluator's fee.

Matter of Judith T. (Rosalie D.T.), _Misc.3d_, 2017 N.Y. Misc LEXIS 5095*; 2017 NY Slip Op 27421 (Cty Ct., Nassau Cty.,) (Knobel, A.C.C.J.)

The court denied the petitioner's motion seeking to call the AIP as a witness, reasoning that because

the petition sought to restrain the AIP's liberty rights, compelling her to testify would be a violation of her Fifth Amendment right against self-incrimination, and would also be contrary to the intent and spirit of Mental Hygiene Law §81.12(a), which places the burden of proof on the petitioner to prove her or his case without having to rely on the AIP's testimony.

Matter of Dorothy K.F. , Sup. Ct. , Westchester Cty ., Index # 20021/15 (Murphy , J.)(unpublished) (Copy available in MHLS 2nd Dept. Director's office)

Where a guardian was removed for cause, legal fees for counsel to the guardian could not be paid from the IP's funds in connection with his representation of the guardian in: (a) a motion to change the abode of the IP which the Court denied as against the IP's best interests or (b) the removal proceeding. The court found that such services representing the guardian did not benefit the IP. The Court rejected counsel's argument that his representation of the guardian in the removal proceeding assisted the Court in securing a more suitable permanent guardian for the IP, stating that the removal would not have been necessary had the guardian not misappropriated the IP's funds.

Matter of Alice D., 113 A.D.3d 609; 979 N.Y.S.2d 77 (2nd Dept., 2014)

Appellate Division held that the Supreme Court erred by partially granting a guardian's cross motion for an award of costs and the imposition of sanctions relating to two separate actions that the IP's daughter had commenced against him in other courts and/or under other index numbers, noting that, according to 22 NYCRR 130-1.1 sanctions could only be imposed by the guardianship court in a proceeding before that court Furthermore, the Supreme Court erred by awarding, without a hearing, compensation to the guardian in view of the existence of an issue of fact as to the propriety of his actions on behalf of his ward. Finally, the Appellate Division noted that the Supreme Court erred in awarding legal fees to the guardian's attorney when it was unclear that the legal services he provided were not duplicative of compensation awarded to the guardian, who was also an attorney. Accordingly, the Appellate Division remanded the matter back to the Supreme Court for further proceedings.

Matter of Verna Eggleston v. Jennifer D., 88 A.D. 3d 706; 930 N.Y.S. 2d 608 (2nd Dept., 2011)

Noting that the Supreme Court did not explain the basis for its award of a "Legal Fee" to the temporary guardian, who, although an attorney, was acting as the IP's guardian, and further noting that the IP had submitted evidence demonstrating issues of fact as to the propriety of the temporary guardian's actions on her behalf and the accuracy of his accountings, the Appellate Division, inter alia**,** deleted the provisions of the Supreme Court's order which awarded the temporary guardian fees, and remitted the matter back to that court for a hearing to determine what, if any, fees were due to him.

Matter of Deanna W., 76 A.D.3d 1096; 908 N.Y.S.2d 692 (2nd Dept., 2010)

The Appellate Division, Second Department, held that the Supreme Court had erred in directing the

Department of Social Services to disregard guardianship expenses when calculating the IP's net available monthly income (NAMI) for the purpose of determining Medicaid eligibility, holding that the agency's interpretation of its own regulations, including Medicaid eligibility regulations, was reasonable.

Matter of Kenneth Sherman, 28 Misc.3d 682; 902 N.Y.S.2d 334 (Sup. Ct., Bronx Cty 2010) (Hunter, J.)

The Court Evaluator, having not been paid for his services, moved to have his fee paid by either the nursing home where the IP had been a resident or by the community guardian FSSY. Initially, the court had appointed the IP"s daughter to serve as his guardian and directed that she file a Commission and post a bond . When she neglected to do so, the court attempted to correspond with her but she failed to respond ; therefore, the court removed her and appointed FSSY. When the Court Evaluator was not paid he contacted FSSY and was advised that the IP"s daughter, with whom the IP shared a joint account, had cleared the funds out of the account upon his death and that there would not be sufficient funds to pay him. The court found, however, that there had been sufficient funds in the IP's account at one point before FSSY paid itself its own commission in full and therefore ordered FSSY to pay the Court Evaluator from the funds it had collected to pay its own commission.

Matter of Emanuel A. Towns, an Attorney and Counselor at Law, 75 A.D.3d 93; 901 N.Y.S.2d 68 (2nd Dept. 2010)

An attorney retained by an 89 year old self petitioner on the verge of incapacity was suspended from practice for 6 months and ordered to make restitution for overcharging his client who was obviously suffering from dementia. Many services he performed were billed at a rate for legal services which were in fact not legal services and only non legal tasks incident to the legal services he provided or billed for excessive amounts of time given the task at hand.

Matter of Nellie G., 74 A.D.3d 1065; 903 N.Y.S.2d 494 (2nd Dept 2010)

The Appellate Division reversed the trial court's finding that compensation of the guardian and legal fees should be paid from the assets of the AIP instead of the petitioner hospital In this case, the guardianship proceeding was not dismissed. It resulted in the appointment of a Personal Needs Guardian, even though the appointment of the Guardian of the Property was eventually reversed upon appeal. The trial court noted the chilling effect that would result from imposing the financial obligation on the petitioners, but the Appellate Division rejected this position.

Matter of AT, 16 Misc.3d 974; 842 N.Y.S.2d 687 (Sup Ct. Nassau Cty, 2007) (O'Connell, J.)

An elderly and infirm man petitioned for guardianship over his female companion of many years who contributed substantially to his support and with whom he lived. Although he was not appointed, an independent guardian was because the AIP was clearly in need of a guardian. The

court in its initial decision denied counsel fees to the petitioner's attorney. On reconsideration the court granted such fees indicating that where the petition is meritorious, even the though the petitioner was not appointed as guardian, petitioner's attorney should be granted fees from the AIP's funds.

Seth Rubenstein v. Cynthia Ganea, 41 A.D.3d 54; 833 N.Y.S.2d 566 (2nd Dept., 2007)

In a suit by petitioner's attorney against petitioner for fees in excess of those awarded in the order to be paid from the AIP's funds, the attorney was permitted to recover the excess fees. It was held that the award of fees from the AIP's funds was not res judicta on the claim for the excess fees. Further, these fees were awarded under a theory of quantum meruit because the attorney had not issued a letter of engagement under 22 NYCRR 1215.1 nor was there a retainer agreement.

Matter of Astor, 14 Misc.3d 1201; 831 N.Y.S.2d 360 (Sup. Ct., NY Cty .2006) (Stackhouse, J.)

Over 3 million dollars in legal and expert fees were amassed by 56 lawyers, 65 paralegals, 6 accountants, 5 bankers, 6 doctors, a law school professor and 2 pubic relations firms during the proceedings in the intensely disputed guardianship of NY philanthropist Brooke Astor. Although there was no opposition filed by any party to any of the fee requests submitted, the court, relying on its inherent authority, reviewed the submissions. In evaluating the fees, the court focused on whether the efforts of the party charging the fee advanced the best interests of the AIP. Under this analysis, the court found that even though the matter was settled, the petitioner was entitled to an award of counsel fees because the efforts of his counsel benefitted Mrs. Astor. Also, while recognizing that Article 81 does not authorize an award of counsel fees to a respondent who opposes a petition, the court nevertheless awarded the respondent, Mrs Astor's son who held her power of attorney, half of his legal fees, highlighting *inter alia* the Court Evaluator's conclusion that the allegations of elder abuse were unsubstantiated.

In re Bloom (Spears), 1 Misc. 3d 910A; 781 N.Y.S.2d 622 (Sup. Ct., Suff. Cty., 2004) (Berler, J.)

Where application was brought in good faith and did ultimately benefit AIP, Court directs that fees for petitioner counsel be paid from the AIP's funds even though the application was ultimately withdrawn. Court also holds that since AIP was not declared incapacitated, she could negotiate her own fee arrangement with her own counsel.

Matter of Jackson, NYLJ, p. 22, col 5 (Sup. Ct., Queens Cty., Feb. 5, 2003)

Denying a request for supplemental fees for substituting one guardian for another in a case where the IP consented to appointment of a guardian and the guardian failed to get himself qualified, the court stated: "The awarding of fees is not a ministerial act wherein the Court merely rubber-stamps an order based on statements by an attorney. If that were the case, the order would be submitted to a clerk for entry. It is the responsibility and obligation of the court to scrutinize all requests to ensure

that the assets of an incapacitated person are not being dissipated by anyone who thinks they are entitled to funds from the estate by claim of legal services, expenses or for any other reason. Attorneys who do legitimate work are entitled to be paid, however that does not mean that all fees should come from the incapacitated person's assets. **The courts position is that *only fees that directly benefit the incapacitated person will be paid from the incapacitated person's assets....*An incapacitated persons assets may not be considered a big piggy bank to be raided by little piggies...."**

Matter of Albert S., 300 A.D.2d 311; 750 N.Y.S.2d 871 (2nd Dept., 2003)

Appellate Division sustains trial court's decision to direct the petitioner to pay only $450 of the $68,000 combined fees of both counsel and the Court Evaluator and to impose these costs upon the AIP even though the 81 petition was ultimately dismissed for lack of merit. Court reasons that the petition was herself of meager means and that she did not at out of malice or avarice in bringing the petition but rather out of concern for the AIP. Strong dissent argues that the 81 proceeding did not confer any benefit on the AIP and he should not pay.

Matter of Petty, 256 A.D.2d 281; 682 N.Y.S.2d 183 (1st Dept., 1998)

Where Court Evaluator determined that petition was weak and guardianship completely unnecessary, and court "so ordered" petitioners to discontinue proceeding, Supreme Court improperly ordered AIP to pay court evaluator's fees, but properly ordered AIP to pay his own attorney's fees because §81.10 gives court's discretion to order petitioners to pay court-appointed attorneys, but not the AIP's privately retained lawyers when a petition is dismissed.

Matter of Grace "PP", 245 A.D.2d 824; 666 N.Y.S.2d 793 (3rd Dept., 1997), *lv. to app. denied,* 92 N.Y.2.d 807; 678 N.Y.S.2d 593 (1998)

§81.10(f) requires that court determine reasonable compensation for attorney appointed to represent AIP, and provides "[t]he person alleged to be incapacitated shall be liable for such compensation unless the court is satisfied that the person is indigent." Fact that AIP receives Medicaid is not dispositive of indigence.

Matter of Epstein (Epstein), 168 Misc.2d 705; 649 N.Y.S.2d 1013 (Sup. Ct., Suffolk Cty., 1996)

Article 81 does not provide means of payment of counsel for AIP where AIP is indigent. Moreover, there is no provision for payment of fees for counsel for guardian other than from assets of IP. Application by petitioner to have State pay fee of her attorney is denied, and court-appointed counsel for the AIP denied right to seek payment of fees from guardianship estate absent showing that IP is not indigent and has sufficient funds to pay fees.

Matter of Susan P. a/k/a Susan O. (Schwartz) 243 A.D.2d 568; 663 N.Y.S.2d 115 (2nd Dept., 1997)

AIP was ordered to pay all fees since it was his lack of cooperation in a pending matrimonial proceeding that gave rise to the need for the guardianship proceeding.

(ii) Petitioner

Matter of Cynthia W., _Misc.3d_, 2019 NYLJ LEXIS 4537 (Sup. Ct., NY Cty., 2019)

The petitioner, an attorney, commenced a proceeding seeking the appointment of a personal needs and property management guardian for his wealthy 86 year-old mother, Cynthia. Before commencement of this proceeding, Cynthia's husband filed a family offense proceeding against the petitioner. After a hearing in that proceeding, a Family Court referee found that the petitioner engaged in menacing and aggravated harassment, and issued an Order of Protection in favor of Cynthia and her husband, which remained in effect at the time of the guardianship hearing. The guardianship court now held that the petitioner failed to present evidence of Cynthia's incapacity, and that Cynthia B.'s advance directives adequately protected her and constituted the least restrictive form of intervention. The court noted that most of the petitioner's testimony was based on his disdain of Cynthia's husband and her husband's children, and highlighted his suspicious procedural delay tactics, and his improper conduct during the proceedings. The court denied the petition and dismissed the proceeding for lack of merit, determining that it was brought in bad faith. The court also directed the petitioner to pay the fees of the court-appointed attorney and court evaluator.

Matter of Gerken, NYLJ, 9/06/19, at p. 21, col. 12 (Sup. Ct., Bronx Cty.), (Johnson, J)

Proceeding was brought by a nursing home to address the outstanding residential debt of the AIP. The Court Evaluator advised the court that the AIP had the capacity to enter a new power of attorney (a prior one designating her brother as attorney in fact could not be located). After the AIP executed a new POA, however, the nursing home refused to withdraw the petition. Although the court did not find that the nursing home's commencement of the proceeding was inappropriate or ill-advised insofar as the nursing home was entitled to be paid for the services it provided, the court held that the nursing home's refusal to withdraw the petition after the AIP had executed the new POA constituted frivolous conduct. Consequently, the court held the nursing home responsible for the fees generated by the AIP's counsel subsequent to the execution of the POA.

Matter of Judith T. (Rosalie D.T.), _Misc.3d_, 2017 N.Y. Misc LEXIS 5095*; 2017 NY Slip Op 27421 (Cty. Ct., Nassau Cty.,) (Knobel, A.C.C.J.)

The court denied the petition brought by the daughter of the AIP, a highly intelligent retired schoolteacher who desired to move to Manhattan and volunteer at the American Museum of Natural History. In so doing, the court noted that the petitioner failed to establish by clear and convincing

evidence that the AIP did not adequately understand and appreciate the nature of the physical limitations caused by the stroke she had eight years earlier, and that she was unable to provide for her personal and financial needs. The court noted that the AIP understandably desires to have a productive, useful and happy life, and to not be held back her physical disabilities, or the fears and wishes of her daughters, or the husband that she was then seeking to divorce. The court ordered the petitioner to pay the AIP's counsel fees, but ordered that the petitioner and the AIP each pay one half of the court evaluator's fee.

Matter of Judith T. (Rosalie D.T.), _Misc.3d _, 2017 N.Y. Misc LEXIS 5095*; 2017 NY Slip Op 27421 (Cty Ct., Nassau Cty.,) (Knobel, A.C.C.J.)

The court denied the petitioner's motion seeking to call the AIP as a witness, reasoning that because the petition sought to restrain the AIP's liberty rights, compelling her to testify would be a violation of her Fifth Amendment right against self-incrimination, and would also be contrary to the intent and spirit of Mental Hygiene Law §81.12(a), which places the burden of proof on the petitioner to prove her or his case without having to rely on the AIP's testimony.

Matter of Bonnie O., ____Misc3d____; 2016 N.Y. Misc. LEXIS 4462 (Sup. Ct. Dutchess Cty.) (Pagones, J.)

Upon finding that guardianship was not warranted because the AIP, a 90 year old woman, had made sufficient alternative arrangements to assist her in her areas of need, including issuing a Power of Attorney and Health Care Proxy to one of her two daughters, relying on friends, and hiring paid professionals and caregivers to help in her own home, the Court dismissed the guardianship petition and ordered Petitioner, the AIPs other daughter, to return certain property to the AIP. Upon additional findings that Petitioner had sufficient funds to absorb her own legal fees, and a further finding that while not "wholly frivoulous" the petition had been motivated by "avarice, possible financial gain and distrust of her sister's ability to manage their mother's finances", the Court ordered petitioner to pay MHLS as the Court Evaluator and also, upon submission of an affirmation of services, the fees of an attorney who has been appointed initially to represent the AIP. The Court declined to order Petitioner to pay the fees of an attorney subsequently retained by the AIP in as much as MHL 81.10 does not provide for payment to privately retained counsel.

Matter of Madeline H., 51 Misc3d 834; 28 N.Y.S. 3d 271 (County Ct., Nassau Cty. 2016)

Petitioner and the AIP were embroiled in a contentious matrimonial action and complicated trust dispute when petitioner brought the instant Article 81 proceeding. After the Court Evaluator's report unequivocally concluded that the AIP was not incapacitated, Petitioner withdrew the petition. The Court found that the petition was not brought for any altruistic purpose, that the petitioner's motives were "at very least questionable" and that withdrawal of this petition was the functional equivalent of a dismissal and assessed 100% of the fees for the Court Evaluator and AIP's counsel to petitioner.

Matter of Jean C., 136 AD3d 632; 25 N.Y.S. 3d 255 (2nd Dept., 2016)

An attorney, who had been hired by the IP's grandson as part of a fraudulent scheme to gain control over his grandmother's assets, submitted his bill for legal fees to the guardian who had subsequently been appointed to protect the grandmother from her grandson's efforts to gain control over her. When the guardian refused to pay his legal fees from the IP's assets, the attorney moved in the guardianship part for the payment of his fees. Supreme Court denied the fees, stating that the record did not support a finding that the legal work had been performed for the IP's benefit. Appellate Division upheld the trial court's finding that the legal work had been done for the benefit of the grandson, not the IP, and affirmed.

In re: Fairley, 136 AD3d 432; 26 N.Y.S. 3d 1 (1st Dept. 2016)

Appropriateness of trial court 's order shifting payment of the fees of court appointed counsel, the Temporary Guardian and Court Evaluator may not be challenged in the context of the hearing as to the reasonable amount of such fees where the order shifting payment to the petitioner had not been appealed when entered.

Matter of Cziraky, 48 Misc.3d 271; 9 N.Y.S. 3d 820(Sup. Ct., Broome Cty. 2015)(Guy, J.)

Where a nursing home brought an application for guardianship to assist it in applying for Medicaid so it could be paid for its services, and the AIP ultimately gave Power of Attorney to the Department of Social Services and the application was withdrawn by Petitioner, the Court denied the application by the nursing home for its counsel fees to be paid from the AIP's meager assets, noting that the application had been brought for the benefit of the Petitioner because it was not being paid by its resident.

Matter of Mae R., 123 A.D.3d 1034; 999 N.Y.S. 2d 166 (2nd Dept. 2014)

In the absence of evidence that petitioner had commenced the proceeding in bad faith, it was an improvident exercise of discretion for the trial court to have directed the petitioner to pay the fees of the Court Evaluator and Court Appointed Counsel.

Matter of Brice (Wilks), 42 Misc3d 1231(A); 2014 N.Y. Misc. LEXIS 854 (Sup. Ct. Kings Cty) (King, J.)

Petitioner, the AIP's granddaughter, who had an estranged and hostile relationship with the AIP, which included an Order of Protection against her, petitioned pro se for the appointment of a guardian for her grandmother in which she sought, inter alia, to stay the AIP from serving as Executor of her deceased husband's estate. The court found among other things that the petition had been alleged only upon information and belief and contained no first hand allegations as to the AIP's ability to meet her own needs. Further, petitioner had no witnesses and planned to make out

her case with only the the AIP"s testimony. AIP's counsel objected on the grounds that such testimony would violate her 5th amendment rights against self-incrimination and the court sustained that objection and dismissed the petition. The Court then set the Court Evaluator's fees and directed that they be paid solely by the Petitioner. Petitioner advised the Court Evaluator that she had no funds to pay the fee and thereafter the Court Evaluator moved the court to have the fee paid by the AIP or split between the AIP and the petitioner. The court, finding that the petitioner had brought the proceeding to "settle a score" with the AIP, refused to apply the fee splitting or fee shifting options, stating that fee shifting was designed to discourage frivolous guardianship petitions and petitions motivated by avarice and bad faith. The court found that this petition had been brought in bad faith, that the AIP had already been burdened by the unnecessary cost of hiring her own counsel and that therefore, petitioner was responsible for the entire fee.

Matter of Valk, 41 Misc. 3d 1216(A); 2013 N.Y.Misc. LEXIS 4719; (Surr. Ct, Nass. Cty. 2013)(Surr. McCarty III)

Although the court acknowledged that where the fair value of legal fees exceeds the amount awarded by the court to be paid from the AIP's funds, counsel for petitioner may seek to recover the balance from the petitioner upon proof that counsel had reached such an agreement with the petitioner, it held that in the instant case, the fair value of the attorney's services was less than the attorney was charging and therefore there was no excess balance to seek from the petitioner. The court identified first that the attorney's charged hourly rate was higher than that customarily charged for this work and also that much time was billed for preparing a trust document that was simply a form that he court has long distributed to practitioners.

Matter of Yosef B., Sup Ct., Kings Cty., Unpublished Decision and Order, Index # 100051/11 (Feb. 1, 2013) (Baily-Schiffman, J.) (Copy available through MHLS 2nd Dept., Special Litigation and Appeals Unit)

Although the Court believed that, under the facts of that case (where the petition was brought in good faith and the AIP's situation was improved as a consequence thereof), both the petitioner and the AIP should equally bear the cost of the fees generated by the Court Evaluator and the AIP's attorney, it concluded that it was without authority to as to ascribe any responsibility for fees to the AIP in light of the petitioner's failure to establish the AIP's need for a guardian or his incapacity.

Matter of Samuel S. (Anonymous), 96 AD3d 954; 947 N.Y.S. 2d 144 (2nd Dept. 2012)

The Appellate Division held that Supreme Court properly exercised its discretion in directing petitioner to personally to pay the Court Evaluator's fee in its entirety, as petitioner's motives in commencing the guardianship proceeding were questionable, given his knowledge of the existence of advance directives and the lack of any evidence that the AIP had suffered any manner of harm or loss, circumstances that were confirmed by the Court Evaluator.

Matter of Marjorie T., 84 A.D.3d 1255; 923 N.Y.S.2d 870 (2nd Dept., 2011)

Appellate Division reversed an Order of the Supreme Court which had directed the petitioner to pay the AIP's legal fees, due to the lack of evidence that the proceeding, which was ultimately withdrawn by the petitioner, had been brought in bad faith.

Matter of Theodore T. v. Charles T., 78 AD3d 955; 912 N.Y.S.2d 72(2nd Dept., 2010)

Noting that "[t]he petitioner bears the ultimate burden of establishing that the court has personal jurisdiction over the respondent," and that "[t]he method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with," the Appellate Division affirmed so much of the Supreme Court's order in which it dismissed the petition for lack of jurisdiction due to the petitioner's use of a method of service which was not expressly authorized in the order to show cause. However, the Appellate Division remitted the matter back to the Supreme Court, noting that the court had failed to explain any of the factors upon which it had relied in ordering that the petitioner pay the fees generated by the court evaluator and by the AIP's court-appointed counsel.

Matter of Charles X, 66 A.D.3d 1320; 887 N.Y.S. 2d 731 (3rd Dept. 2009)

Court awarded fees to the Court Evaluator (private attorney) and Counsel (MHLS) to be paid by petitioner and petitioner appealed the award of the fees to both. The Appellate Division held that the trial court lacked authority to direct petitioner to pay both. Citing MHL 81.09(f) the court stated that it is only when the petition is denied or dismissed that the court may direct the petitioner to pay. The court also noted, without further explanation, that under these same circumstances, the court could have directed counsel fees be paid to the private attorney had this attorney been appointed as Counsel rather than as the Court Evaluator.

Matter of N.W., 23 Misc.3d 713; 873 N.Y.S.2d 864 (Sup. Ct. Bronx Cty. 2009) (Singer, J.)

The Court Evaluator's fee and all expenses of petitioner, an attorney who proceeded *pro se*, were assessed against the petitioner. The court found that although the AIP, petitioner's father had physical limitations as a result of stroke, there was no evidence that he lacked understanding of the nature of his limitations and there was evidence that he had made alternate provisions for his care by issuing to his other son a POA and HCP. Moreover, the court determined that the petitioner had really brought the case, not because he thought his father lacked capacity but because there was conflict between the two brothers and he did not approve of his father's choice to have the other brother be in charge of his care.

Matter of Kurt T., 64 A.D.3d 819; 881 N.Y.S.2d 688 (3rd Dept 2009)

The Appellate Division found, contrary to the trial court's decision, that petitioner should be responsible for the full amount of her counsel l 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 and 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.

Matter of Eugenia M., 20 Misc. 3d 1110A; 867 N.Y.S.2d 373 (Sup. Ct. Kings Cty., 2008) (Barros, J.)

Where there was: (a) no evidence to establish that the AIP was indigent; (b) no benefit to the AIP from the bringing of the petition and (c) the court dismissed the "threadbare" petition for failure of proof which consisted only of stale evidence of such limited functional limitations that the court questioned the "bone fide "of the petition, the court balanced the equities and directed petitioner APS to pay the legal fees for MHLS as counsel for the AIP. In so doing, the court stated: "The fee shifting provisions of MHL Article 81 are designed not only to be just but are also intended to discourage frivolous guardianship petitions and those motivated by avarice and bad faith."

Matter of Monahan, 17 Misc.3d 1119A; 851 N.Y.S.2d 71 (Sup. Ct., Nassau Cty, 2007) (Iannucacci, J.)

Where the petition was: (1) false in at least one material fact in that it alleged that the AIP was in need of 24 hour care when she was already receiving 24 hour care; (2) commenced only to gain a financial advantage in a pending proceeding in Surrogate's Court; and, (3) not withdraw by the petitioner after it had become clear that there was no merit to the allegations causing undue delay and costs, the court held that the petitioner had engaged in frivolous conduct as defined by 22 NYCRR 130-1.1 and directed the petitioner to pay all counsel fees and the court evaluator fee by a date certain. The court further held that if said fees were not paid by that date each counsel could enter a money judgement for the amount awarded without further notice upon an affirmation of non-compliance and the clerk shall enter judgement accordingly.

Matter of G. S., 17 Misc. 3d 303; 841 N.Y.S.2d 428 (Sup. Ct., New York Cty, 2007) (Hunter, J.)

Proceeding was brought by nursing home because AIP's son and attorney-in-fact had paid only a portion of the outstanding nursing home bill from the proceeds of the sale of the AIP's home. The nursing home's theory was that the power of attorney should be voided because the son was breaching his fiduciary duty. The Court held that he had established that he had used his mother's funds responsibly and soley for her benefit and stated "The purpose for which this guardianship proceeding was brought, to wit, for the nursing home to be paid for its care of [the AIP], was not the legislature's intended purpose when Article 81 of the MHL was enacted in 1993." The fees of the court evaluator and petitioner's counsel were assessed against the petitioner nursing home.

Matter of S.K., 13 Misc.3d 1045; 827 N.Y.S.2d 554 (Sup. Ct. Bronx Cty., 2006) (Hunter, J.)

AIP had functional limitations but also had sufficient and valid advanced directives in place as alternative resources. The nursing home where the AIP resided brought an Article 81 proceeding solely for the purpose of collecting it's bill because the AIP's wife, who held the POA, was not paying because she believed the Long Term Care policy should payout. The Court stated: "**The purpose for which this guardianship proceeding was brought, to wit, for the nursing home to be paid for its care of the [AIP] was not the Legislature's intended purpose when Article 81 of the MHL was enacted in 1993."** The Court imposed all costs of the proceeding upon the petitioner.

Matter of Williams, 12 Misc.3d 1191A; 824 N.Y.S.2d 770 (Sup. Ct., Kings Cty. 2006)(Belen, J.)

Court denied motion of petitioner nephew's attorney to be paid out of the AIP's funds finding that although the bringing of the petition was probably in the AIPs best interest, (1) the petitioner's application to be selected as guardian had been denied due his self-dealing behavior and theft of her property; (2) the attorney should have disqualified himself from representing the petitioner due to a conflict of interest since he previously represented the AIP when he prepared her Will and the Power of Attorney giving petitioner control of her finances and (3) although having established an attorney-client, confidential relationship with the AIP and even having met with her and having been notified that she believed the petitioner was stealing from her, he undertook to represent petitioner in a proceeding adverse to the AIP to declare her incompetent and nullify her revocation of the power of attorney that he prepared.

Hobson -Williams v. Jackson, 10 Misc.3d 58; 809 N.Y.S.2d 771 (App. Term 2nd Dept., 2005)

After an unfavorable court award from the assets of the ward, counsel for the petitioner successfully brought suit against her own client for the balance of her fee. Court holds that attorney fee awards from the AIP's estate are within the discretion of the court and the AIP's estate is not the exclusive source for such fees. See also, "Hobson -Williams: Fee disputes with Guardianship case clients", NYLJ Dec 16, 2005, by Daniel Fish warning Elder Law attorneys to clarify this possible outcome from the inception of the attorney-client relationship with a petitioner-client.

Matter of Albert S., 268 A.D.2d 684; 730 N.Y.S.2d 128 (2nd Dept., 2001)

Where AIP had living will, durable Power of Attorney, and where trust fund was being established for his benefit, Appellate Division directed petitioner to pay fees of the court evaluator and counsel for AIP for petitioning for unnecessary guardianship.

Matter of Shapiro, 2001 NY Misc. LEXIS 1359; 225 NYLJ 75 (Sup. Ct., Nassau Cty.)(Rosetti, J.)

Court denied payment of counsel fees to counsel for party whose action created need for the litigation and whose work, although capable and vigorous, did not result in benefit to AIP.

Matter of De Santis, 186 Misc.2d 791; 720 N.Y.S.2d 757 (Sup. Ct., Nassau Cty., 2000)

Court has power to review reasonableness of petitioner's attorney's fees where petitioner complains they are excessive, even where attorney will be paid by petitioner and not from the AIPs funds.

In re: DOE, 181 Misc.2d 787; 696 N.Y.S.2d 384 (Sup. Ct., Nassau Cty., 1999)

Court orders fees for AIP's court appointed counsel to be paid by petitioner-also find fees for "vigorous representation" of AIP by court appointed counsel was appropriate, especially where counsel for AIP and court alerted petitioner to deficiencies in his case.

Matter of Naimoli (Rennhack), NYLJ, 9/8/97, p. 25, col. 4 (Sup. Ct., Nassau Cty., 1997)

Where petitioner commenced Art. 81 proceeding as result of power struggle over control of mutual relations estate, petitioner was held personally responsible for compensation of court examiner and AIP's counsel.

Matter of Hammons (Perreau), NYLJ, 7/7/95, p.29,col.3 (Sup. Ct., Kings Cty.)(Goodman, J.)

Where Court has "serious questions" about the "unfounded dramatic allegations in petition," court directs petitioner, Commissioner of Social Services, to pay compensation of MHLS, initially as Court Evaluator and then as attorney.

Matter of Chackers (Shirley W.), 159 Misc.2d 912; 606 N.Y.S.2d 959 (Sup. Ct., NY Cty., 1993)

Where petition was brought in good faith but all parties ultimately agreed that discontinuance was warranted and no guardian was needed, petitioner's counsel's fee was borne by petitioner not AIP. While petitioner's attorney's fees may be borne by AIP if court "deems it appropriate," court did not impose petitioner's counsel's fees on AIP here. Court finds fact that proceeding was brought in good faith was alone insufficient to shift burden of paying for this proceeding to the AIP where no special circumstance existed to warrant shifting burden of fee to AIP.

(iii) Payment of fees pursuant to County Law 18-B

Hirschfeld v. Horton, 88 AD3d 401; 929 N.Y.S.2d 599 (2nd Dept., Sept. 13, 2011)

The Appellate Division, Second Department, reversed an order of the Supreme Court, Queens County, and granted the motion of the Assigned Counsel Plan (the panel empowered by the City of

New York to implement County Law article 18-B) for summary judgment, in effect, declaring that the Assigned Counsel Plan is not obligated to compensate MHLS in situations where MHLS is appointed as counsel to represent indigent AIPs in Article 81 proceedings, and where the court awards counsel fees to MHLS pursuant to County Law art. 18-B. In so doing the Court held that "there is no authority in Mental Hygiene Law article 81, the legislative history thereof, the case law, or elsewhere"which would support MHLS' position that it was entitled to such payment from the City. The Appellate Division remitted the matter back to the Supreme Court for the entry of a related judgment. MHLS' motion for leave to appeal to the Court of Appeals was denied.

Matter of Lukia QQ., 27 A.D.3d 1021; 812 N.Y.S.2d 162 (3rd Dept. 2006)

Neither County Law §722-b nor anything in Article 81 requires that counsel to the AIP or the Court Evaluator be paid at assigned counsel rates under County Law §722-b.

Matter of Turner (Loeffler), 189 Misc.2d 55; 730 N.Y.S.2d 188 (Sup. Ct., NY Cty. 2001)

Citing a "growing crisis" in the judicial system caused by the exceedingly low rates paid to 18-B counsel, an inability to secure counsel and fiduciaries in Art 81. proceedings, and the constitutional liberties at stake in Art 81 proceedings requiring counsel, court assigns 18-B counsel for IP in Art. 81 proceeding to modify the guardian's powers, sets fees at double the statutory rates established in 1986 and calls for Legislature and Governor to follow suit.

Matter of Application of St. Luke's Hospital Center (Marie H.), 159 Misc.2d 932; 607 N.Y.S.2d 574 (Sup. Ct., NY Cty., 1993), *modified and remanded*, 215 A.D.2d 337; 627 N.Y.S.2d 357 (1st Dept., 1996), *aff'd*, 226 A.D.2d 106; 640 N.Y.S.2d 73, *aff'd*, 89 N.Y.2d 889, 653 N.Y.S.2d 257 (1996)

Where Article 81 petition seeks power to transfer AIP to nursing home or to make major medical or dental treatment decisions without AIP's consent, responsibility of paying for assigned counsel falls upon locality under Article 18-B, rather than upon State pursuant to Judiciary Law §35.

(iv) Public agencies

Matter of Eugenia M., 2008 NY Slip Op 51301U; 20 Misc. 3d 1110A (Sup. Ct. Kings Cty., 2008) (Barros, J.)

Where there was: (a) no evidence to establish that the AIP was indigent; (b) no benefit to the AIP from the bringing of the petition and (c) the court dismissed the "threadbare" petition for failure of proof which consisted only of stale evidence of such limited functional limitations that the court questioned the "bone fide "of the petition, the court balanced the equities and directed petitioner APS to pay the legal fees for MHLS as counsel for the AIP. In so doing, the court stated: "The fee shifting provisions of MHL Article 81 are designed not only to be just but are also intended to discourage frivolous guardianship petitions and those motivated by avarice and bad faith".

In re: Blakey (Buhania), 187 Misc.2d 312; 722 N.Y.S.2d 333 (Sup. Ct., Monroe Cty., 2000)

Court authorizes attorneys fees to the AIP's attorney pursuant to the Civil Rights Attorney's Fee Act of 1976 awards against **Attorney General**, even though he claims to have brought claim for reimbursement of "improperly paid" Medicaid in good faith claiming that because this area of the law is still unsettled.

Matter of Hammons (Perreau), NYLJ, 7/7/95, p. 29, col. 3 (Sup. Ct., Kings Cty.)(Goodman, J.)

Where Court has "serious questions" about the "unfounded dramatic allegations in petition," court directs petitioner, **Commissioner of Social Services**, to pay compensation of MHLS, initially as Court Evaluator and then as attorney.

(v) Non-petitioning Nursing home

Matter of John T., 42 A.D.3d 459; 839 N.Y.S.2d 783 (App. Div., Second Dept, 2007)

Nursing home refuses to discharge 94 year old AIP to his adult daughter who held the Health Care Proxy, would not honor the proxy and would not allow AIP to sign himself out AMA, alleging that he was incompetent to do so. Nursing home forced daughter to bring Art. 81 petition to secure her father's discharge. Nursing home based its refusal on fact that APS had started an investigation as to the cause of wound he had received while daughter was trying to get him into his bed at home. Although APS had indicated that they were no longer pursuing the investigation, the nursing home still would not discharge the AIP. The daughter brought the petition without alleging incapacity and the court ultimately found that a guardian was not needed. Petitioner sought legal fees from and sanctions upon nursing home. Nursing home argued that they were not a party and the court has no jurisdiction to order them to pay. Court does order nursing home to pay and finds its authority under MHL §81.16 (f) and also case law holding that a court is empowered to assess legal fees when litigation creates a benefit to another or when an opposing parties malicious act cause another to incur fees. Court states that the nursing home knew that it should have started the proceeding itself if it believed that it was unsafe to discharge the AIP, but probably knew that the court would not grant it because the AIP was not lacking capacity and that they would stuck with the bill. The court concludes that the nursing home could not avoid its responsibilities by forcing the daughter to free her father from their unlawful custody and described the nursing home's behavior as reprehensible. Court assess fees but not sanctions. States that it would assess sanctions if it had not awarded fees. Appellate Division reversed, finding that attorneys' fees should not have been assessed against the non-party nursing home without notice and the opportunity to be heard.

Matter of Luby, 180 Misc.2d 621; 691 N.Y.S.2d 289 (Sup. Ct., Suffolk Cty., 1999)

Nursing home denied legal fees in connection with Art. 81 proceeding wherein AIP was represented

by separate court-appointed counsel where nursing home was not petitioning party. Also nursing home was not entitled to award of legal fees in connection with its acceptance and exercise of power of attorney received from resident previously diagnosed by its own physicians with dementia where one objective of power of attorney was to protect nursing home's interest as creditor, since IP received little benefit, if any, as result of appointment of nursing home administrator as his attorney-in-fact. Circumstances surrounding execution of power of attorney, and marketing of IP's home for sale created conflict of interest on part of nursing home. Moreover, nursing home, whose primary objective should have been to secure care and well-being of its patient, placed itself in untenable position when it commenced eviction proceedings against child of its resident. Accordingly, IP will not bear any legal costs associated with execution and exercise of power-of-attorney given to nursing home.

Matter of Sylvia Gaskell, 1994 NY Misc. LEXIS 713; 211 N.Y.L.J. 39 (Sup. Ct., Suffolk Cty., 1994) (Luciano, J.)

Where health care facility had unnecessarily required family to petition court for appointment of guardian, court would consider ordering facility to pay fee for Court Evaluator and petitioner's attorney.

(vi) Non-party intervenor

Matter of JS, 24 Misc.3d 1209A; 899 N.Y.S.2d 60 (Sup. Ct. Nass. Cty. 2009)(Diamond, J.)

Court declined to award counsel fees from the AIP's funds to an interested non - party on the grounds that such fees are not provided for by statute and further that under the facts of this case would not be in the best interest of the AIP.

Matter of Kanfer (Lefkowitz), NYLJ, 11/8/96, p. 25, col. 3 (Sup. Ct., Kings Cty.)(Leone, J.)

Nonparty who opposed guardianship is not entitled to counsel fees, especially where his actions did not benefit the AIP and served only to prolong the otherwise straightforward proceedings.

Matter of Schwartz, NYLJ, 3/13/95, p. 25, col. 1 (Sup. Ct., Nassau Cty.)(Rossetti, J.)

Court-appointed fiduciaries, children of 83-year-old IP, applied for reimbursement from funds of their father. Children were divided as to proper management of his affairs. Court granted attorneys' fees from funds but denied reimbursement for personal and litigation expenses primarily incurred as result of battle for control between children. These costs were deemed spent to benefit their own interests, not their father's.

(vii) "The bar in general"

Matter of Maier, NYLJ, 2/6/98, p. 25, col. 3 (Sup. Ct., Bronx Cty.)(Wilkins, J.)

Attorneys were paid only their retainers in interests of fairness and "community service" that the bar owes to community.

b. To whom fees paid

(i) Retained counsel

Matter of Christopher A., 180 A.D.3d 1036 (2nd Dept., 2020)

In a pending guardianship proceeding, the Appellate Division held that the trial court correctly declined to approve an attorney's fee generated in an action brought by the IP's mother/guardian to recover damages for the personal injuries he sustained in a motorcycle accident. In so doing, the AD noted that the mother executed the retainer agreement that entitled the law firm to retain one-third of any sum recovered in the action, prior to her appointment as her son's guardian, and there was no indication that she possessed actual or apparent authority to execute the retainer on his behalf. The AD upheld the trial court's determination of legal fees, in a reduced amount, premised upon the well-established criteria utilized in guardianship proceedings.

Matter of Bonnie O., ____Misc3d____; 2016 N.Y. Misc. LEXIS 4462 (Sup. Ct. Dutchess Cty.) (Pagones, J.)

Upon finding that guardianship was not warranted because the AIP, a 90 year old woman, had made sufficient alternative arrangements to assist her in her areas of need, including issuing a Power of Attorney and Health Care Proxy to one of her two daughters, relying on friends, and hiring paid professionals and caregivers to help in her own home, the Court dismissed the guardianship petition and ordered Petitioner, the AIPs other daughter, to return certain property to the AIP. Upon additional findings that Petitioner had sufficient funds to absorb her own legal fees, and a further finding that while not "wholly frivoulous" the petition had been motivated by "avarice, possible financial gain and distrust of her sister's ability to manage their mother's finances", the Court ordered petitioner to pay MHLS as the Court Evaluator and also, upon submission of an affirmation of services, the fees of an attorney who has been appointed initially to represent the AIP. The Court declined to order Petitioner to pay the fees of an attorney subsequently retained by the AIP in as much as MHL 81.10 does not provide for payment to privately retained counsel.

Matter of Theodore T., 83 AD3d 852; 920 N.Y.S.2d 688 (2nd Dept., 2011)

Appellate Division reversed an order of the Supreme Court, granted the guardian's motion seeking reimbursement for attorney's fees he incurred on behalf of his ward., and remitted the matter for a

hearing setting the amount of such fees, noting that the Supreme Court had erred in summarily denying the guardian's request based solely upon his failure to seek prior court approval for the expenditure.

Matter of Emanuel A. Towns, an Attorney and Counselor at Law, 75 A.D.3d 93; 901 N.Y.S.2d 68 (2nd Dept. 2010)

An attorney retained by an 89 year old self petitioner on the verge of incapacity was suspended from practice for 6 months and ordered to make restitution for overcharging his client who was obviously suffering from dementia. Many services he performed were billed at a rate for legal services which were in fact not legal services and only non legal tasks incident to the legal services he provided or billed for excessive amounts of time given the task at hand.

In the Matter of Enna D., 30 A.D.3d 518; 816 N.Y.S.2d 368(2nd Dept., 2006)

Following the death of the AIP, the guardianship proceeding abated. Thereafter, Supreme Court lacked the authority to award an attorney's fee to the attorney retained by the petitioner, as §81.10[f], §81.16[f] do not authorize such an award, following the death of the AIP to attorneys other than those appointed by the court.

Matter of John Peterkin, 2 Misc. 3d 1011A ;2004 NY Slip Op 50284U(Sup. Ct., NY Cty., 2004) (Visitation-Lewis, J.)

AIP's daughter held a POA. Her brother petitioned under Article 81 to vacate the POA and be appointed as guardian alleging among other things that the daughter was not caring for the father and was stealing from him. The court finds that the petitioner had not met his burden of proof, that his petition had been brought in bad faith and that he had alleged false and misleading claims. The daughter retained private counsel to represent her for legal fees incurred in defending against the petition. Since MHL §81.10(f) does not apply to retained counsel but only to appointed counsel, she petitioned instead under 22 NYCRR 130-1.1 alleging frivolous litigation and the court directed that her counsel fees be paid by petitioner. She also moved, successfully under MHL §81.08(f) for petitioner to pay the Court Evaluator's fees.

Matter of H.E.M, NYLJ, 8/16/02 (story only) 1091961/01 (Sup. Ct., Kings Cty.)(Leventhal. J.)

Fees for retained counsel for self petitioner in guardianship are reviewable by the court even though there is no express authority in the statute.

Matter of William S., 253 A.D.2d 557, 677 N.Y.S.2d 371 (2nd Dept., 1998); 169 Misc.2d 620; 646 N.Y.S.2d 760 (Sup. Ct., Queens Cty., 1996)

Upon motion of court examiner-fee for private attorney selected by AIP set at zero where attorney failed to submit affirmation of services detailing work performed and otherwise failed to demonstrate

that she performed any services on behalf of AIP. Although MHL §81.10 does not specifically provide for court approval of fees paid to private counsel for AIP, court has inherent authority to supervise same and, in determining reasonable fee, court must consider number of factors. Although attorney here contends that she could not submit affirmation of services because AIP instructed her not to reveal certain information to court, and to file affirmation of services would breach attorney-client privilege, burden of substantiating fee is upon attorney.

Matter of Roy (Lepkowski), 164 Misc.2d 146; 623 N.Y.S.2d 995 (Sup. Ct., Suffolk Cty., 1995 (Luciano, J.)

Where petitioner's counsel successfully obtained court-appointed guardians for property management and personal needs of AIP, counsel fees will be determined pursuant to MHL§81.16 (f), which provides for reasonable compensation, and not pursuant to retainer agreement between petitioner and attorney.

Matter of Petty, 256 A.D.2d 281; 682 N.Y.S.2d 183 (1st Dept., 1998)

Where court evaluator determined that petition was weak and guardianship completely unnecessary, and court "so ordered" petitioners to discontinue proceeding, Supreme Court improperly ordered AIP to pay court evaluator's fees, but properly ordered AIP to pay his own attorney's fees because §81.10 gives court's discretion to order petitioners to pay court-appointed attorneys, but not the AIP's privately retained lawyers when a petition is dismissed.

Matter of Maier, NYLJ, 2/6/98, p. 25, col. 3 (Sup. Ct., Bronx Cty.)(Wilkins, J.)

Attorneys were paid only their retainers in interests of fairness and "community service" that the bar owes to community.

Matter of Ricciuti, 256 A.D.2d 892; 682 N.Y.S.2d 264 (3rd Dept., 1998)

Court not bound by fees set in prior retainer agreement between AIP and counsel. Court sets reasonable compensation.

Matter of Rocco, 161 Misc.2d 760; 615 N.Y.S.2d 260 (Sup. Ct., Suffolk Cty., 1994)

MHL §81.10 (f) does not authorize court to direct petitioner to pay attorney's fees of AIP's privately retained counsel. Section 81.10 (f) authorizes court to direct petitioner to pay fees for MHLS or any attorney appointed pursuant to section 81.10, but has no application when AIP has privately retained counsel. However, this practical limitation on an AIP's access to counsel is incongruous in light of statutory scheme, which is so greatly focused on recognizing and protecting rights of AIP, and Legislature should explore whether appropriate amendment to Article 81 is needed. However, case was referred for hearing on sanctions and if frivolous conduct found, attorney fees could be awarded as sanction.

(ii) Counsel for Cross - petitioners

<u>In the Matter of Ida Q</u>., 11 A.D.3d 785; 783 N.Y.S.2d 680 (3rd Dept., 2004)

Contains following dicta: "....Supreme Court enjoys broad discretion to award [attorneys] fees to..., a cross petitioner in a Mental Hygiene Law article 81 proceeding, even where, as here, the original petition is not granted and the proceeding is discontinued. "Fees were not granted in this case, however, because respondent made his motion long after the proceeding was discontinued and petitioners' motion for counsel fees was decided without any explanation or excuse for his failure to promptly cross-move. Because of the obvious impact of two sizeable awards of counsel fees on the assets of the AIP and the advantages of the court having been able to considering both fee applications at the same time, it was not improper for the court to deny the fee application here. Supreme Court did not err by refusing to consider respondent's motion on the merits.

(iii) Counsel for Public agencies and MHLS

<u>Matter of Rebecca R.</u>, (Sup Ct. Westchester Cty) (Murphy, J. 2016) (unpublished decision - copy available through Director's office of MHLS, 2nd Dept.)

Upon objection by counsel for Petitioner to the guardian's Final Accounting, the court held that FSSY, the guardian, was not permitted to prioritize its commissions and the fees of its own attorney over the fees of Petitioner's counsel fees and those of MHLS as counsel to respondent. The Court ordered FSSY to reimburse the guardianship estate and pay Petitioner's attorney and MHLS from the funds, on a pro-rata share of the assets.

<u>Matter of Wingate (Kern)</u>, 165 Misc.2d 108; 627 N.Y.S.2d 257 (Sup. Ct., Suffolk Cty., 1995)

County Attorney who appears should be awarded "reasonable compensation" pursuant to §81.16(f) only in extraordinary circumstances.

<u>Matter of Hammons (Perreau</u>), NYLJ, 7/7/95, p. 29, col. 3 (Sup. Ct., Kings Cty.)(Goodman, J.)

Where Court has "serious questions" about the "unfounded dramatic allegations in petition," court directs petitioner, Commissioner of Social Services, to pay compensation of MHLS, initially as Court Evaluator and then as attorney.

(iv) Counsel for guardians/conservators

Matter of McEwen (Welte), _Misc.3d_, 2019 NY Slip Op 50777(U) (Sup. Ct., Monroe Cty, 2019)

In assessing the reasonable value of compensation due to the petitioner's attorney, the Court reduced the billing rate and number of hours charged, noting that the rate charged was higher than that charged by attorneys in the geographical area, and that the total number of hours charged, often to litigate "non-issues," was grossly excessive.

Matter of Dorothy K.F. , Sup. Ct. , Westchester Cty ., Index # 20021/15 (Murphy , J.)(unpublished) (Copy available in MHLS 2nd Dept. Director's office)

Where a guardian was removed for cause, legal fees for counsel to the guardian could not be paid from the IP's funds in connection with his representation of the guardian in: (a) a motion to change the abode of the IP which the Court denied as against the IP's best interests or (b) the removal proceeding. The court found that such services representing the guardian did not benefit the IP. The Court rejected counsel's argument that his representation of the guardian in the removal proceeding assisted the Court in securing a more suitable permanent guardian for the IP, stating that the removal would not have been necessary had the guardian not misappropriated the IP's funds.

Matter of Rebecca R., (Sup Ct. Westchester Cty) (Murphy, J. 2016) (unpublished decision - copy available through Director's office of MHLS, 2nd Dept.)

Upon objection by counsel for Petitioner to the guardian's Final Accounting, the court held that FSSY, the guardian, was not permitted to prioritize its commissions and the fees of its own attorney over the fees of Petitioner's counsel fees and those of MHLS as counsel to respondent. The Court ordered FSSY to reimburse the guardianship estate and pay Petitioner's attorney and MHLS from the funds, on a pro-rata share of the assets.

Matter of J.S.W., 15 Misc.3d 1118A; 839 N.Y.S.2d 437 (Sup. Ct., Bronx Cty., 2007)
(Hunter, J.)

Where the order appointing the co-guardians never authorized the co-guardians to retain counsel, the court denied the fee application by the attorney for the guardian to be paid from the IP's funds even though the attorney had previously agreed not to charge the guardians directly.

Matter of Brown, 182 Misc.2d 172; 697 N.Y.S.2d 838 (Sup. Ct., Queens Cty., 1999) (Kassoff, J.)

Court declines award of attorney's fees from IP's estate for legal fees incurred by conservator to reconstruct IP's financial records, in connection with proceeding to remove conservator for breach of fiduciary.

(v) Counsel for Guardian's surety

In the Matter of Benjamin D. Sherman, 277 A.D.2d 320;715 N.Y.S.2d 746 (2nd Dept., 2000)

Counsel fees awarded to counsel for guardian's surety and counsel for IP's daughter where, after IP's death, daughter petitioned in Supreme Court for Special Guardian and final accounting in relation to guardian's wrong doing in failing to make nursing home payments for IP and also failing to turn

(vi) Counsel for non - party

Matter of Sidney W.B., 133 AD3d 596; 18 N.Y.S. 3d 560 (2nd Dept 2015)

The trial court's award of fees to counsel for a non-party objectant was reversed as unauthorized by MHL Article 81.

Matter of Marion C.W., 83 AD3d 1089; 923 N.Y.S.2d 558 (2nd Dept., 2011)

Appellate Division affirms Supreme Court's award of attorney's fees to non-party trustee of the AIP's trust, noting that it is proper for the court in which the trust litigation is conducted to determine the amount and source of counsel fees in that litigation.

Matter of Ruth Q., 23 A.D.3d 479; 808 N.Y.S.2d 110 (2nd Dept., 2005)

MHL 81.16 (f) does not authorize an award of attorneys fees to counsel for a non-party for services rendered in opposing a petition for the appointment of a guardian.

c. Reasonableness of fee requested

Matter of Christopher A., 180 A.D.3d 1036 (2nd Dept., 2020)

In a pending guardianship proceeding, the Appellate Division held that the trial court correctly declined to approve an attorney's fee generated in an action brought by the IP's mother/guardian to recover damages for the personal injuries he sustained in a motorcycle accident. In so doing, the AD noted that the mother executed the retainer agreement that entitled the law firm to retain one-third of any sum recovered in the action, prior to her appointment as her son's guardian, and there was no indication that she possessed actual or apparent authority to execute the retainer on his behalf. The AD upheld the trial court's determination of legal fees, in a reduced amount, premised upon the well-established criteria utilized in guardianship proceedings.

Matter of Yolanda T., __AD3d_____; 2017 N.Y. App. Div. LEXIS 657 (2nd Dept. 2017)

On appeal of an order settling a final accounting and awarding guardianship commissions and attorney fees, the Appellate Division reduced the attorney fee request holding that compensation for legal services is limited to time spent on legal matters and where the claimed legal service actually constitutes the normal and customary duties of a guardian compensable through the ordinary award of a commission, that service will not be compensated as a legal service at the attorney's billing rate.

Matter of Zofia, 136 AD3d 818; 26 N.Y.S. 3d 95 (2nd Dept. 2016)

Death of IP rendered moot a challenge by the IP's son to have his sister removed as guardian but the issues as to reasonableness of counsel and court evaluator fees was held not academic and, on appeal, it was found that the trial court had failed to provide, in writing, a clear and concise explanation for its award, requiring the issue to be remitted back to the trial court for a hearing as to the reasonableness of counsel and court evaluator fees.

Matter of Uriel R ., 133 AD3d 859; 19 N.Y.S. 3d 441 (2nd Dept., 2015)

Attorney claimed entitlement to attorney fees and commissions for work he performed as a co-guardian over a 4 years period. The trial court, absent explanation, denied all compensation. On appeal, the Appellate Division acknowledged that generally the trial court must provide a clear written explanation for its award, or lack thereof, but held that in this instance, despite the absence of such written explanation, the attorney has submitted no proof as to the work he performed or its reasonable value and thus has failed to meet even his threshold burden of establishing that he was owed compensation. The Appellate Division upheld the trial court's denial of fees without remitting the matter back to the trial court to establish the a reasonable award. (It should be noted that although not mentioned in the text of the decision, the attorney requesting compensation in this case had been previously disbarred and has pled guilty to grand larceny for defrauding dozens of disabled clients he was supposed to be serving as guardian.

Matter of Mae R., 123 A.D.3d 1034; 999 N.Y.S. 2d 166 (2nd Dept. 2014)

Where the trial court had set the fees of the Court Evaluator and Court Appointed counsel without providing an explanation of the factors it had considered or its basis for arriving at the amounts awarded, the Appellate Division directed that upon remittal the trial court was to make a new determination as to the amount of those awards, setting forth the reasons and factors considered.

Matter of Valk, 41 Misc. 3d 1216(A); 981 N.Y.S.2d 639 (Surr. Ct, Nass. Cty. 2013)(Surr. McCarty III)

Although the court acknowledged that where the fair value of legal fees exceeds the amount awarded by the court to be paid from the AIP's funds, counsel for petitioner may seek to recover the balance from the petitioner upon proof that counsel had reached such an agreement with the petitioner, it held

that in the instant case, the fair value of the attorney's services was less than the attorney was charging and therefore there was no excess balance to seek from the petitioner. The court identified first that the attorney's charged hourly rate was higher than that customarily charged for this work and also that much time was billed for preparing a trust document that was simply a form that he court has long distributed to practitioners.

Matter of Martha M. (Anonymous), (Unpublished Decision and Order), June 22, 2012, Index # 1032/06, Sup. Ct., Dutchess Cty. (Pagones, J.)

In assessing the reasonable value of service rendered by the Petitioner's attorney, the Court declined to accept the itemized billing records submitted by the firm (wherein the attorneys billed at hourly rates between $270 and $650 and paralegals billed at hourly rates of $225), noting that the rates charged therein were substantially higher than the rates charged by attorneys in this geographical area (where typical hourly rate for an attorney was between $200 and $350, and where the typical hourly rated for a paralegal rarely exceeded $90).

Matter of Samuel S. (Anonymous), 96 AD3d 954; 947 N.Y.S. 2d 144 (2nd Dept. 2012)

The Appellate Division held that the trial courts failure to hold an adversarial hearing and provide, in writing, a clear and concise explanation of the factors it considered and its reasoning in arriving at the amounts it awarded to the Court Evaluator and medical expert required the matter to be remitted to the Supreme Court for a hearing, taking into consideration the appropriate factors.

Matter of Doris J., 93 AD3d 726; 940 N.Y.S. 2d 293 (2nd Dept. 2012)

The Appellate Division remitted a decision back to the trial court to set forth a clear explanation of its determination with respect to an award of fees for accounting services rendered in an Article 81 guardianship because the trial court had limited the accountant's fee to the rate of only $150.00 per hour without explaining its reason for disregarding the rates utilized by the accountant.

Matter of Reitano v. Department of Social Servs., 90 AD3d 934; 934 N.Y.S.2d 710 (2nd Dept 2011)

The Appellate Division affirmed a lower court's denial of a guardian's motion requesting an award of attorney's fees *nunc pro tunc* for the preparation of accountings for 4 prior years. The guardian, an attorney, had already been paid commissions for her services as guardian and the court found that she failed to meet the burden of establishing that the services she performed to prepare the accountings were legal in nature, rather than an administrative function of her responsibilities as guardian.

Matter of Emanuel A. Towns, an Attorney and Counselor at Law, 75 A.D.3d 93; 901 N.Y.S.2d 68 (2nd Dept. 2010)

An attorney retained by an 89 year old self petitioner on the verge of incapacity was suspended from practice for 6 months and ordered to make restitution for overcharging his client who was obviously suffering from dementia. Many services he performed were billed at a rate for legal services which were in fact not legal services and only non legal tasks incident to the legal services he provided or billed for excessive amounts of time given the task at hand.

Matter of C.C. 27 Misc.3d 1215A; 910 N.Y.S.2d 761(Sup. Ct. Bronx Cty. 2010)(Hunter, J)

Petitioner's counsel's fee could not be paid until she submitted an Affirmation of Services setting for what she had done so the court could determine the reasonableness of the fee requested.

Matter of Aida C. (Heckle), 67 A.D.3d 1361; 891 N.Y.S.2d 214 (4th Dept 2009)

Matter remand to trial court for consideration of reasonableness of counsel fees, after hearing, if necessary, where IP's attorney was unable to review submissions by counsel for petitioner and trial court failed to provide concise explanation for its award of such fees.

Matter of Anne M. T., 64 A.D.3d 784; 882 N.Y.S.2d 715 (2nd Dept. 2009)

Appellate Division upwardly modifies order for counsel fees after finding that the trail court had not provided any analysis for the lower fee and finding that a proper analysis would have resulted in a higher fee award. (It is noteworth that the Appellate Division modified the fee and did not remand it back to the trial court to reestablish the fee.)

Matter of Jewish Association for Services for the Aged Community Guardian Program v David Kramer, 60 A.D.3d 531; 874 N.Y.S.2d 375 (1st Dept 2009)

Order directing reimbursement of temporary guardianship expenses and legal fees incurred in connection with an interim stay of the guardianship powers obtained by respondent's counsel unanimously reversed, on the law, without costs, and the matter remanded for re-evaluation of the legal fees to be imposed, if any. The Appellate Division determined that attorney fees had been improvidently imposed without the requisite written decision setting forth the basis for the award and an explanation as to the reasonableness of the fees imposed further, directed that an evaluation *de novo* as to whether the legal fees sought were occasioned by procedural mistakes possibly committed by respondent's counsel.

Matter of J.S.W., 15 Misc.3d 1118A; 839 N.Y.S.2d 437 (Sup. Ct. Bronx Cty. 2007)(Hunter, J.)

Where the co-guardians were themselves attorneys, it was unreasonable of them to have their

attorney prepare the final accounting and move to terminate the guardianship.

Matter of Audrey J.S., 34 A.D.3d 820; 825 N.Y.S.2d 520 (2nd Dept. 2006)

Appellate Division held an appeal of an attorney fee award in abeyance and remitted it back to Supreme Court, Queens County to set forth a clear and concise explanation of the factors considered in awarding the fees and the reasons for its determination. The Appellate Division reiterated the factors to be considered in awarding the attorneys fees as: (1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented, (2) the attorney's experience, ability, and reputation, (3) the amount involved and the benefit flowing to the ward as a result of the attorney's services, (4) the fees awarded in similar cases, (5) the contingency or certainty of compensation, (6) the results obtained, and (7) the responsibility involved.

Matter of Astor, 14 Misc.3d 1201; 831 N.Y.S.2d 360 (Sup. Ct., NY Cty. 2006) (Stackhouse, J.)

Over 3 million dollars in legal and expert fees were amassed by 56 lawyers, 65 paralegals, 6 accountants, 5 bankers, 6 doctors, a law school professor and 2 pubic relations firms during the proceedings in the intensely disputed guardianship of NY philanthropist Brooke Astor. Although there was no opposition filed by any party to any of the fee requests submitted, the court, relying on its inherent authority, reviewed the submissions. The court, in approving a substantial amount of the requests, noted that Mrs. Astor's financial holdings are extremely complex, that her financial records were poorly maintained thus complicating the task of marshaling and taking control of her assets and income; that the case necessitated investigation into allegations that her son/guardian had converted her assets into his own use; that there were motions by three press organizations for leave to intervene and for access to the files and proceedings; that because the proceeding settled only 6 days before the trial date the parties had to substantially prepare for trial and that there was a need for the law firms to assign a large numbers of staff to the project to move it along quickly. In evaluating the fees, the court allowed only fees for services that served the benefit of the AIP, set the cap for legal fees at $450/hr., denied all fees related to public relations efforts and the party's attempts to try the case in the media; and denied charges attributable to preparation of the fee applications.

Matter of Lukia QQ., 27 A.D.3d 1021; 812 N.Y.S.2d 162 (3rd Dept. 2006)

Appellate Division reduces fee awarded to Court Evaluator and counsel to AIP because the case was not complex enough to warrant the amount awarded and the CE and counsel to AIP engaged in duplicative work.

Matter of Nebrich, 23 A.D.3d 1018; 804 N.Y.S.2d 224 (4th Dept., 2005)

Appellate Division remands case for written decision to explain basis for awarding Counsel fees in accordance with following factors: (1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented, (2) the attorney's

experience, ability, and reputation, (3) the amount involved and the benefit flowing to the ward as a result of the attorney's services, (4) the fees awarded in similar cases, (5) the contingency or certainty of compensation, (6) the results obtained, and (7) the responsibility involved**.**

Matter of Catherine K ., 22 A.D.3d 850; 803 N.Y.S.2d 193 (2005 2nd Dept)

Appellate Division uphold award of attorneys fees challenged by counsel as insufficient. Court quotes factors as : (1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented, (2) the attorney's experience, ability, and reputation, (3) the amount involved and the benefit flowing to the ward as a result of the attorney's services, (4) the fees awarded in similar cases, (5) the contingency or certainty of compensation, (6) the results obtained, and (7) the responsibility involved.

In the Matter of Martha O. J., 22 A.D.3d 756; 804 N.Y.S. 2d 387 (2nd Dept 2005), *modified after remittitur* 33 A.D. 3d 1002; 822 N.Y.S. 2d 734; (2006)

Appellate Division held an appeal in abeyance and remitted four orders awarding attorneys fees back to Supreme Court Queens County to set forth a clear and concise explanation of the factors considered in awarding the fees and the reasons for its determinations. The Appellate Division sets forth the factors to be considered in awarding the attorneys fees as: (1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented, (2) the attorney's experience, ability, and reputation, (3) the amount involved and the benefit flowing to the ward as a result of the attorney's services, (4) the fees awarded in similar cases, (5) the contingency or certainty of compensation, (6) the results obtained, and (7) the responsibility involved. Upon return from remittitur the Appellate Division modified the fee awards.

Estate of Rose BB, 16 A.D.3d 801; 791 N.Y.S.2d 201 2005 (3rd Dept. 2005), revised judgement affirmed 35 A.D.3d 1044; 826 N.Y.S.2d 791(3rd Dept. 2006)

IP died and the guardianship proceeding was transferred to the Surrogate's Court and consolidated with a probate proceeding. The parties to the guardianship proceeding enter into a Stip on the records agreeing that the Surrogates Court would determine the fees due in the guardianship proceeding. Guardian submitted final accounting in the Surrogates Court and it was later approved by the Appellate Division. Petitioner in the Art 81 proceeding moved in Surrogates Court for counsel fees pursuant to the Stip. and after hearing the Surrogates Court enters an order directing payment of fees to be paid by the respondent in this appeal who was the other party to the stip.
Respondent argues that the petitioners fee was untimely but court finds that it was delayed by appeals, some of which were required due to respondents behavior. Respondent also argues that the Surrogates Court cannot determine the fees due from the guardianship proceeding but the Appellate Division rejects that argument holding that "when appropriate, counsel fees may be awarded in situations where the misconduct of a fiduciary brings about the expense". Appellate court however finds that it is not in a position to determine the reasonableness of the fees awarded and remands to Surrogates Court for further proceedings as determined by Surrogates Court. On

subsequent appeal, the judgement, as revised by Surrogate's Court is affirmed.

Matter of Maylissa, 5 A.D.3d 4992; 772 N.Y.S.2d 554 (2nd Dept., 2004)

Appellate Division holds that it was error for court to have denied attorneys fees for the preparation of and filing of the semi-annual account of the co-guardians who are not attorneys or accountants and remands for findings as to proper fee.

Matter of De Santis, 186 Misc.2d 791; 720 N.Y.S.2d 757 (Sup. Ct., Nassau Cty., 2000)

Court has power to review reasonableness of petitioner's attorney's fees where petitioner complains they are excessive, even where attorney will be paid by petitioner and not from the AIPs funds.

Matter of Enid B., 7 A.D.3d704, 777 N.Y.S.2d 178 (2nd Dept 2004)

AIP's counsel appeals from order which setting her fee without providing an explanation based upon the relevant factors. Appellate Division, while acknowledging that the trial court has broad discretion, found that the trial court made no reference at all to the relevant factors and it appeared that they were not considered. Therefore, it remitted for a new determination based consideration of the factors.

Matter of Helen C., 2 A.D.3d 729; 768 N.Y.S.2d 617 (2nd Dept., 2003)

Supreme Court found to have providently exercised its discretion in limiting award of legal fees to counsel for the guardian where "many of the legal services performed...were of the type customarily performed by a guardian".

Matter of Tijuana M., 303 A.D.2d 681; 756 N.Y.S.2d 796 (2nd Dept. 2003)

Appellate Division modifies order awarding attorney fees by increasing the fees, stating that the trial court failed to analyze the relevant criteria and set forth analysis in written decision. Appellate Division enumerates relevant criteria and conduct analysis in its opinion.

Matter of Keele, NYLJ, 6/12/01, (Sup. Ct., NY Cty.) (Lehner, J.); Aff'd 305 A.D.2d 145 (1st Dept., 2003)

Where counsel for guardian had already been compensated on hourly basis for legal work done, counsel would not be further compensated on basis of percentage of substantial funds recovered, especially for non-legal work, such as searching for assets and correcting accounts that could have been performed by a non lawyer.

Matter of Spingarn, 164 Misc.2d 891; 626 N.Y.S.2d 650 (Sup. Ct., NY Cty., 1995)

Where many hours billed by law firm were unnecessary, duplicative and not responsibility of AIP, only reduced legal fee paid from AIP's funds will be allowed based on court's experience and analysis of time reasonably involved in preparing, processing and presenting petition to court. In determining reasonableness of legal fees involved, following factors must be considered: hours reasonably expended; reasonable hourly rate of attorney; nature of services rendered and difficulties involved. Many hours billed were for unnecessary charges such as numerous attorneys in same firm reviewing same documents, and for rudimentary research on Article 81 proceedings as well as for more attorneys than were reasonably necessary appearing in court.

Matter of Kunzelmann, 199 A.D.2d 1068; 605 N.Y.S.2d 606 (4th Dept., 1993)

App. Div. finds trial court's award of fees for AIP's attorney was not "reasonable in relation to the results obtained" and was an abuse of discretion, based on totality of representation, including result obtained, time expended, and attorney's standing in legal community. (*No details provided in opinion*)

Matter of O' Day v. Anthony Maggipinto, 229 A.D.2d 583; 646 N.Y.S.2d (2nd Dept., 1996)

Where order of appointment provided, inter alia: "that the [guardian] is authorized to pay out of the funds of the [AIP] such fees and disbursements of attorneys, guardian ad litem, and the doctor as will hereinafter be fixed by the Court," and attorney billed Guardian directly for fees, substantially over and above those that court had authorized Estate to pay him, court properly directed attorney to return improperly-billed funds to Estate.

d. Proper Court to award fees Surrogate's or Supreme

Matter of Marion C. W., 83 AD3d 1087; 922 N.Y.S.2d 173 (2nd Dept., 2011)

Where the AIP died after a hearing had been held and a decision had been issued determining her need for a guardian, but her death occurred prior to the entry of the judgment, the Appellate Division found that Supreme Court had the authority to award counsel fees because entry of the judgement was merely a ministerial act.

Matter of the Will of Edith M. Leslie, 2008 N.Y. Misc. LEXIS 5747; 240 NYLJ 57 (Surr. Ct., Bronx Cty.) (Surr. Glen 2008)

An SNT had been created in Surrogate's Court under a construction of a general trust under the will for the benefit of decedent's disabled daughter. In addition to being the beneficiary of this trust, this daughter was also an IP with an Article 81 guardian. The Article 81 guardian was the proposed trustee of the SNT. Among other things, the petition sought an order fixing the future annual fees of the guardian and directing that the guardian's fee be paid from the SNT. The Surrogate instead

held that given the continuing nature of the Supreme Court's jurisdiction over the guardianship, all issues regarding the commissions of the trustee of the SNT were to be addressed by the Supreme Court consistent with MHL 81.28, as also provided in the term of the proposed SNT. The Surrogate also held that to the extent the guardian incurred fees and costs not payable from the SNT in connection with investigating and securing appropriate medical care for the IP, the guardian could seek fees from the general trust. Finally, the Surrogate held that it would retain jurisdiction over administration of the general trust that had been created under the will.

Matter of Lehman, 2008 N.Y. Misc. LEXIS 2106; 239 NYLJ 61 (Surr Ct ., Bronx Cty.)(Surr. Holzman)

An Article 81 guardian, who had been appointed in Supreme Court (by a now retired Justice), applied in Surrogate's Court to fund an SNT with the proceeds of a wrongful death action that had been compromised in the Surrogate's Court in connection with the settlement of the estate of the IP's mother. The Article 81 guardian also requested that from these same proceeds, the Surrogate fix legal fees to various attorneys who represented him or the IP previously pursuant to the order of the Supreme Court. The Surrogate reasoned that although jurisdiction had been obtained over all the parties, the application should have been made in Supreme Court because establishing the SNT would require an increase in the authority of the petitioner over that originally granted by the Supreme Court. The Surrogate then reasoned that if the case were transferred to it, it would have jurisdiction to act on all the issues since the funds were derived from the compromise in Surrogate's Court. Therefore, the Surrogate deemed the application to have been made pursuant to SCPA 501(1)(b) seeking the Surrogate's consent to receive any action pending in Supreme Court relating to the administration of the estate if, upon referral back to Supreme Court, the Supreme Court in the exercise of its discretion, decides that the matter should proceed in Surrogate's Court.

Estate of Marguerite Porter, 2007 NY Misc LEXIS 5656; 238 NYLJ 17 (Surr. Ct., Richmond Cty.) (Surr. Fusco)
Surrogate Court set fee of attorney for Guardian of deceased IP pursuant to terms of a stipulation.

Estate of Hornik, NYLJ, 11/9/06, p. 30, col. 3 (Surr. Ct. Queens Cty. 2006)(Surr. Nahman)

Surrogate's Court denies without prejudice an application by the guardian of the decent for compensation and refers the guardian back to Supreme Court where the guardianship was handled.

Estate of Rose BB, 16 A.D.3d 801; 791 N.Y.S.2d 201(3rd Dept. 2005), revised judgement affirmed 35 A.D.3d 1044; 826 N.Y.S.2d 791 (3rd Dept., 2006)

IP died and the guardianship proceeding was transferred to the Surrogate's Court and consolidated with a probate proceeding. The parties to the guardianship proceeding enter into a Stip on the records agreeing that the Surrogates Court would determine the fees due in the guardianship proceeding. Guardian submitted final accounting in the Surrogates Court and it was later approved by the Appellate Division. Petitioner in the Art 81 proceeding moved in Surrogates Court for

counsel fees pursuant to the Stip. and after hearing the Surrogates Court enters an order directing payment fo fees to be paid by the respondent in this appeal who was the other party to the stip. Respondent argues that the petitioners fee was untimely but court finds that it was delayed by appeals, some of which were required due to respondents behavior. Second, respondent argues that the Surrogates Court cannot determine the fees due from the guardianship proceeding but the Appellate Division rejects that argument holding that "when appropriate, counsel fees may be awarded in situations where the misconduct of a fiduciary brings about the expense."

Estate of Josette Pyram, NYLJ, 1/8/04, p. 31, (Surr. Ct., Queens Cty.)(Surrogate Nahman)

The request for legal fees in an Article 81 proceeding which resulted in the appointment of a Guardian for the decedent was denied by Surrogate's Court without prejudice to request such fees in the Guardianship Part of Supreme Court.

Matter of Miriam Shapiro, NYLJ, 9/34/03, p. 22 (Surr. Riordan)

Where IP died, her attorney for the Art 81 proceeding should submit bill for services to the Art 81 court, not the Surrogate's court during probate.

e. Fees set by other courts

(i) Foreign courts not binding

Matter of Serrano, 179 Misc.2d 806; 686 N.Y.S.2d 263 (Sup. Ct., Bronx Cty., 1998)

Article 81 guardian, with court permission, bought home in Puerto Rico for IP and then sought order permitting him to use IP's assets to pay legal fees for transaction. Issue was whether amount of legal fees, set in an extraordinarily high amount by foreign court, is binding on New York court. NY court holds that Puerto Rican court could only set fees subject to its approval and awards more reasonable fees to prevent "an outrageous injustice."

Matter of Whitehead, 169 Misc.2d 554; 642 N.Y.S.2d 979 (Sup. Ct., Suffolk Cty., 1996)

In proceeding brought by co-committees of Canadian IP, who were appointed by Queen's Bench, Canada, seeking guardian of IP's New York assets, it is inappropriate for Supreme Court to defer to determination by Queen's Bench as to a counsel fee payable by IP in proceeding before Supreme Court. Setting counsel fee by other than Supreme Court's determination pursuant to §81.16 (f) is contrary to public policy of New York State.

(ii) Other New York Courts

Cathy R. v. Aaron Fischberg, 2003 NY Slip OP 50551U; 2003 NY Misc. LEXIS 67

Resolution of attorneys fees issue within the context of an Art 81 proceedings is res judicata and the fee issues cannot later be litigated in another court.

F. Court Evaluators

(i) Role

Matter of Elizabeth TT. (Suzanne YY.--Elizabeth ZZ.), _AD3d_, 2019 NY Slip Op 06667 (3rd Dept., 2019)

Although a court evaluator may retain an independent medical expert where the court finds it is appropriate under MHL § 81.09(c)(xvii)(7), and may apply to the court for permission to inspect records of medical, psychological and/or psychiatric examinations of the AIP under MHL § 81.09(d), there is no corresponding statutory requirement for an AIP to abide by a court evaluator's recommendation that he or she undergo a neuropsychological evaluation to assess his or her present cognitive condition. Although MHL § 81.11(c) provides that the AIP must be present in order for the court to obtain its own impression of the person's capacity and make an independent assessment of the AIP, there is no corresponding requirement in Article 81 that compels the AIP to testify at a hearing.

Matter of Govan W., __ Misc.3d __; 2019 NY Slip Op 50650(U) (Ct of Claims of NY, 2019)

The Court of Claims rejected a court evaluator's claim that he was entitled to $14,232.00 in fees, noting that the court evaluator, who rendered services that vastly exceeded the scope of his appointment, appeared to confuse his duties with those of the petitioner. He was not appointed as a court evaluator to ensure that the petitioner was successful in seeking the appointment of a guardian. Rather, a court evaluator is a neutral appointee entrusted with duties and responsibilities as set forth by statute, to assist the court in determining whether a guardian should be appointed, or whether there are less restrictive measures that can be employed to protect the subject of the proceeding.

Matter of Incorporated Village of Patchogue v. Zahnd, 3/12/2010 , NYLJ 29, (col. 1) Sup. Ct. Suff. Cty. (Luft, J.)

Counsel for the AIP moved to dismiss petitioner‘s application after presentation of evidence on petitioner’s *prima facia* case, arguing that the Court should have considered only the sufficiency of that evidence and that on its own, it is not clear and convincing, a point he emphasized in his additional application to suspend the appointment of the Court Evaluator pursuant to §81.10(g). The Court concluded, however, that it was appropriate to consider the Court Evaluator's testimony and

report *before* ruling on the motion to dismiss. The court reasoned :(1) that while suspension of the appointment of the Court Evaluator is permissible in cases in which the Court has appointed counsel for the AIP:, the primary purpose for that authority seems to be to avoid unnecessary expense to an AIP and determination to forego the benefit of a Court Evaluator is generally exercised in the initial Order to Show Cause or shortly thereafter. Noting that MHL 81.10 does not establish any time frame for suspension of the Court Evaluator, the Court reasoned that where, as here, the Court Evaluator has already conducted an investigation and prepared a written report, the value of receiving the benefit of the Court Evaluator's work is outweighed by any cost savings or procedural advantage the AIP seek in securing the suspension of the Court Evaluator. The Court further reasoned that (2) while there is an adversarial element to an Article 81 proceeding, the Court must also consider the best interests of the AIP and the failure to considered the testimony and report of the Court Evaluator would be a failure to look beyond the adversarial aspect of the proceeding and a failure to consider the bests interests of the AIP.

Faraldo v. Kessler et al., 2008 U.S. Dist. LEXIS 5367 (E.D.N.Y., 2008); 2008 WL 216608 at *5 (Feurstein, J.)

For purposes of a federal civil rights action, a Court Evaluator appointed by the state court pursuant to MHL 81.09 arguably acts under color of state law when investigating and preparing reports, and might also be a State actor under the "close nexus/joint action " test. A Court Evaluator is, however, absolutely immune from liability under §1983 because (s)he acts and an arm of the court and performs functions integral to the judicial process.

Matter of "Jane Doe," An incapacitated person, 16 Misc. 3d 894; 842 N.Y.S.2d 309 (Sup. Ct., Kings County, 2007)(Leventhal, J.)

Where interim guardian was not an attorney, but brought to Court's attention a problem, court evaluator, who was an attorney, petitioned the Court to remedy the problem.

Matter of Heckl, 44 A.D.3d 110; 840 N.Y.S.2d 516 (4th Dept., 2007)

Although acknowledging that an AIP's liberty is at stake in an Article 81 proceeding, citing the nature of an Article 81 proceeding as being about care and treatment and non-criminal, the Court declined to find that the AIP's 5th amendment right against self incrimination was implicated by the AIP's desire to refuse to speak to the Court Evaluator. This AIP had counsel of her own choosing. The court held that although a Court Evaluator may be dispensed with under 81.10 when there is counsel for the AIP, that exception only applied when there were financial constraints preventing the appointment of both and that was not the case here. The Court did however also hold that while it could not dispense with the appointment of the Court Evaluator, it also could not compel the AIP to speak to the Court Evaluator because the duties imposed by the statute were upon the Court Evaluator to interview the AIP but not upon the AIP to be interviewed. Likewise, the Court held that it could not hold the AIP in contempt for refusing to speak to the Court Evaluator.

Matter of the Guardianship of F.R., 12 Misc.3d 247; 820 N.Y.S.2d 435; (Sup. Ct., Kings Cty., 2006) (Leventhal, J.)

Court Evaluator bid at auction on real estate belonging to the AIP in whose Art 81 proceeding he served as CE. Court notes that although there was nothing per se improper about the CE bidding at a public auction, but since the CE serves as the "eyes and ears" of the court, its function is quasi-judicial and thus even the appearance of impropriety is to be avoided. Case has good discussion of the role of Court Evaluator.

Matter of D.G., 4 Misc.3d 1025A; 798 N.Y.S.2d 343 (Sup Ct, Kings Cty., 2004) (Leventhal, J.)

The Court Evaluator is not an adversarial party. Even if the individual appointed is an attorney he/she he does not serve as an attorney. The Court Evaluator works as an arm of the court and the assessment made is of an independent nature. Therefore, the court denied petitioner's motion to strike the Court Evaluator's report and for the Court Evaluator to recuse herself for meeting with the petitioner without her counsel present.

55th Management Corp v. Goldman, NYLJ April 15, 2003 (Sup. Ct., NY Cty.)(Lebedeff, J.)

Out of court statements made to a court evaluator in an 81 proceeding are protected by the privileges afforded participants in judicial proceedings, therefore, a libel action against the informant did not lie. The court reasons that the court evaluator plays a vital fact finding role in the article 81process and his/her function cannot be hampered by the threat that anyone who talks to the C/E will be the subject of a libel suit.

Matter of Lula XX, 88 N.Y.2d 842; 644 N.Y.S.2d 683 (1996); 667 NE2d 333; 1996

The Court Evaluator is not a party to an Article 81 proceeding.

Matter of Lee "I" (Murphy), 265 A.D.2d 750; 697 N.Y.S.2d 385 (3rd Dept., 1999)
It is not the role of court evaluator to be an advocate for AIP but rather to be a neutral advisor to court.

(ii) Appointment

Matter of Carl Ginsberg v Annie Larralde, 2/19/09 NYLJ 39 (col 2) (1st Dept. 2009)

While traveling in France, the AIP had a stroke and was hospitalized. Upon the petition of the French hospital to a French court, the French court found that the AIP was in need of a guardian. Thereafter, the NY court accepted the findings of the French Court and appointed a temporary guardian in NY without holding a hearing and without appointing a Court Evaluator. On appeal by the AIP, the Appellate Division held that the NY court had not erred by accepting the findings of the French court without a hearing or appointment of a Court Evaluator in NY.

Matter of Rochester General Hospital (Levin), 158 Misc.2d 522; 601 N.Y.S.2d 375 (Sup. Ct., Monroe Cty., 1993)

Where formal statutory notice informed AIP of appointment of court evaluator to explain proceeding and investigate claims made in application, failure to make such appointment does not render proceeding defective where counsel has been appointed pursuant to §81.10. Although Article 81 contains elaborate provisions for appointment and duties of court evaluator, there is no reason why counsel could not perform most of these same services. As practical matter, appointment of both court evaluator and counsel has potential for exhausting resources of AIP, who may have relatively limited assets.

(iii) Compensation

Matter of Cynthia W., _Misc.3d_, 2019 NYLJ LEXIS 4537 (Sup. Ct., NY Cty., 2019)

The petitioner, an attorney, commenced a proceeding seeking the appointment of a personal needs and property management guardian for his wealthy 86 year-old mother, Cynthia. Before commencement of this proceeding, Cynthia's husband filed a family offense proceeding against the petitioner. After a hearing in that proceeding, a Family Court referee found that the petitioner engaged in menacing and aggravated harassment, and issued an Order of Protection in favor of Cynthia and her husband, which remained in effect at the time of the guardianship hearing. The guardianship court now held that the petitioner failed to present evidence of Cynthia's incapacity, and that Cynthia B.'s advance directives adequately protected her and constituted the least restrictive form of intervention. The court noted that most of the petitioner's testimony was based on his disdain of Cynthia's husband and her husband's children, and highlighted his suspicious procedural delay tactics, and his improper conduct during the proceedings. The court denied the petition and dismissed the proceeding for lack of merit, determining that it was brought in bad faith. The court also directed the petitioner to pay the fees of the court-appointed attorney and court evaluator.

Matter of Govan W., __ Misc.3d __; 2019 NY Slip Op 50650(U) (Ct of Claims of NY, 2019)

The Court of Claims denied a court evaluator's application seeking $14,232.00 in compensation from the petitioner, DSS, and instead directed DSS to pay him $750. The court reasoned that because the petition had been granted, in accordance with MHL § 81.09(f), the court was only authorized to award him compensation from the IP's assets, and here the IP had none. Furthermore, the court evaluator either knew or should have known of DSS' practice of consenting to make this $750 fixed payment, for which DSS would not otherwise be responsible, to serve as an incentive for eligible court evaluator appointees to accept cases where the AIP has little or no assets.

<u>Matter of Judith T. (Rosalie D.T.)</u>, _Misc.3d_, 2017 N.Y. Misc LEXIS 5095*; 2017 NY Slip Op 27421 (Cty. Ct., Nassau Cty.,) (Knobel, A.C.C.J.)

The court denied the petition brought by the daughter of the AIP, a highly intelligent retired schoolteacher who desired to move to Manhattan and volunteer at the American Museum of Natural History. In so doing, the court noted that the petitioner failed to establish by clear and convincing evidence that the AIP did not adequately understand and appreciate the nature of the physical limitations caused by the stroke she had eight years earlier, and that she was unable to provide for her personal and financial needs. The court noted that the AIP understandably desires to have a productive, useful and happy life, and to not be held back her physical disabilities, or the fears and wishes of her daughters, or the husband that she was then seeking to divorce. The court ordered the petitioner to pay the AIP's counsel fees, but ordered that the petitioner and the AIP each pay one half of the court evaluator's fee.

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<u>Matter of Bonnie O.</u>, ____Misc3d____; 2016 N.Y. Misc. LEXIS 4462 (Sup. Ct. Dutchess Cty.) (Pagones, J.)

Upon finding that guardianship was not warranted because the AIP, a 90 year old woman, had made sufficient alternative arrangements to assist her in her areas of need, including issuing a Power of Attorney and Health Care Proxy to one of her two daughters, relying on friends, and hiring paid professionals and caregivers to help in her own home, the Court dismissed the guardianship petition and ordered Petitioner, the AIPs other daughter, to return certain property to the AIP. Upon additional findings that Petitioner had sufficient funds to absorb her own legal fees, and a further finding that while not "wholly frivoulous" the petition had been motivated by "avarice, possible financial gain and distrust of her sister's ability to manage their mother's finances", the Court ordered petitioner to pay MHLS as the Court Evaluator and also, upon submission of an affirmation of services, the fees of an attorney who has been appointed initially to represent the AIP. The Court declined to order Petitioner to pay the fees of an attorney subsequently retained by the AIP in as much as MHL 81.10 does not provide for payment to privately retained counsel.

Matter of Yosef B., Sup Ct., Kings Cty., Unpublished Decision and Order, Index # 100051/11 (Feb. 1, 2013) (Baily-Schiffman, J.) (Copy available through MHLS 2nd Dept., Special Litigation and Appeals Unit)

Although the Court believed that, under the facts of that case (where the petition was brought in good faith and the AIP's situation was improved as a consequence thereof), both the petitioner and the AIP should equally bear the cost of the fees generated by the Court Evaluator and the AIP's attorney, it concluded that it was without authority to as to ascribe any responsibility for fees to the AIP in light of the petitioner's failure to establish the AIP's need for a guardian or his incapacity.

Matter of Schwarz, 33 Misc3d 1203A; 938 N.Y.S. 2d 230 (Sup. Ct., Kings Cty., 2011)

The Supreme Court declined to revoke the advance directives of a 57 year old rabbi, bedridden by multiple sclerosis that had recently been exacerbated by diabates and leukemia, which were in favor of the AIP's sister, with whom the AIP resided in a room of her home which was comparable to a room at a skilled nursing facility. Noting that the advance directives allowed for the management of the AIP's activities of daily living, his personal needs, his finances and property, and was consistent with the statutory goal of effectuating the least restrictive form of intervention, the Court invalidated a subsequent power of attorney in favor of the petitioner, the AIP's brother, which the petitioner had recently obtained from the AIP, while he was incapacitated, under false pretenses. Finally, the Court, noting that the petitioner had commenced the proceeding in bad faith "to settle scores and address unresolved issues among siblings rather than advance the best interest of the AIP," held the petitioner responsible for the Court Evaluator's fees.

Matter of Theodore T. v. Charles T., 78 A.D.3d 955; 912 N.Y.S. 2d 72 (2nd Dept., 2010)

Noting that "[t]he petitioner bears the ultimate burden of establishing that the court has personal jurisdiction over the respondent," and that "[t]he method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with," the Appellate Division affirmed so much of the Supreme Court's order in which it dismissed the petition for lack of jurisdiction due to the petitioner's use of a method of service which was not expressly authorized in the order to show cause. However, the Appellate Division remitted the matter back to the Supreme Court, noting that the court had failed to explain any of the factors upon which it had relied in ordering that the petitioner pay the fees generated by the court evaluator and by the AIP's court-appointed counsel.

Matter of Deanna W., 76 A.D.3d 1096; 908 N.Y.S. 2d 692 (2nd Dept., 2010)

The Appellate Division, Second Department, held that the Supreme Court had erred in directing the Department of Social Services to disregard guardianship expenses when calculating the IP's net available monthly income (NAMI) for the purpose of determining Medicaid eligibility, holding that the agency's interpretation of its own regulations, including Medicaid eligibility regulations, was reasonable.

<u>Matter of Kenneth Sherman</u>, 28 Misc.3d 682; 902 N.Y.S.2d 334 (Sup. Ct., Bronx Cty 2010) (Hunter, J.)

The Court Evaluator, having not been paid for his services, moved to have his fee paid by either the nursing home where the IP had been a resident or by the community guardian FSSY. Initially, the court had appointed the IP"s daughter to serve as his guardian and directed that she file a Commission and post a bond . When she neglected to do so, the court attempted to correspond with her but she failed to respond ; therefore, the court removed her and appointed FSSY. When the Court Evaluator was not paid he contacted FSSY and was advised that the IP's daughter, with whom the IP shared a joint account, had cleared the funds out of the account upon his death and that there would not be sufficient funds to pay him. The court found, however, that there had been sufficient funds in the IP's account at one point before FSSY paid itself its own commission in full and therefore ordered FSSY to pay the Court Evaluator from the funds it had collected to pay its own commission.

<u>Matter of James A. McG.</u>, 68 A.D.3d 1118; 890 N.Y.S. 345 (2nd Dept., 2009)

Petitioner in an Article 81 proceeding appealed an order assessing the entire amount of the Court Evaluator fee against the petitioner. Without providing explanation, the Appellate Division held that under the facts of this case it would cut the fee by two thirds, leaving petitioner to pay only one third of the original fee.

<u>Matter of Charles X</u>, 66 AD3d1320; 887 N.Y.S. 2d 731 (3rd Dept., 2009)

Court awarded fees to the Court Evaluator (private attorney) and Counsel (MHLS) to be paid by petitioner and petitioner appealed the award of the fees to both. The Appellate Division held that the trial court lacked authority to direct petitioner to pay both. Citing MHL 81.09(f) the court stated that it is only when the petition is denied or dismissed that the court may direct the petitioner to pay. The court also noted, without further explanation, that under these same circumstances, the court could have directed counsel fees be paid to the private attorney had this attorney been appointed as Counsel rather than as the Court Evaluator.

<u>Matter of Kurt T.</u>, 64 A.D.3d 819; 881 N.Y.S.2d 688 (3rd Dept., 2009)

The Appellate Division found, contrary to the trial court's decision, that petitioner should be responsible for the full amount of her counsel l 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 and 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.

Matter of Englemeyer, 49 A.D.3d 348; 842 N.Y.S.2d 769 (1st Dept., 2008)

"[The AIP] should not have to pay any part of the evaluator's fee where the petition, which was dismissed after a hearing for lack of medical evidence substantiating petitioner's claim of incapacity, lacks the required 'specific factual allegations' of personal actions or financial transactions demonstrating incapacity."

Matter of G. S., 17 Misc. 3d 303;841 N.Y.S.2d 428 (Sup. Ct., New York County, 2007) (Hunter, J.)

Proceeding was brought by nursing home because AIP's son and attorney-in-fact had paid only a portion of the outstanding nursing home bill from the proceeds of the sale of the AIP's home. The nursing home's theory was that the power of attorney should be voided because the son was breaching his fiduciary duty. The Court held that he had established that he had used his mother's funds responsibly and soley for her benefit and stated "The purpose for which this guardianship proceeding was brought, to wit, for the nursing home to be paid for its care of [the AIP], was not the legislature's intended purpose when Article 81 of the MHL was enacted in 1993." The fees of the court evaluator and petitioner's counsel were assessed against the petitioner nursing home.

Matter of Lukia QQ., 27 A.D.3d 1021; 812 N.Y.S.2d 162 (3rd Dept., 2006)

Neither County Law §722-b nor anything in Article 81 requires that counsel to the AIP or the Court Evaluator be paid at assigned counsel rates under County Law §722-b.

Matter of Nebrich, 23 A.D.3d 1018; 804 N.Y.S.2d 224 (4th Dept., 2005)

Appellate Division remands case for written decision to explain basis for awarding Court Evaluator fees in accordance with following factors: (1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented, (2) the attorney's experience, ability, and reputation, (3) the amount involved and the benefit flowing to the ward as a result of the attorney's services, (4) the fees awarded in similar cases, (5) the contingency or certainty of compensation, (6) the results obtained, and (7) the responsibility involved**.**

Matter of W.E., NYLJ, 4/8/05, p. 119 (Sup. Ct. Bronx Cty.) (Hunter, J.)

Where there was no clear and convincing evidence that AIP was incapacitated, and petitioner, AIP's husband, admitted on the stand that the reason he filed the petition was to have declared null and void a waiver that she signed upon receiving compensation for the 9/11 World Trade Center compensation fund so they could be eligible for more money, court assessed the Court Evaluator's compensation against petitioner, even though he withdrew the petition, finding that but for the Court Evaluator's investigation and report, petitioner would have successfully perpetrate his fraud against the court.

Matter of John Peterkin, 2 Misc. 3d 1011A; 784 N.Y.S.2d 923 (Sup. Ct., NY Cty., 2004) (Visitacion-Lewis, J.)

AIP's daughter held a POA. Her brother petitioned under Article 81 to vacate the POA and be appointed as guardian alleging among other things that the daughter was not caring for the father and was stealing from him. The court finds that the petitioner had not met his burden of proof, that his petition had been brought in bad faith and that he had alleged false and misleading claims. The daughter retained private counsel to represent her for legal fees incurred in defending against the petition. Since MHL §81.10(f) does not apply to retained counsel but only to appointed counsel, she petitioned instead under 22 NYCRR 130-1.1 alleging frivolous litigation and the court directed that her counsel fees be paid by petitioner. She also moved, successfully under MHL §81.08(f) for petitioner to pay the Court Evaluator's fees.

Matter of Albert S., 300 AD.2d 311; 750 N.Y.S.2d 871 (2nd Dept., 2003)

App. Div. sustains trial court's decision to direct the petitioner to pay only $450 of the $68,000 combined fees of both counsel and the court evaluator and to impose the these costs upon the AIP EVEN THOUGH the 81 petition was ultimately dismissed for lack of merit. Court reasons that the petition was herself of meager means and that she did not at out of malice or avarice in bringing the petition but rather out of concern for the AIP. Strong dissent argues that the 81 proceeding did not confer any benefit on the AIP and he should not pay.

Matter of Epstein (Epstein), 168 Misc.2d 705; 649 N.Y.S.2d 1013 (Sup. Ct., Suffolk Cty., 1996)

Court Evaluator may not seek payment of fees from guardianship estate without first showing that AIP has sufficient funds to pay fees.

Matter of Naimoli (Rennhack), NYLJ, 9/8/97, p. 25 col. 4 (Sup. Ct., Nassau Cty., 1997)

Where petitioner commenced Art. 81 proceeding as result of power struggle over control of relatives estate, petitioner was held personally responsible for compensation of court evaluator and AIP's counsel.

Matter of Slifka, Index No. 00757/96, Sup. Ct., Westchester Cty., Pallella, J., 6/6/96. (NOR)

Court granted AIP's motion to dismiss Article 81 petition but denied motion to impose sanctions on petitioner. Petition was for guardianship over trust to pay for AIP's inpatient care; however he left hospital voluntarily, rendering petition moot. Because it should have been discontinued at that point "obviating the necessity for the motion to dismiss," court did order petitioner to pay the costs of the proceeding plus the court evaluator's fee.

Matter of Sylvia Gaskell, 1994 NY Misc. LEXIS 713; 211 N.Y.L.J. 39 (Sup. Ct., Suffolk Cty., 1994) (Luciano, J.)

Where health care facility had unnecessarily required a family to petition for appointment of guardian, court would consider ordering facility to pay fee for court evaluator and petitioner's attorney.

Matter of Geer, 234 A.D.2d 939; 652 N.Y.S.2d 171 (4th Dept., 1996)

Court may not direct AIP to pay portion of court evaluator's fee where petition is denied or dismissed.

Matter of Maier, NYLJ, 2/6/98, p. 25, col. 3 (Sup. Ct., Bronx Cty.)(Wilkins, J.)

Because of their intense involvement as interveners, AIP's family members were ordered to pay court evaluator's fees.

Matter of Susan Pollack (Marvin Pollack), 243 A.D.2d 568; 663 N.Y.S.2d 115 (2nd Dept., 1997)

Where trial court ordered AIP to pay one-half of court evaluator fee and directed petitioner to pay other half of that fee, court improvidently exercised its discretion by directing petitioner to pay half of fee. Under circumstances of this case where petition was brought as result of lack of cooperation by AIP and his conduct in a pending matrimonial action, and petitioner was forced to bring petition because AIP's guardian ad litem refused to do so, AIP should have been required to pay entire fee.

Matter of Schwartz, NYLJ, 3/13/95, p. 32, col. 1 (Sup. Ct., Nassau Cty.)(Rossetti, J.)

Court-appointed fiduciaries, children of 83-year-old AIP, applied for reimbursement from his funds. Children were divided as to proper management of his affairs. Court granted attorneys' fees from funds but denied reimbursement for personal and litigation expenses primarily incurred as result of battle for control between children. These costs were deemed spent to benefit their own interests.

Matter of Robert S.T., 265 A.D.2d 919; 695 N.Y.S.2d 822 (4th Dept., 1999)

AIP (appellant) agreed to pay award of reasonable allowance to court evaluator (respondent). After court evaluator, submitted her affirmation of services, AIP, objected to amount sought. Under those circumstances, lower court erred in determining amount to be awarded court evaluator without conducting hearing. In addition, lower court did not discharge its duty to explain, in writing, reasons for awarding fees in excess of $2,500 (see N.Y. Comp. Codes R. & Regs. tit. 22 §36.4 [b]). Court therefore reversed judgment, and remitted matter to lower court to determine amount of reasonable allowance to be awarded court evaluator.

Matter of Chackers (Shirley W.), 159 Misc.2d 912; 606 N.Y.S.2d 959 (Sup. Ct., NY Cty., 1993)

Where petition was brought in good faith but all parties ultimately agreed that discontinuance was warranted and no guardian was needed, court evaluator's fee will be payable by AIP in an amount set in order to be settled.

Matter of Krishnasastry, NYLJ, 8/25/95, p. 25, col. 1 (Sup. Ct., Nassau Cty.) (Rossetti, J.)

Petitioner husband, involved in divorce action, sought to discontinue guardianship proceeding for his wife. At issue was who should pay the fees of the court-appointed evaluator and attorney. It apparently was unlikely that incapacity of wife could have been proven. Court, noting petitioner's partially self-interested motivation for instituting a guardianship proceeding and noting wife's lack of cooperation, ruled that husband must pay two-thirds and his wife must pay one-third.

Matter of Petty, 256 A.D.2d 281; 682 N.Y.S.2d 183 (1st Dept., 1998)

Where court evaluator determined that petition was weak and guardianship completely unnecessary, and court "so ordered" petitioners to discontinue proceeding, Supreme Court improperly ordered AIP to pay court evaluator's fees, but properly ordered AIP to pay his own attorney's fees because §81.10 gives courts discretion to order petitioners to pay court-appointed attorneys, but not AIP's privately retained lawyers when petition is dismissed.

Matter of Elmer "Q.", 250 A.D.2d 256; 681 N.Y.S.2d 637 (3rd Dept., 1998)

Although 81.10 does not compel courts to assess fees for private counsel, court nevertheless properly exercised its discretion to set counsel fees for privately retained attorney because "utility of court approved fees for services rendered to [an AIP] is equally compelling with regard to a privately retained attorney." Amount of $32,000 billed by private attorneys was reasonable, even though there were only two court appearances, no evidentiary hearing, and no protracted discovery.

a. Enforcement of Fee Awards

Matter of James H., N.Y. App. Div. LEXIS 166 (3rd Dept. 2019)

During the pendency of a protracted probate proceeding relating to the estate of the AIP's mother, the AIP sought to have his trustee of several trusts, including an SNT, removed and replaced with an Art 81 guardian. In so doing, the AIP asserted that had been unable to meet his basic financial needs under the existing arrangement. The Supreme Court appointed a Guardian and ordered the Guardian to pay the Court Evaluator's fee. The Guardian reported to the Court that he was unable to pay the fee as the funds in the guardianship estate were insufficient. The Supreme Court issued

an ex parte order directing the Trustee to pay the Court Evaluator's fee from the SNT and, when the Trustee did not pay, held him in contempt and ordered sanctions against him. On appeal by the Trustee, the App. Div. held that he could not be either held in contempt or subjected to sanctions for failing to pay the Court Evaluator's fees because the SNT was unexecuted and unfunded and, under such circumstances, the legal standards for contempt and sanctions were not satisfied.

Matter of Soto, 91723/11, NYLJ 1202617140588 at *1 (Sup. Bx, Decided Aug., 2, 2013) (Hunter, J.)

More than one year after having been awarded fees that she had been unable to collect, a Court Evaluator moved before the trial judge in the guardianship proceeding for an order directing the Petitioner to pay the court ordered fees for her services as the Court Evaluator and also now her legal fees incurred by her need to bring that motion. Petitioner, the IPs daughter, who had been named as the guardian, had been unable to marshal her father's assets prior to his death due to many well documented delays caused by her attorney's errors in settling the order and obtaining a Commission. The Court determined that because the guardianship was properly brought for the benefit of the IP, the Court Evaluator's fees should be paid from the IPs assets but since the guardian had not become commissioned prior to the IP's death the Court Evaluator would have to submit her claim in the probate proceeding to collect her fee. The Court did however direct the petitioner to personally pay the Court Evaluator's legal fees for bring this motion.

Matter of Maria F, 35 Misc. 3d 1240A; 954 N.Y.S.2d 759 (Sup. Ct. Bronx Cty., 2012) (Hunter, J)

The trial court denied a petition for guardianship and directed the petitioner to, *inter alia*, pay the Court Evaluator's fee. After several months of the Court Evaluator attempting to collect her fee, she moved before the court that had presided over the guardianship proceeding for an order compelling petitioner to pay or in the alternative for the court to enter judgement against the petitioner. Petitioner's counsel argued that he had filed for an extension of time to appeal the order that directed payment of those fees and the Court Evaluator demonstrated that the motion to extend was filed only after the instant proceeding to collect her fees. The trial court directed payment of the Court Evaluator's fee within 20 days and ordered that if the fee was not paid, petitioner would be held in contemp of court.

(iv) Report as evidence

Matter of Imhof, 31183-I-2014, NYLJ 1202663929634 at *1 (Co. NA, Decided July 15, 2014)(Knobel, J.)

Trial court denies application by respondent's counsel to vacate a portion of an order allowing the CE to review AIP's psychiatric records. Respondent's counsel sought to have the order vacated

citing the physician-patient privilege of CPLR 4504(a), Matter of Miguel M., and HIPAA as prohibiting the disclosure of the confidential records over respondent's objection when respondent had not placed her medical or mental condition at issue. The court held that the cited authority addressed evidentiary issues, that the CE's access to the records to prepare her report was not such an evidentiary issue, that the CE's review of the records might assist in completing her report, and that the question of the admissibility of this information into evidence would later be addressed at the hearing.

Matter of B.P, 9 Misc.3d 1115; 808 N.Y.S.2d 916 (Sup. Ct., Bronx Cty., 2005) (Hunter, J.)
Court Evaluator's report could not be considered as evidence because, although the court Evaluator was available to testify, he in fact did not testify and was not in fact cross- examined on the content of the report.

G. Hearings

(i) Hearing required

Matter of Angeliki K. (Fanny K.), _AD3d_, 20202 NY App. Div. LEXIS 2863 (2nd Dept., 2020)

The Appellate Division held that Supreme Court should not have sua sponte terminated the guardianship without a hearing because a guardianship may be terminated only on application of a guardian, the IP or any other person entitled to commence a proceeding and only then upon notice and hearing. In any event, the evidence submitted in support of the motion that returned matter to court demonstrated that the IP still required a guardian to maintain her property.

Matter of Korer (Dworecki), 134 AD3d 64;19 N.Y.S. 3d 228 (1st Dept., 2015)

After apparently freely and voluntarily consenting to the appointment of co-guardians on behalf of the AIP, who was not present in the courtroom, counsel for the AIP subsequently moved to stay entry of an order appointing such co-guardians. Counsel argued that he had in fact not consented and, in strong language, accused the court of fraud and "trampling on the rights" of the AIP. The trial judge sanctioned counsel for the frivolous behavior of denying his consent that clearly appeared on the record. Counsel appealed the sanctions. On appeal, the majority, responding to a strong dissent, upheld the sanctions (in part), holding that while it was indeed error for the trial court to have accepted the AIP's consent in her absence, that error did not excuse counsel's frivolous behavior of falsely denying such consent in the face of a clear record of same.

Matter of Carl Ginsberg v Annie Larralde, 2/19/09 NYLJ 39 (col 2) (1st Dept. 2009)

While traveling in France, the AIP had a stroke and was hospitalized. Upon the petition of the French hospital to a French court, the French court found that the AIP was in need of a guardian. Thereafter, the NY court accepted the findings of the French Court and appointed a temporary guardian in NY without holding a hearing and without appointing a Court Evaluator. On appeal by

the AIP, the Appellate Division held that the NY court had not erred by accepting the findings of the French court without a hearing or appointment of a Court Evaluator in NY.

Matter of Nelly M., 46 A.D.3d 904; 848 N.Y.S.2d 705 (2nd Dept., 2007)

Supreme Court appointed a temporary guardian without affording the attorney in fact notice and an opportunity to be heard. The attorney in fact appealed. The Appellate Division held that since the trial court subsequently made the appointment permanent after a hearing on notice to the appellant the error complained of has been rendered academic.

Matter of Carl K.D., 45 A.D.3d 1441; 846 N.Y.S.2d 846 (4th Dept., 2007)

Supreme Court appointed a conservator in 1988 prior to the enactment of Art. 81. Subsequently, in 2000, the Surrogate's Court appointed the same individual as guardian of the person and property of the IP. For the next 4 years the guardian submitted accountings only to the Surrogate Court and said accountings were not in compliance with the requirements of MHL 81.33(b). In 2007, the petitioner in the Art 81 proceeding moved in Supreme Court to compel the guardian to file annual reports in Supreme that were in compliance with MHL Art 81.33 (b) and to collect his fees. The guardian cross-moved in Supreme Court to vacate the original 1998 order appointing her as conservator *nunc pro tunc* to 2000 when the Surrogate's Court appointed her as guardian. Supreme Court granted that cross- motion without a hearing as required by MHL 81.36 (c) and did not direct the guardian to file annual reports that met the requirements of MHL 81.33(b). The Appellate Division reversed and remitted to Supreme Court to determine the motion and cross- motion in compliance with Art 81.

Matter of Diane N.J., 39 A.D.3d 863; 835 N.Y.S.2d 322 (2nd Dept. 2007)

Where the issue of which of the AIP's family members should serve as guardian was sharply contested and the AIP"s capacity to select who should serve was as yet undetermined, the Supreme Court exceeded its authority in permitting the referee to hear and report on the issues raised in the underlying Article 81 petition. The Appellate Division stated: "Under these circumstances, the relevant witnesses, including the AIP, should be observed first hand by a Justice rather than by a referee....".

Matter of Louis G., 39 A.D.3d 546 ; 833 N.Y.S.2d 202 (2nd Dept., 2007)

The Appellate Division determined that it was error for the trial court to deny objections to a final accounting without first permitting the objectant an opportunity to cross-examine the conservator on all of the written submissions, given that the objectant had raised substantial questions on a number of material issues and the objectant had not waived her right to cross-examination.

Matter of Daniel TT., 39 A.D.3d 94; 830 N.Y.S.2d 827 (3rd Dept., 2007)

Summary judgment dismissing a petition for guardianship was reversed on appeal. Although the AIP had issued a Power of Attorney, health care proxy and other advanced directives in the past to one of his daughters, his other daughter, the petitioner, had, in the petition challenged the validity of those instruments, alleging that the AIP already lacked capacity when he issued the advanced directives, that the directives were issued under duress, and that the daughter who Held the powers was failing to carry out her fiduciary duties to the AIP. Moreover, the Court Evaluator's report, and an affirmation submitted by the AIP's long time personal attorney raised similar questions which lead the Court Evaluator to move for permission to review the AIPs medical/psychiatric records and to have him examined. Therefore, the Appellate Division held that it was error for the trial judge to summarily dismiss the petition before the petitioner and Court Evaluator had the benefit of discovery and a hearing to establish that the AIP did not, in fact, have valid and sufficient alternative resources that obviated the need for guardianship.

Matter of William J.J., 32 A.D.3d 517; 820 N.Y.S. 2d 318; (2nd Dept., 2006)

In the 9th Judicial District, one judge sits in the Guardianship Accounting Part ("GAP") to review and confirm the reports of the Court Examiners in all of the counties of the 9th District. When confirming the Court Examiner's report the instant case, the GAP judge, in two orders, also: (1) added the requirement that the guardian be required to file a bond even though the appointing judge who issued the Order and Judgment had dispensed with a bond; (2) deleted the provision of the Order and Judgment providing that the guardian could draw an annual salary as compensation from the assets of the IP and added that the guardian was required to obtain prior court approval before taking a Commission, and, (3) curtailed the power granted in the Order and Judgment that allowed the guardian to retain professional services of attorneys and accountants etc. with the IP's funds without prior court approval. The Appellate Division held that the GAP judge had exceeded his authority under MHL §81.32 to alter the guardian's compensation because such compensation can only be altered if the guardian had violated MHL 81.32(c); that the GAP judge exceeded his authority when he modified the guardian 's powers to pay the professional fees without prior court approval because that power was reserved to the appointing judge, and even the appointing court could not act *sua sponte*, but only upon application of the guardian, the IP or any other person entitled to commence a proceeding and only then upon notice and hearing; and that the GAP judge has also erred in directing the filing of the bond in the absence of such provisions in the original Order and Judgement.

In the Matter of The Application of Joseph Meisels (Grand Rabbi Moses Teitelbaum); 10 Misc.3d 659; 807 N.Y.S. 2d 268 (Sup. Ct. Kings Cty., 2005)(Leventhal, J.)

An Article 81 petition was brought for guardianship over the Grand Rabbi of The Satmar sect**.** The parties wanted to bring the proceeding in the Bet Din religious tribunal but could not agree on which one so the petitioner ultimately filed in State Supreme Court. The court noted that the matter could not have been held in the Bet Din, which would have been akin to submitting it to arbitration because

the case involved the capacity of an individual and not a religious matter; guardianship involves important civil liberties protected by due process, that such process includes a plenary hearing with counsel, application of the rules of evidence, the clear and convincing evidence standard, the placement of the burden of proof on the petitioner and the right to a jury. Thus, the court stated: "An Article 81 proceeding cannot be heard or determined other than by a New York State Court ."

In re New York Foundation (Schoon), 14 A.D.3d 317; 787 N.Y.S.2d 288 (1st Dept)

Appellate Division holds that it was not improper for trial court, without holding a hearing, to restore powers back to an IP who was hostile and threatening toward the guardian making it impossible for the guardian to fulfill its duties under the order without placing its caseworker at risk of harm.

Matter of Wynne, 11 A.D.3d 1014; 783 N.Y.S.2d 179 (4th Dept 2004)

"Mental Hygiene Law Sec 81.11 (a) requires a hearing to determine whether appointment of a guardian is necessary (see, Matter of Flight,....) ...The determination who that guardians should be is left to the discretion of the court."

Matter of Anthon (Loconti), 11 A.D.3d 937; 783 N.Y.S.2d 168(4th Dept., 2004)

"The hearing requirement is not restricted to occasions when a guardian is to be imposed on a possibly unwilling alleged incapacitated person) ... Rather, section 81.11(b) states clearly that "any party" to an Article 81 proceeding shall have the right to present evidence, call witnesses, cross-examine witnesses and be represented by counsel."

In re Egglston (Wali Muhammed), 303 A.D.2d 263; 757 N.Y.S.2d 24 (1st Dept., 2003)

A hearing is required to dismiss or grant an Article 81 petition. It may be requested by any party. The goal of narrow tailoring is enhanced by an evidentiary hearing. Appellate Division reversed dismissal of an Art 81 petition and remanded for hearing.

Matter of Marvin W., 306 A.D.2d 289; 760 N.Y.S.2d 337 (2nd Dept., 2003)

Appellate Division reverses order of Supreme Court that denied, without hearing, IP's application to terminate the guardianship. Court holds that MHL §81.36(c) requires that a hearing be held, that the burden of proof is on the person opposing termination of the guardianship, and that the standard of proof is clear and convincing evidence that the guardian's authority should not be terminated.

Levy v. Davis, 302 A.D.2d 309; 756 N.Y.S.2d 35 (1st Dept., 2003)

The patient, a person adjudicated to be incapacitated, who suffered from diabetes and dementia, was admitted to the hospital because, according to her court-appointed guardian, she had refused insulin treatments at home. The patient's guardian commenced a proceeding for modification of the

guardianship order to permit permanent placement in a nursing home. However, the patient's court-appointed attorney informed the court that the patient had refused voluntary placement in a nursing home, and wanted to return to her apartment. ***Instead of holding a hearing, the judge referred the question of whether the patient should be involuntarily placed in a nursing home to a special referee***. The appellate court found that, contrary to the judge's contention, there was nothing in MHL Art. 81 that suggested that the time limitations were applicable only to guardianship appointment proceedings and not to proceedings brought to modify guardianship powers. Moreover, the judge exceeded his authority by referring the issue of the patient's placement to a special referee.

Matter of Flight, 296 A.D.2d 845; 744 N.Y.S.2d 920 (4th Dept., 2002)

Appellate Division reverses and remits for hearing where Supreme Court did not conduct a hearing as required by MHL §81.11 to determine who is whether guardian is needed. Also makes clear that hearing must be conduct in relation to choice of guardian not only whether guardian is needed. **See related case: Matter of Flight, 8 A.D.3d 977; 778 N.Y.S.2d 815 (4th Dept. 2004)**(App. Div. affirms lower court decision appointing AIPs brother as his guardians and rejects, without discussion of the facts, the contention by petitioner that the non-family members she proposed should have been appointed instead. Courts reference to the lower Court exercise of its discretion may suggest that a Court may exercise discretion without a hearing may be sufficient to determine whom to appoint.

Matter of Hoffman (Zeller), 288 A.D.2d 892; 732 N.Y.S.2d 394 (4th Dept., 2001)

Appellate Division reverses and remits for hearing where Supreme Court did not conduct a hearing as required by MHL §81.11.

Matter of Ruth "TT", 267 A.D.2d 553; 699 N.Y.S.2d 195 (3rd Dept., 1999)

Where finding of incapacity was made solely upon report of court evaluator who was not cross-examined and whose report therefore was not introduced into evidence, and upon recommendation of court-assigned attorney, it was not possible to determine whether there was clear and convincing evidence of incapacity. Order and judgment reversed, on law, without costs, and matter remitted to Supreme Court for an evidentiary hearing with respondent represented by counsel of her choice.

a. Presence of AIP at hearing / Bedside hearings

Matter of Rachel Z. (Jack Z. - Anna B.), 181 AD3d 805 (2nd Dept., 2020)

Noting that no party, including the AIP's counsel, had objected to the Supreme Court's determination to dispense with the AIP's presence at a portion of her hearing, the Appellate Division found that, in any event, this determination did not constitute reversible error insofar as the court heard the AIP's testimony on the first day of the hearing, at which time it obtained its own impression of her

capacity, and concluded that she would not be able to meaningfully participate thereat.

Matter of Banks, 138 AD3d 519; 28 N.Y.S. 3d 321 (1st Dept. 2016)

The AIP, who had avoided personal service of the initiatory papers multiple times, advised her counsel at the last minute that she was not feeling well and would not attend the hearing. The trial court proceeded without her, finding that she has waived her appearance by failing to appear despite having notice. The Appellate Division remanded for a new hearing at which the AIP would be afforded an opportunity to be present, citing MHL 81.11(c) and stating the rationale that "there is an overarching value in a court having the opportunity to observe, first hand, the [AIP]"

Matter of Gulizar N.O., 111 A.D.3d 749; 974 N.Y.S.2d 801 (2nd Dept. 2013)

The Appellate Division reversed an order and judgement appointing a guardian of the person and property and remitted the matter back to the trial court for the appointment of counsel to represent the appellant and for a new hearing because the previous hearing was conducted in the absence of appellant and any counsel for her. The Appellate Division found that there was no evidence presented at the hearing that the appellant was unable to be present in court, that she was unable to participate in the hearing, or that no meaningful participation would result from her presence and that the court failed to set forth a sufficient factual basis for conducting the hearing without the appellant being present. Moreover, since there was no evidence that the appellant made an informed decision to refuse the assistance of counsel, the Supreme Court should have appointed counsel to represent her.

Matter of Alice Zahnd, 27Misc.3d 1215A; 910 N.Y.S.2d 762 (Sup. Ct. Suff. Cty. (Luft, J.)

Where, according to the court, the AIP elected not to appear, the court drew a negative inference based on her non- appearance.

Matter of Lillian UU, 66 A.D.3d 1219; 887 N.Y.S. 2d 321(3rd Dept. 2009)

The Appellate Division, citing to MHL 81.11(c), reversed an order extending guardianship over an IP who was residing in an out-of-State nursing home because the hearing was held outside her presence, there was medical evidence that she could have expressed her wishes but would likely have refused to participate or might have been agitated if she did participate, and the trial court's order failed to recite its reasons for concluding either than she had been unwilling to attend or that her presence would not have resulted in meaningful participation to explain its conducting of the hearing outside her presence.

Matter of Lillian A., 20 Misc.3d 348; 860 N.Y.S.2d 382 (Sup. Ct., Delaware Cty., 2008) (Peckham, J.)

An Article 81 guardian was appointed by a New York court after a bedside hearing, while the AIP

was a patient in a hospital in New York. The Order provided, among other things, that the guardian had the power to change the IP's place of abode and also that the guardianship was for a limited durations and subject to being extended upon further motion at a later date. The guardian then changed the place of the IP's abode to an out-of- state nursing home. When the Order was expiring, the guardian moved in the New York court to extend his powers. The New York Court held that (1) it did have jurisdiction over the IP even though she was now out-of-state because, although the guardian had the power to transfer her abode, he did not have the power to and did not change her domicile and (2) if a judicial proceeding is begun with jurisdiction over the person it is within the power of the State to bind that party by subsequent orders in the same cause. Having established that jurisdiction existed , the court then held that because the IP was then "not present in the state" under MHL 81.11 (c)(1) the IP's presence at the hearing could be waived.

Matter of E.H., 13 Misc.3d 1233A; 831 N.Y.S.2d 352 (Sup.Ct., Bronx Cty., 2006)(Hunter, J.)

Court waived AIP's presence at hearing and conducted hearing in her absence because she refused to come to court for the hearing even though arrangements were made by the hospital to bring her to court. AIP did not want to discuss the proceedings at the hospital and left the room even though her attorney was present.

Matter of C.F.R., 2006 N.Y. Misc. LEXIS 2867; 236 N.Y.L.J. 15 (Sup Ct., Bronx Cty. 2006)

Petitioner daughter sought to have a guardian appointed for respondent, her 90 year old mother, an alleged incapacitated person. A hearing was conducted in the absence of the mother as she came to the courthouse to be present for the hearing but became anxious before her case was called. The parties agreed that it would be best if her home health aide took her back to her apartment. The court waived her appearance.

Matter of Edward G.N., 17 A.D.3d 600; 795 N.Y.S.2d 244 (2nd Dept., 2005)

Appellate Division reverses Order and Judgment appointing a guardian, on the law, without costs or disbursements, denies the petition and dismisses the proceeding finding that the trial court erred in conducting a hearing in the AIP's absence because there was no evidence establishing that the AIP was unable to come to court, as required under Mental Hygiene Law § 81.11(c). Second, the evidence at the hearing failed to conclusively establish that the appellant was completely unable to participate in the hearing, or that no meaningful participation would result from his presence thereat (*see* Mental Hygiene Law § 81.11[c]). Further, the Supreme Court failed to set forth in its order and judgment of appointment a sufficient factual basis for conducting the hearing without the appellant's presence (*see* Mental Hygiene Law § 81.11[d]).

Matter of Rose P., 15 A.D.3d 665; 790 N.Y.S.2d 689 (2nd Dept 2005)

Order to sell AIP's home reversed and matter was remanded because Appellate Division, citing MHL 81.11, held that trial judge should have held bedside hearing where AIP was able to

meaningfully participate in the proceedings. The court reasoned: "A bedside hearing, apart from giving the Supreme Court he opportunity to make an independent assessment, would give Rose P. an opportunity to be part of the decision making process regarding a proposed significant change in her life .

b. Findings of Foreign Courts

Matter of Carl Ginsberg v Annie Larralde, 2/19/09 NYLJ 39 (col 2) (1st Dept. 2009)

While traveling in France, the AIP had a stroke and was hospitalized. Upon the petition of the French hospital to a French court, the French court found that the AIP was in need of a guardian. Thereafter, the NY court accepted the findings of the French Court and appointed a temporary guardian in NY without holding a hearing and without appointing a Court Evaluator. On appeal by the AIP, the Appellate Division held that the NY court had not erred by accepting the findings of the French court without a hearing or appointment of a Court Evaluator in NY.

Matter of Serrano, 179 Misc.2d 806; 686 N.Y.S.2d 263 (Sup. Ct., Bronx Cty., 1998)

Article 81 guardian, with court permission, bought home in Puerto Rico for IP and then sought order permitting him to use IP's assets to pay legal fees for transaction. Issue was whether amount of legal fees, set in an extraordinarily high amount by foreign court, is binding on New York court. NY court holds that Puerto Rican court could only set fees subject to its approval and awards more reasonable fees to prevent "an outrageous injustice."

Matter of Whitehead, 169 Misc.2d 554; 642 N.Y.S.2d 979 (Sup. Ct., Suffolk Cty., 1996)

In proceeding brought by co-committees of Canadian IP, who were appointed by Queen's Bench, Canada, seeking guardian of IP's New York assets, it is inappropriate for Supreme Court to defer to determination by Queen's Bench as to a counsel fee payable by IP in proceeding before Supreme Court. Setting counsel fee by other than Supreme Court's determination pursuant to §81.16 (f) is contrary to public policy of New York State.

Cathy R. v. Aaron Fischberg, 2003 NY Slip OP 50551U; 2003 NY Misc. LEXIS 67

Resolution of attorneys fees issue within the context of an Art 81 proceedings is res judicata and the fee issues cannot later be litigated in another court.

(ii) Medical Testimony not required

Matter of Ardelia R., 28 A.D.3d 485; 812 N.Y.S.2d 140 (2nd Dept 2006)

AIP was properly found to be incapacitated. She was 82-years old, found in her home by APS

without running water, food, electricity, or heat, malodorous and frail. She was unable to cook, and was known to wander away from her home. She had forgotten where she banked and did not know her sources of income. Although she owned a home and possessed approximately $115,000 in savings, she was delinquent on her utility bills. Based on these facts, the hearing record established by clear and convincing evidence that AIP lacked the understanding or appreciation of the nature and consequences of her functional limitations. Thus, the Supreme Court's finding that she was an incapacitated person requiring a guardian was proper notwithstanding the lack of medical testimony regarding her medical condition.

Matter of Bess Z., 27 A.D.3d 568; 813 N.Y.S.2d 140 (2nd Dept., 2006)

Appellate Division finds that trial court violated the violated the physician - patient privilege by admitting the testimony of the AIP's treating physician and that AIP did not waive the privilege by affirmatively placing her medical condition in issue. However, it finds such violation to be harmless error since medical testimony is not required in an guardianship proceeding and the non-medical testimony established that the IP was unable to function to care for her medical, personal and financial needs.

Matter of Rosa B., 1 A.D.3d 355; 767 N.Y.S.2d 33 (2nd Dept., 2003)

The Appellate Division re-emphasized that the rules of evidence apply in an Article 81 proceedings but that a court, for good cause, may waive the rules in an uncontested proceeding. Specifically, the physician patient privilege applies and the AIP does not waive it by contesting the application for guardianship if he does not specifically put his *medical condition* at issue. In this case, even though it was a jury trial, the court found that the violation of the privilege was harmless error since medical testimony was not required and there was sufficient independent evidence of functional incapacity based upon non-medical evidence.

Matter of Kustka, 163 Misc.2d 694; 622 N.Y.S.2d 208 (Sup. Ct., Queens Cty., 1994)

Medical testimony is not required in all Article 81 proceedings. Article 81 does not mandate medical testimony and, even when medical testimony might be necessary, an individual's disease or underlying medical condition is only one factor to be considered since focus of Article 81 is one's functional limitations. Functional limitations can be determined without medical testimony, since non-medical person can determine whether individual is capable of dressing, shopping, cooking, managing assets, and performing other similar activities. Also, Article 81 provides for guardianship tailored to meet individual's needs, and to create limited guardianship.

Matter of Rimler (Richman), 164 Misc.2d 403; 224 A.D.2d 625; 639 N.Y.S.2d 390 (2nd Dept., 1996); *lv. to app. denied* 88 N.Y.2d 805; 646 N.Y.S.2d 985 (1996)

AIP appellant alleged that trial court's decision to appoint guardian was based largely on psychiatric testimony, and contends that she should have been afforded opportunity to challenge that testimony

with the testimony of a court-appointed independent psychiatrist. Appellate court found that trial court based its determination upon statements and testimony of all witnesses, not merely upon psychiatric testimony, and held that nothing in Article 81 mandates medical testimony in guardianship proceeding.

Matter of Donald Loury (Loury), 1993 N.Y. Misc. LEXIS 633; NYLJ, 9/23/93, p. 26, col. 2 (Surr. Ct., Kings Cty.)(Surr. Leone)

AIP was found locked in apartment into which he refused entry, requiring family to drill locks, found dressed in dirty clothes; unshaven, holding a bible surrounded by trash bags, debris, numerous containers of liquid appearing to be urine; strong small of feces present; and no running water in building. AIP owned several investment properties which were all in disrepair and in default of real estate taxes. Court concludes that AIP's present functional level and functional limitations impair his ability to provide for personal needs and to manage property; that he cannot adequately understand and appreciate nature and consequences of such inability; and that he is likely to suffer harm because of such inability and lack of understanding. Court notes that AIP refused to speak to psychiatrist who nevertheless diagnosed him as bi-polar and paranoid schizophrenic, but noted that no such testimony was need to establish functional impairment.

Matter of Seidner, NYLJ, 10/8/97, p. 25, col. 1 (Sup. Ct., Nassau Cty.)(Rossetti, J.)

Medical evidence upon which petitioner sought to rely was excluded because it was privileged. Privilege is not waived merely by defending an action and denying allegations, so long as defending party does not affirmatively assert his stable mental condition. AIP's privacy concerns were particularly important here because of context of petition (bitter marital dispute).

(iii) Applicability of rules of evidence

Matter of Mary WW., 125 A.D.3d 1269; 4 N.Y.S.3d 381 (3rd Dept. 2015)

The trial court was found to have properly waived the rules of evidence for good cause shown when it permitted hearsay testimony from witnesses as to the acrimonious relationship between the appellant and the IP because the IP was suffering from severe dementia and could not herself testify as to her interactions with the appellant. The Appellate Division further noted that appellant has not been prejudiced since she was present at the hearing and able to dispute the testimony.

Matter of M.R. v H.R., 2008 N.Y. MISC. LEXIS 4347; 240 NYLJ 8 (Sup. Ct. Bronx Cty 2008) (Hunter, J.)

MHLS counsel for the AIP asserts that photographs annexed to the petition were not authenticated and have no probative value and thus may not be introduced at trial. The court reserved for trial whether or not the photos will be admitted into evidence Counsel further objected to the use of a

printout from Wikepedia annexed to the Petition that purported to establish the AIP's clinical condition. The court held that the printout was unreliable and may not be used at trial.

Matter of Rosa B., 1 A.D.3d 355; 767 N.Y.S.2d 33 (2nd Dept., 2003)

The Appellate Division re-emphasized that the rules of evidence apply in an Article 81 proceedings but that a court, for good cause, may waive the rules in an uncontested proceeding. Specifically, the physician patient privilege applies and the AIP does not waive it by contesting the application for guardianship if he does not specifically put his *medical condition* at issue. In this case, even though it was a jury trial, the court found that the violation of the privilege was harmless error since medical testimony was not required and there was sufficient independent evidence of functional incapacity based upon non-medical evidence.

Matter of Janczak (Ethel Jacobs), 167 Misc.2d 766; 634 N.Y.S.2d 1020 (Sup. Ct., Ontario Cty., 1995)

Court did not consider portion of DSS record, which consisted of information derived from visiting nurse service which did not provide home health care services pursuant to contract with DSS, and police investigator, neither of which had duty to report to agency, even though §81.12 (b) provides that court may, upon good cause shown, waive rules of evidence, since relaxation of evidence rules in proceedings under Article 81 only applies in uncontested proceedings. Here, offered exhibit would not be admissible in evidence as business record, and, therefore, an exception to hearsay rule, under CPLR 4518 (a), because knowledge of entrant was not based upon information obtained from a declarant under business duty to report the information.

*[See also all case under **physician-patient privilege** section]

(iv) Clear and convincing evidence

Matter of Judith T. (Rosalie D.T.), _Misc.3d_, 2017 N.Y. Misc LEXIS 5095*; 2017 NY Slip Op 27421 (Cty Ct., Nassau Cty.,) (Knobel, A.C.C.J.)

The court notes that in view of the potential loss of civil liberties at stake in an Article 81 proceeding, the Legislature has mandated that the petitioner meet the highest standard of proof in civil cases, "clear and convincing evidence," that the AIP is incapacitated. The petitioner must "'satisfy [the trier of fact] that the evidence makes it highly probable that what he claims is actually what happened' (Prince-Richardson on Evidence, § 3-205 [ed.], quoting 1 NY PJI2d (Supp), P.J.I. 1:64).'" "'The evidence required for a personal needs guardian would be to show that there are deficiencies in attending to the activities of daily life, including procurement of food, clothing, arranging for or maintaining shelter, coordinating health care or the inability of the individual to understand and appreciate the risk inherent in their behavior to their personal safety. Evidence of a need for a property management guardian would tend to show the individual's lack of understanding of his or her assets and value thereof, the individual's lack of providence with money, irrational asset

management, and a failure to pay bills...' (Russo & Machlin, New York Elder Law and Special Needs Practice, § 8.3 [2017 ed.])."

<u>Matter of Incorporated Village of Patchogue v. Zahnd</u>, 3/12/2010 , NYLJ 29, (col. 1) Sup. Ct. Suff. Cty. (Luft, J.)

Counsel for the AIP moved to dismiss petitioner‘s application after presentation of evidence on petitioner’s *prima facia* case, arguing that the Court should have considered only the sufficiency of that evidence and that on its own, it is not clear and convincing, a point he emphasized in his additional application to suspend the appointment of the Court Evaluator pursuant to §81.10(g). The Court concluded, however, that it was appropriate to consider the Court Evaluator's testimony and report *before* ruling on the motion to dismiss. The court reasoned :(1) that while suspension of the appointment of the Court Evaluator is permissible in cases in which the Court has appointed counsel for the AIP:, the primary purpose for that authority seems to be to avoid unnecessary expense to an AIP and determination to forego the benefit of a Court Evaluator is generally exercised in the initial Order to Show Cause or shortly thereafter. Noting that MHL 81.10 does not establish any time frame for suspension of the Court Evaluator, the Court reasoned that where, as here, the Court Evaluator has already conducted an investigation and prepared a written report, the value of receiving the benefit of the Court Evaluator's work is outweighed by any cost savings or procedural advantage the AIP seek in securing the suspension of the Court Evaluator. The Court further reasoned that (2) while there is an adversarial element to an Article 81 proceeding, the Court must also consider the best interests of the AIP and the failure to considered the testimony and report of the Court Evaluator would be a failure to look beyond the adversarial aspect of the proceeding and a failure to consider the bests interests of the AIP.

<u>Matter of Weinlein</u> , NYLJ, 8/13/04, p.19 col 1 (Sup Ct Dutchess Cty) (Pagones, J.)

Court holds plenary hearing to determine need for guardian upon finding of clear and convincing evidence of incapacity but offers parties option of mediating the question of who shall be the proper guardian at the Dutchess County Mediation Center Art. 81 program as an alternative to further litigation if consent to mediation is unanimous.

<u>Matter of Marvin W.</u>, 306 A.D.2d 289; 760 N.Y.S.2d 337 (2nd Dept.)

App. Div. reverses order of Supreme Court that denied, without hearing, IP’s application to terminate the guardianship. Court holds that MHL §81.36(c) requires that a hearing be held, that the burden of proof is on the person opposing termination of the guardianship, and that the standard of proof is “clear and convincing evidence” that the guardian’s authority should not be terminated.

<u>In the Matter of Joseph A. (Anonymous) a/k/a Joseph B.A.</u> , 304 A.D.2d 660; 757 N.Y.S.2d 481 (2nd Dept., 2003)

Appellate Division reverses order on the law without costs, denied petition and dismisses

proceedings upon finding that "petitioner failed to prove by clear and convincing evidence that the appellant was unable to provide for the management of his property and did not appreciate the consequences of such inability." (no facts discussed in opinion)
Matter of Hammons (Ehmke), 164 Misc.2d 609; 625 N.Y.S.2d 408 (Sup. Ct., Queens Cty., 1995); *aff'd* 237 A.D.2d 439 (2nd Dept., 1997)

Clear and convincing evidence means "high probability that what is claimed is actually so."

Matter of Ruth "TT"(Mc Ghee), 267 A.D.2d 553; 699 N.Y.S.2d 195 (3rd Dept., 1999)

Where finding of incapacity was made solely upon report of court evaluator who was not cross-examined and whose report therefore was not introduced into evidence, and upon recommendation of court-assigned attorney, it was not possible to determine whether there was clear and convincing evidence of incapacity.

(v) Confidentiality issues

a. Physician-patient privilege

Matter of S.B. (E.K.), 60 Misc.3d 735 (Sup. Ct., Chemung Cty.)(2018)(Guy, AJSC)

The petitioner primarily sought court ordered visitation with her mother, the AIP, under MHL 81.16(c)(4)-(6) ("the Peter Falk amendment"), and secondarily sought the appointment of a guardian of her mother's person/property. The petitioner urged that even if no guardian were appointed, the Peter Falk amendment gives the court the authority to direct visitation. The Court held that the Legislature's placement of this amendment in MHL 81.16(c), entitled "Appointing a guardian," rather than in MHL 81.16(b), which provides for protective arrangements and single transactions, indicates that it was intended to apply only in the event that a guardian is appointed. The court further looked to references in the legislative history of the amendment concerning an AIP's right to determine one's own visitation and found no language suggesting that a court can order visitation where the petitioner has not sustained her burden of establishing the need for a guardian. The court, noting that it was constrained to examine visitation from the AIP's perspective rather than that of the petitioner, stated that even in a guardianship based on the AIP's consent, the AIP would ultimately remain in control of whom she visits, as fulfillment of her wishes and desires is required in applying the least restrictive alternative standard.

*Note - the Supreme Court's order, which granted the AIP's motion to dismiss the petition, was later reversed in Matter of Elizabeth T.T. (Suzanne Y.Y. - Elizabeth Z.Z.), 177 AD3d 20 (3rd Dept., 2019), based upon the Appellate Division's finding that an issue of fact existed regarding whether the arrangements that had been put in place to protect the AIP's personal and property needs were the product of undue influence.

Matter of Imhof, 31183-I-2014, NYLJ 1202663929634 at *1 (Co. NA, Decided July 15, 2014)(Knobel, J.)

Trial court denies application by respondent's counsel to vacate a portion of an order allowing the CE to review AIP's psychiatric records. Respondent's counsel sought to have the order vacated citing the physician-patient privilege of CPLR 4504(a), Matter of Miguel M., and HIPAA as prohibiting the disclosure of the confidential records over respondent's objection when respondent had not placed her medical or mental condition at issue. The court held that the cited authority addressed evidentiary issues, that the CE's access to the records to prepare her report was not such an evidentiary issue, that the CE's review of the records might assist in completing her report, and that the question of the admissibility of this information into evidence would later be addressed at the hearing.

Matter of Schwartz v King, 81 AD3d 737; 921 N.Y.S. 2d 861(2nd Dept., 2011)

Appellate Division dismissed a proceeding pursuant to CPLR Article 78, inter alia, in the nature of mandamus to compel the court presiding over an Article 81 hearing to direct the respondent to produce all discovery items sought by the petitioners noting that the petitioner had failed to demonstrate a clear legal right to the relief sought.

Matter of Taishoff (Ruvolo), (Unpublished Decision and Order) Sup. Ct. Suff. Cty. Index # 44869/08 (Sgroi, J.)

Petitioner sought a subpoena for the hospital records from the AIP's psychiatric inpatient treatment and requested that they be sealed and shown only the judge (in a non- jury case). The court declined to grant the subpoena stating that the records were subject to the physician-patient privilege, and were neither necessary nor appropriate evidence in a contested MHL Art 81 guardianship proceeding.

Matter of Q.E.J., 14 Misc.3d 448; 824 N.Y.S.2d 882 (App Term., 1st Dept 2006) (Leventhal, J.)

Where a treating medical/healthcare facility seeks to admit into evidence a treating physician's testimony and medical records regarding an AIP, such records and testimony, even for the salutary purpose of securing an appropriate placement for the AIP, remain privileged and will not be admitted unless the AIP waives the privilege or affirmatively places his/her medical condition in issue.

Matter of Bess Z., 27 A.D.3d 568; 813 N.Y.S.2d 140 (2nd Dept., 2006)

Appellate Division finds that trial court violated the violated the physician-patient privilege by admitting the testimony of the AIP's treating physician and that AIP did not waive the privilege by affirmatively placing her medical condition in issue. However, it finds such violation to be harmless error since medical testimony is not required in an guardianship proceeding. and the non-medical testimony established that the IP was unable to function to care for her medical, personal and

financial needs.

Matter of Marie H., 25 A.D.3d 704; 811 N.Y.S.2d 708 (2nd Dept. 2006)

For the purposes of the physician-patient privilege, a psychiatrist who examines an individual as part of a mobile crisis team to determine his/her need for involuntary psychiatric treatment and who did not prescribe or otherwise participate in her treatment and who was unaware of the nature of her treatment is NOT a treating psychiatrist whose testimony can be barred under CPLR 4504(a).

Matter of B.P., 9 Misc. 3d 1115A; 808 N.Y.S.2d 916 (Sup. Ct Bronx Cty 2005) (Hunter, J.)

Information about the AIP's medical condition included as part of the petition was deemed in violation of the physician /patient privilege and court refused to consider it.

Matter of Rosa B., 1 A.D.3d 355; 767 N.Y.S.2d 33 (2nd Dept., 2003)

The Appellate Division re-emphasized that the rules of evidence apply in an Article 81 proceedings but that a court, for good cause, may waive the rules in an uncontested proceeding. Specifically, the physician patient privilege applies and the AIP does not waive it by contesting the application for guardianship if he does not specifically put his *medical condition* at issue. In this case, even though it was a jury trial, the court found that the violation of the privilege was harmless error since medical testimony was not required and there was sufficient independent evidence of functional incapacity based upon non-medical evidence.

Matter of Barry B., 236 A.D.2d 391; 654 N.Y.S.2d 315 (2nd Dept., 1997)

Somewhat vague and evasive decision which may suggest that physician-patients privilege may not exist in Art.81 case, but is not very clear authority at all.

Matter of Higgins (England), NYLJ, 10/6/95, p. 1 col. 1 (Sup. Ct., NY Cty.)(Ramos, J.)

Supporting affidavit from attending doctor of AIP violated physician-patient privilege. Court also held that court evaluator had standing to raise this issue.

Matter of Richter (Goldfarb), 160 Misc.2d 1036; 612 N.Y.S.2d 788 (Sup. Ct., Suffolk Cty., 1994)

The physician-patient privilege under CPLR 4504 (a) may not be asserted where AIP has submitted own doctor's report in opposition to application, and where AIP has sufficient capacity to retain counsel to oppose petition, since AIP knowingly and effectively put own medical condition in issue, thereby waiving privilege. In addition, regardless of person's actions, intentions and capacity, court may admit medical, psychological and psychiatric records and permit medical, psychological and psychiatric testimony in contravention of CPLR 4504 (a) under authority of Article 81 because 81.09(d) expressly permits disclosure of medical, psychological and psychiatric records to court

evaluator and permits such further disclosure of such records as court deems proper.

Matter of Tara X., NYLJ, 9/18/96, p.27, col. 1 (Sup. Ct., Suffolk Cty.)(Prudenti, J.)

Physician-patient privilege prevents court evaluator from examining medical records where AIP opposes appointment of a guardian.

Matter of Flowers (Bullens), 148 Misc.2d 166; 559 N.Y.S.2d 775 (Sup. Ct., Kings Cty., 1990)

Unless AIP puts medical issue in question before court, privilege is not waived.

b. Social Worker - Client Privilege

Matter of G.P., 37 Misc. 3d 1219(A); 964 N.Y.S.2d 57; 2012 N.Y. Misc. LEXIS 5182 (Sup. Ct., Dutchess Cty.) (Pagones, J.)

The Supreme Court acknowledges that CPLR 4508 social worker-patient privilege applies in MHL Article 81 proceeding, but holds that the alleged incapacitated person waived it by affirmatively placing his physical and mental condition in issue by defending against the guardianship petition.

Matter of E.H., 13 Misc.3d 1233A; 831 N.Y.S.2d 352 (Sup.Ct., Bronx Cty., 2006)(Hunter, J.)

Court acknowledges that CPLR 4508 social worker-patient privilege applies in MHL Article 81 proceeds but permits Assistant Director of Social Work at hospital where AIP was hospitalized to testify in his role as a discharge planning social worker, holding that such a role is different from a social worker in a community setting who has a treating relationship with a patient and assists the person in social and psycho-social issues.

c. Access to DSS records

Matter of Frati; Matter of Grant, NYLJ, 9/18/97, p. 25, col. 1 (Sup. Ct., Nassau Cty.) (Rossetti, J.)

In two guardianship proceedings, petitioner hospital requested judicial subpoenas for production of county Adult Protective Services' records concerning AIP. Citing privacy rights, court held that confidential records should first be disclosed only to court evaluator and court. If after review, court determined that records were necessary to guardianship proceedings, it would reconsider their further disclosure.

Vellosi v. Brady, 267 A.D.2d 695; 698 N.Y.S.2d 361 (3rd Dept., 1999)

Daughter who held power of attorney and subsequent appointment as guardian sought to compel production of her father's social services file pursuant to Social Services Law §473-e[1][b]. Request was denied by DSS which asserted confidentiality. Daughter appealed. Matter was mooted by father's death which extinguished the power of attorney and guardianship that had been the basis for her standing to make request of DSS and thus appeal.

d. Sealing of Courtroom/Court records

Matter of Caminite (Amelia G.), ___Misc3d___; 2017 N.Y. Misc. LEXIS 3307 (Cty. Ct., Nassau Cty.)(Knobel, J.)

The Court denied a non-party, cross-petitioner's application to seal the records of a guardianship proceeding on the grounds that the applicant had failed to establish "good cause " under the standards of either MHL 81.14(b)(consideration of "the orderly and sound administration of justice, the nature of the proceedings, and the privacy of the person alleged to be incapacitated ") or 22 NYCRR 216.1(a)("consider[ation of] the interests of the public as well as the parties"). The Court, after a comprehensive discussion of the jurisprudential and public policy considerations which would warrant shining a light on guardianship proceedings, noted that sealing the record in this case would have the effect of "burying secrets, hiding the truth and thwarting the best interests of the [AIP] …" and further noted that the decision as to whether to seal the record should be based upon the interests of the AIP and not those of other litigants.

Matter of Beatrice Dreyfus, (Unpublished Decision and Order), Dec. 19, 2008, Index # 100050-2005, Sup. Ct., Kings Cty. (Ambrosio, J.)

Court declines to find good cause to overcome the presumption of openness and seal the accountings filed in an Article 81 proceeding. In this case, where there were multiple issues involving misappropriation of large sums of the IP's funds, breach of fiduciary duty and, self-dealing by her guardian, the court determined that the proceedings should be open to the public stating: "This is certainly not the case in which the court should draw a veil of secrecy surrounding the finances of the ward and the alleged misappropriation of her assets by [her guardian] while under the jurisdiction of the court. ..... These proceedings, including the accountings, should be open to the public to ensure that they are conducted efficiently, honestly, and fairly. Transparency is more conducive to ascertaining the truth. The presence of the public historically has been ... to enhance the integrity and quality of what takes place..... ." The court also noted that although the IP did not wish to have her personal finances disclosed, she does not have the same privacy rights with respect to her finances as she has in relation to her mental and medical conditions. The court further stated: "That the IP may be embarrassed by the disclosure is insufficient to overcome the presumption of openness". The court did however order that before disclosure is made, identifying information such as account numbers be redacted.

<u>In the Matter of V.W.</u>, 20 Misc.3d1106A; 2008 NY Slip Op 51250U (Sup. Ct., Bronx Cty., 2008) (Hunter, J.)

The original petitioner, who was found to be unfit to serve as guardian, by motion sought a copy of the transcript and to have the court's file unsealed for the purpose of obtaining all orders contained in the court file related to the guardianship matter in order to perfect his appeal. The court held that the appeal could be made on a sealed record and since his inability to serve as guardian was a matter of law decided by the court, he had not sufficiently demonstrated why a transcript of the entire Article 81 hearing and other subsequent orders related to the guardianship would be relevant or necessary for him to file his appeal. Therefore, his requests for a copy of the transcript and to unseal the record to allow him to obtain copies of all orders contained in the file were denied.

<u>Matter of Phillip Marshall (Brooke Astor)</u>, 13 Misc.3d 1203A; 824 N.Y.S.2d 755 (Sup. Ct., NY Cty., 2006) (Stackhouse, J.)

In a highly publicized case in which Phillip Marshall sought to remove his father, Anthony Marshall, as caregiver of his 104 year old grandmother, philanthropist and socialite Brooke Astor, the Court, at the request of several news organizations, and over the objection of every party to the proceeding, vacated its own interim sealing order, with limited exceptions. Initially, the Court found that the public had a great interest in the proceeding, emphasizing its interest in witnessing that "justice is dispensed in the same manner to the rich as to the poor," and its interest in learning about "the neglect and mistreatment of the elderly." Secondly, the Court found that opening the proceedings to the public would not impede the orderly and sound administration of justice (despite the Court Evaluator's claim that opening the proceeding to the press had impacted, and would continue to impact, his ability to gather information), so long as the Court Evaluator reports remained under seal. Finally, the Court responded to concerns regarding the confidential nature of Article 81 guardianship proceedings, and to concerns regarding Ms. Astor's personal rights to privacy and dignity, by characterizing her as an "open and candid person" who had earlier published two memoirs in which she detailed episodes of physical abuse by her first husband, by noting that she was not suffering from any "significant emotional or physical distress" as a result of the proceeding, and by affirmatively ordering that her medical, mental health and nursing home records, and all of the Court Examiner's reports be filed under seal, and that all identifying financial information be redacted prior to its submission to the Court.

<u>Matter of A.J.</u>, 1 Misc.3d 910A; 781 N.Y.S.2d 623 (Sup. Ct., Kings, Cty., 2004) (Leventhal, J.)

Court closes courtroom, seals record and permits redaction of Court Evaluator report during guardianship hearing for elderly couple, whose son was alleged to be abusive, based upon the Court Evaluator's assessment that the couple and other witnesses feared the son and would not be able to testify in a forthcoming manner if he was in the courtroom. Court cites §81.14(c) permitting judge to excluding individuals including the public for "good cause shown", the sound administration of justice and the sensitive nature of the matters involved as outweighing the public's need to know.

Matter of Michael B., Sup. Ct., Westchester Cty., 6/24/99 (Palella, J.)(NOR)

Where AIP had committed highly publicized crime, and media further sought information concerning his Art 81 proceeding, records of proceeding were partially sealed, leaving unsealed only those portions showing how and why proceeding was commenced, and keeping sealed information about his clinical, personal and financial matters.

In re: DOE, 181 Misc.2d 787; 696 N.Y.S.2d 384 (Sup. Ct., Nassau Cty., 1999)

Court seals record finding that access to record could be embarrassing and damaging for AIP and that there is no public interest in proceedings.

e. Fifth amendment

Matter of Elizabeth TT. (Suzanne YY.--Elizabeth ZZ.), _AD3d_, 2019 NY Slip Op 06667 (3rd Dept., 2019)

Although a court evaluator may retain an independent medical expert where the court finds it is appropriate under MHL § 81.09(c)(xvii)(7), and may apply to the court for permission to inspect records of medical, psychological and/or psychiatric examinations of the AIP under MHL § 81.09(d), there is no corresponding statutory requirement for an AIP to abide by a court evaluator's recommendation that he or she undergo a neuropsychological evaluation to assess his or her present cognitive condition. Although MHL § 81.11(c) provides that the AIP must be present in order for the court to obtain its own impression of the person's capacity and make an independent assessment of the AIP, there is no corresponding requirement in Article 81 that compels the AIP to testify at a hearing.

Matter of S.B. (E.K.), 60 Misc.3d 735 (Sup. Ct., Chemung Cty.)(2018)(Guy, AJSC)

The petitioner primarily sought court ordered visitation with her mother, the AIP, under MHL 81.16(c)(4)-(6) ("the Peter Falk amendment"), and secondarily sought the appointment of a guardian of her mother's person/property. The petitioner urged that even if no guardian were appointed, the Peter Falk amendment gives the court the authority to direct visitation. The Court held that the Legislature's placement of this amendment in MHL 81.16(c), entitled "Appointing a guardian," rather than in MHL 81.16(b), which provides for protective arrangements and single transactions, indicates that it was intended to apply only in the event that a guardian is appointed. The court further looked to references in the legislative history of the amendment concerning an AIP's right to determine one's own visitation and found no language suggesting that a court can order visitation where the petitioner has not sustained her burden of establishing the need for a guardian. The court, noting that it was constrained to examine visitation from the AIP's perspective rather than that of the petitioner, stated that even in a guardianship based on the AIP's consent, the AIP would ultimately remain in control of whom she visits, as fulfillment of her wishes and desires is required in applying the least

restrictive alternative standard.

*Note - the Supreme Court's order, which granted the AIP's motion to dismiss the petition, was later reversed in Matter of Elizabeth T.T. (Suzanne Y.Y. - Elizabeth Z.Z.), 177 AD3d 20 (3rd Dept., 2019), based upon the Appellate Division's finding that an issue of fact existed regarding whether the arrangements that had been put in place to protect the AIP's personal and property needs were the product of undue influence.

Matter of Judith T. (Rosalie D.T.), _Misc.3d_, 2017 N.Y. Misc LEXIS 5095*; 2017 NY Slip Op 27421 (Cty Ct., Nassau Cty.,) (Knobel, A.C.C.J.)

The court denied the petitioner's motion seeking to call the AIP as a witness, reasoning that because the petition sought to restrain the AIP's liberty rights, compelling her to testify would be a violation of her Fifth Amendment right against self-incrimination, and would also be contrary to the intent and spirit of Mental Hygiene Law §81.12(a), which places the burden of proof on the petitioner to prove her or his case without having to rely on the AIP's testimony.

Matter of Linda E. (Justin B.), ___NY Misc. 3d____; 2017 N.Y. Misc. LEXIS 559 (Sup. Ct. Tompkins Cty.) (2017)
(Guy, J.)

The AIP had been found incapacitated to stand trial on a felony indictment and was committed to Mid - Hudson Forensic Psychiatric Center, pursuant to CPL 730.50, for evaluation. The District Attorney prosecuting that indictment sought to attend the AIP's pending guardianship hearing in order to obtain evidence to use against him in the pending criminal proceedings, arguing that a finding of incapacity in the Article 81 proceeding would be relevant to the issue of capacity in the criminal proceeding. MHLS, on behalf of the AIP, moved to seal the courtroom pursuant to MHL Sec. 81 .14(b). The guardianship court found that good cause had been shown to justify excluding the public from the guardianship proceeding because, in order for the court to fairly adjudicate the Article 81 proceeding, the AIP and petitioner must be able to speak fully and freely and present relevant evidence without fear of adversely impacting the outcome of the criminal proceeding. The court added that the presence of the public, particularly individuals from the DA's office, could have a chilling impact on the production of this evidence. The court further held that the courtroom should be closed and the records sealed because the AIP's 5th Amendment rights were at stake due to the possible loss of liberty in the guardianship proceeding and because the AIP also had medical privacy rights under HIPAA, the NYS Pub. Health Law Sec 18; MHL 33.13 and NY case law.

Matter of Brice (Wilks), 42 Misc3d 1231(A); 988 N.Y.S.2d 521 (Sup. Ct. Kings Cty 2014) (King, J.)

Petitioner, the AIP's granddaughter, who had an estranged and hostile relationship with the AIP, which included an Order of Protection against her, petitioned pro se for the appointment of a guardian for her grandmother in which she sought, inter alia, to stay the AIP from serving as

Executor of her deceased husband's estate. The court found among other things that the petition had been alleged only upon information and belief and contained no first hand allegations as to the AIP's ability to meet her own needs. Further, petitioner had no witnesses and planned to make out her case with only the the AIP"s testimony. AIP's counsel objected on the grounds that such testimony would violate her 5th amendment rights against self-incrimination and the court sustained that objection and dismissed the petition. The Court then set the Court Evaluator's fees and directed that they be paid solely by the Petitioner. Petitioner advised the Court Evaluator that she had no funds to pay the fee and thereafter the Court Evaluator moved the court to have the fee paid by the AIP or split between the AIP and the petitioner. The court, finding that the petitioner had brought the proceeding to "settle a score" with the AIP, refused to apply the fee splitting or fee shifting options, stating that fee shifting was designed to discourage frivolous guardianship petitions and petitions motivated by avarice and bad faith. The court found that this petition had been brought in bad faith, that the AIP had already been burdened by the unnecessary cost of hiring her own counsel and that therefore, petitioner was responsible for the entire fee.

Matter of G.P., 37 Misc. 3d 1219(A); 964 N.Y.S.2d 57 (Sup. Ct., Dutchess Cty. 2012) (Pagones, J.)

Rejecting Matter of Heckle, and the caselaw upon which is it based as inconsistent with the developments in guardianship law attributable to the passage of Article 81, the court followed Matter of A.G. and held that an AIP may not be compelled by petitioner to testify to assist petitioner to meet his burden. Due Process requires that an AIP in an Article 81 proceeding have the right to assert the 5th amendment privilege against self incrimination because of the potential deprivation of liberty inherent in taking away one's right to make decision about his own person and property.

Matter of Aida C. (Heckle), 67 A.D.3d 1361; 891 N.Y.S.2d 214 (4th Dept 2009)

Court declined to find a violation of the IP's due process rights because the trial court had required her to testify. The court cited to MHL §81.11 requiring the presence of the AIP at the hearing so that a court can obtain its own impression of the AIP's capacity and also cited to existing case law rejecting the contention that an AIP's 5th amendment rights are violated by requiring her testimony.

Matter of Heckl, 44 A.D.3d 110; 840 N.Y.S.2d 516 (4th Dept., 2007)

Although acknowledging that an AIP's liberty is at stake in an Article 81 proceeding, citing the nature of an Article 81 proceeding as being about care and treatment and non-criminal, the Court declined to find that the AIP's 5th amendment right against self incrimination was implicated by the AIP's desire to refuse to speak to the Court Evaluator. This AIP had counsel of her own choosing. The court held that although a Court Evaluator may be dispensed with under 81.10 when there is counsel for the AIP, that exception only applied when there were financial constraints preventing the appointment of both and that was not the case here. The Court did however also hold that while it could not dispense with the appointment of the Court Evaluator, it also could not compel the AIP to speak to the Court Evaluator because the duties imposed by the statute were upon the Court

Evaluator to interview the AIP but not upon the AIP to be interviewed. Likewise, the Court held that it could not hold the AIP in contempt for refusing to speak to the Court Evaluator.

Matter of A.G. (United Health Services), 6 Misc.3d 447; 785 N.Y.S.2d 313 (Sup Ct., Broome Cty., 2004)(Peckam, J.)

AIP may not be compelled by petitioner to testify help petitioner meet his burden. Due Process and CPLR 4501 require that an AIP in an Article 81 proceeding have the right to assert the 5th amendment privilege against self incrimination because the potential deprivation of liberty inherent in taking away one's right to make decision about his own person and property.

Matter of Allen, 10 Misc.3d 1072A; 814 N.Y.S.2d 564 (Sup. Ct. Tompkins Cty., 2005) (Peckham, J.)

Brother who was entitled to and did receive notice of the proceeding was not therefore a party. He would not be considered a party unless he filed a cross petition seeking relief that was not requested in the petition. Therefore, he could not be granted an adjournment nor could he submit an answer. While he could not participate as party in the hearing on the central issue of the need for guardianship, he was considered a party to that part of the Order to Show that issued a TRO against him. Moreover, he was permitted to call the AIP as a witness since this part of the proceeding was in the nature of a civil proceeding involving the discovery of property and was not, as prohibited by the United Health Services case (above), a proceeding in which compelling AIP's testimony could serve to infringe upon the AIP's liberty in violation of the 5th amendment.

f. Information Subpoenas

Matter of the Application of James B. and Patricia B., 25 Misc.3d 467; 881 N.Y.S.2d 837 (Sup. Ct. Delaware Cty. 2009)(Peckham, J.)

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.

g. Judicial Proceeding Privilege

Coyle v Tipton, 2011 NY Slip Op 30212U; 2011 N.Y. Misc. LEXIS 178 (Sup. Ct., NY Cty.) (Madden, J.)

In an action for defamation commenced by an AIP's personal assistant, who was fired based on the

AIP's niece's statements to the temporary guardian that the personal assistant had been observed by the AIP's night aide as he was removing financial records from the AIP's apartment, the Supreme Court dismissed the complaint, holding that the niece's statements were protected by the judicial proceeding privilege.

(vi) Jury trials

Matter of Agam S.B., 2019 N.Y. App. Div. LEXIS 1383 (2nd Dept. 2019)

At the conclusion of a bench hearing which resulted in the trial court's denial of the mother's cross -petition to be named as her son's guardian, the mother moved, in effect, to have the judgment vacated and for a jury trial on the issue of her appointment. The trial court held that she had waived her right to a jury trial by not requesting it from the outset and the Appellate Division upheld that determination.

Matter of Heidi B. (Pasternack), _AD3D_, 2018 N.Y. App. Div. LEXIS 6891 (2nd. Dept., 2018)

On an appeal from a judgment granting a petition for the appointment of a guardian, the Appellate Division held, inter alia, that the appellant's jury demand, made on the date of the hearing, was untimely, as MHL 81.11(f) and CPLR 4102 (e) require such demand to be made "on or before the return date designated in the Order to Show Cause."

Matter of Jane S. (Mel S.), 15 Misc.3d 1037; 838 N.Y.S.2d 373 (Sup. Ct., Otsego Cty., 2007) (Peckham, Acting J.)

There is no right to a jury trial in an accounting proceeding under Article 81 where the issue is whether there has been a breach of fiduciary duty of loyalty, i.e. an act of self dealing.

In re Application of Department of Social Work of Beth Israel Medical Center (Panartos), 308 A.D.2d 350; 764 N.Y.S.2d 87 (1st Dept., 2003)

App. Div. reverses trial court where trial court refuses to permit a jury trial even though appellant made timely demand therefore. Instead, trial court held "preliminary hearing" to determine whether there were any triable issues of fact and decided that there were none. MHLS was not given any warning that there would be a hearing that day and had no witnesses and thus could not rebut the hospital's case. Court used this situation to find that there were no triable issues of fact to justify a jury trial. App. Div. DOES NOT GO SO FAR AS TO SAY THAT A JURY MUST BE PERMIT UPON TIMELY REQUEST.

Matter of Claiman, 169 Misc.2d 881; 646 N.Y.S.2d 940 (Sup. Ct., NY Cty., 1996)

AIP is not entitled to jury trial where no party raised issue of fact regarding need for appointment of

guardian. No useful purpose would be served by jury since no factual issue presented as to need for personal needs and property management guardian for AIP. It is function of court, not jury, to determine who will be appointed guardian and powers of guardian.

(vii) Court's consideration of best interest and wishes of AIP

Matter of Mae R., 123 A.D.3d 1034; 999 N.Y.S. 2d 166 (2nd Dept. 2014)

Where the AIP, who was found by the court to be incapacitated, objected to the individual proposed by petitioner to serve as guardian, the court held that the proposed guardian should not be appointed. The court stated: " Even where the court finds that appointment of a guardian is necessary, it is not required to appoint the person proposed by the petitioner ..... Despite her functional limitations, [the AIP] clearly and succinctly expressed her opposition to having the petitioner appointed .... "

Matter of Willie C., 65 A.D.3d 683; 884 N.Y.S.2d 468 (2nd Dept., 2009)

Citing the trial court's obligation to protect the best interests of the AIP, the Appellate Division upheld the trial court's refusal to accept a stipulation between the parties because that did not adequately protect the interests of the AIP.

Matter of Shapiro, 2001 NY Misc LEXIS 1359; 225 NYLJ 75 (Sup. Ct., Nassau Cty.)(Rosetti, J.)

Elderly IP transferred all $680,000 of her assets to neighbors who recently began helping her, although there were relatives in the picture who had been supportive. Court voids transfer, noting, *inter alia*, that while it is bound to consider wishes and desires of IP, it is only bound to consider "competent wishes consistent with IP's best interest."

(viii) Burden of proof

Matter of Mary WW., 125 A.D.3d 1269; 4 N.Y.S.3d 381 (3rd Dept. 2015)

Where the trial court placed the burden of proof to justify modification of a guardian's powers upon the appellant, the Appellate Division held that this was not a violation of §81.36 because that section requires placement of the burden upon the party objecting to modification only in the situation where the IP is seeking to modify the guardian's powers . The purpose of allocating the burden to the objecting party is to ease the burden on an IP seeking to regain his/her autonomy. In this case, the person objecting to the guardian's powers was a third party, not the IP.

Matter of Eugenia M., 20 Misc.3d 1110(A); 2008 NY Slip Op 51301U (Sup. Ct. Kings Cty., 2008) (Barros, J.)

Court states in *dicta* that a petitioner has the burden of proving his case and cannot rely upon the Court Evaluator to establish his case for him. Court also stated that the burden of proving risk to the AIP cannot be met by a petitioner's ***"speculation" about "hypothetical future .... events.".*** (Cross reference: see detailed description of facts of this case under "FUNCTIONAL LIMITATIONS section of this document).

Matter of Marvin W., 306 A.D.2d 289; 760 N.Y.S.2d 337 (2nd Dept., 2003)

App. Div. reverses order of Supreme Court that denied, without hearing, IP's application to terminate the guardianship. Court holds that MHL §81.36(c) requires that a hearing be held, that the burden of proof is on the person opposing termination of the guardianship, and that the standard of proof is clear and convincing evidence that the guardian's authority should not be terminated.

Matter of Shapiro, 2001 NY Misc LEXIS 1359; 225 NYLJ 75 (Sup. Ct., Nassau Cty.) (Rosetti, J.)

Elderly IP transferred all $680,000 of her assets to neighbors who recently began helping her, although there were relatives in the picture who had been supportive. Despite presumption of capacity, evidence of dementia shifted burden to recipients of transferred funds to show that transfer was not due to undue influence or incompetence. Court voids transfer.

(ix) Appointment of Independent Psychiatric, psychological and medical examiners

Matter of Elizabeth TT. (Suzanne YY.--Elizabeth ZZ.), _AD3d_, 2019 NY Slip Op 06667 (3rd Dept., 2019)

Although a court evaluator may retain an independent medical expert where the court finds it is appropriate under MHL § 81.09(c)(xvii)(7), and may apply to the court for permission to inspect records of medical, psychological and/or psychiatric examinations of the AIP under MHL § 81.09(d), there is no corresponding statutory requirement for an AIP to abide by a court evaluator's recommendation that he or she undergo a neuropsychological evaluation to assess his or her present cognitive condition. Although MHL § 81.11(c) provides that the AIP must be present in order for the court to obtain its own impression of the person's capacity and make an independent assessment of the AIP, there is no corresponding requirement in Article 81 that compels the AIP to testify at a hearing.

Matter of S.B. (E.K.), 60 Misc.3d 735 (Sup. Ct., Chemung Cty.)(2018)(Guy, AJSC)

The petitioner primarily sought court ordered visitation with her mother, the AIP, under MHL 81.16(c)(4)-(6) ("the Peter Falk amendment"), and secondarily sought the appointment of a guardian of her mother's person/property. The petitioner urged that even if no guardian were appointed, the Peter Falk amendment gives the court the authority to direct visitation. The Court held that the Legislature's placement of this amendment in MHL 81.16(c), entitled "Appointing a guardian," rather than in MHL 81.16(b), which provides for protective arrangements and single transactions, indicates that it was intended to apply only in the event that a guardian is appointed. The court further looked to references in the legislative history of the amendment concerning an AIP's right to determine one's own visitation and found no language suggesting that a court can order visitation where the petitioner has not sustained her burden of establishing the need for a guardian. The court, noting that it was constrained to examine visitation from the AIP's perspective rather than that of the petitioner, stated that even in a guardianship based on the AIP's consent, the AIP would ultimately remain in control of whom she visits, as fulfillment of her wishes and desires is required in applying the least restrictive alternative standard.

*Note - the Supreme Court's order, which granted the AIP's motion to dismiss the petition, was later reversed in Matter of Elizabeth T.T. (Suzanne Y.Y. - Elizabeth Z.Z.), 177 AD3d 20 (3rd Dept., 2019), based upon the Appellate Division's finding that an issue of fact existed regarding whether the arrangements that had been put in place to protect the AIP's personal and property needs were the product of undue influence.

In the Matter of Donald F. L., 242 A.D.2d 536; 662 N.Y.S.2d 75 (2nd Dept., 1997)

Independent psychiatrist appointed to determine need for guardianship.

Matter of Judith F. Meyers, a/k/a/ Fuhrman, 270 A.D.2d 135; 706 N.Y.S.2d 311(1st Dept., 2000)

Independent psychiatrist appointed to determine need for guardianship.

(x) Findings

Matter of Hoffman (Zeller), 288 A.D.2d 892; 732 N.Y.S.2d 394 (4th Dept., 2001)

Appellate Division reverses and remits for hearing where Supreme Court did not make findings required by MHL §81.15.

(xi) Inferences

<u>Matter of Alice Zahnd</u>, 27 Misc.3d 1215A; 2010 NY Misc. LEXIS 907 (Sup. Ct. Suff. Cty.) (Luft, J.)

Where, according to the court, the AIP elected not to appear, the court drew a negative inference based on her non-appearance.

(xii) Consent to Appointment of Guardian

<u>Matter of Arline J. (James J.--Gerilynn F.)</u>, _AD3d _; 2019 NY Slip Op 05532 (2nd Dept., 2019)

A woman and her late husband established a trust of which they were co-trustees. After the death of her husband, the woman transferred real property that had been in the trust to herself. When the woman's stepson (the trust remainderman) petitioned for the appointment of a guardian for her, she agreed to become a Person in Need of Guardian ("PING"), with no finding of incapacity. Thereafter, the stepson petitioned for the woman's removal as trustee arguing, inter alia, that she was unfit to serve as she was a PING. The Appellate Division affirmed the trial court's denial of the stepson's removal petition, noting, inter alia, that the guardianship order had been entered upon the woman's consent based upon evidence that she had functional limitations that rendered her unable to manage certain aspects of her affairs; that the stepson consented to this order, and did not at that time seek her removal as trustee; and that the stepson failed to demonstrate that subsequent to the issuance of the guardianship order, the woman's condition had worsened and that she had become incapacitated.

<u>Matter of Cooper (Joseph G.)</u>, 46 Misc. 3d812; 996 N.Y.S. 2d 508 (Sup. Ct., Bronx Cty.)

Citing MHL 81.16(c)(1), the Court held that there was no impediment to its accepting the AIP's consent to the appointment of a guardian (deeming him to be a Person in Need of Guardian ["PING"]) and then reserving to itself the right to delineate the specific powers to be given to the guardian.

<u>In the Matter L.J.L.</u>, 39 Misc3d 1224A; 971 N.Y.S. 2d 72 (Sup Ct., Bronx Cty. 2013) (Hunter, J.)

Where all parties with the exception of the Court Evaluator, unequivocally stated that the AIP has the capacity to consent to the guardianship, the Court allowed the AIP to consent to a guardianship of one year duration. The court looked to the legislative intent of Art 81 to take into account the personal wishes, preferences and desires of the AIP and afford the person the greatest amount of independence and self-determination and participation in all the decisions affecting his/her life. The Court noted that it understood the Court Evaluator's concerns as to the AIP's health, well-being, and purported need for inpatient rehabilitation and detoxification, but found that the evidence demonstrated that the AIP had the capacity to consent to the guardianship because she was able to

clearly voice her opinion and articulate the reasons why she consented to the guardianship.

Matter of James D., 39 Misc. 3d 634; 960 N.Y.S.2d 627(Sup. Ct. Suff. Cty. 2013) (Leis, J.)

"A consent guardianship is created on the basis of the individual's agreement thereto and its does not morph into a non -consent guardianship with its inherent finding of incapacity because an emergency occurs and an expansion of powers becomes necessary." A court determining a person's capacity to agree to a guardianship with generally consider: the individuals ability to meaningfully interact and converse with the court; his or her understanding of the nature of the proceeding; and his or her comprehension of the personal and property management powers being relinquished. The inquiry by the court to determine whether an individual has the capacity to consent is not the equivalent of the in-depth examination which occurs in a full hearing to determine incapacity where in the person's ability to understand and appreciate the nature and consequences of their functional limitations is explored and determined. Therefore, where the original guardianship was made upon consent to the AIP, the guardian was prohibited from seeking to expand his powers pursuant to MHL 81.36 over the objection of the his ward and was required to file an new application for guardianship and prove the need for a guardian and incapacity before the court could expand his powers.

H. Intervenors

Matter of S.B. (E.K.), _Misc.3d_; 2019 NY Slip Op 29368 (Sup. Ct., Chenumg Cty.)(2019)
(earlier related decisions: Matter of S.B. [E.K.], 60 Misc.3d 735 [Sup. Ct., Chemung Cty.][2018], reversed, Matter of Elizabeth T.T. [Suzanne Y.Y. - Elizabeth Z.Z.], 177 AD3d 20 [3rd Dept., 2019])

The Supreme Court had appointed as the AIP's Article 81 attorney the attorney who previously drafted and executed a power of attorney in which the AIP designated her daughter, E.I. as her attorney-in- fact. The AIP's other daughter, S.B., subsequently filed a proceeding, inter alia, seeking to invalidate the POA, alleging that E.I. had isolated the AIP, that the POA was the product of undue influence, and that E.I. had otherwise breached her fiduciary duties. The court denied the attorney's motion to intervene in that proceeding, noting that his presence as a party was not necessary for it to determine the validity of the POA. The court expressed concern that the attorney needed direction as to whether he could properly rely on the attorney-in-fact to guide his strategy in defending the AIP against the guardianship. Citing N.Y.C.R.R. 1200.0, Rule 1.14(a) (which requires an attorney representing an individual with diminished capacity to maintain a conventional relationship with the client as far as reasonably possible), and MHL § 81.10 (which states that the role of counsel is to ensure that the AIP's point of view is presented to the court), the court reminded the attorney that insofar as the AIP had consistently expressed her opposition to the guardianship, he could make decisions and pursue a litigation strategy that honored that perspective without reliance on decisions made by the AIP's attorney-in-fact. Further citing to cases where the court must determine whether counsel retained by the AIP was chosen freely and independently, the court noted that although the subject attorney had not been retained by the attorney-in-fact, he had given the court the impression that he had either relied on her, or planned to rely on her, to control his strategy as the AIP's advocate. The court admonished that this would essentially allow the attorney-in-fact, who allegedly

isolated the AIP from S.B., exerted undue influence in the creation of the POA, and breached her fiduciary duty to the AIP, to impermissibly direct the AIP's counsel. Ultimately, however, the court disqualified the attorney because he would be called as a witness to attest to the circumstances regarding the creation and execution of the contested POA.

Matter of J.J., 32 Misc3d 1215A; 934 NYS2d 33 (Sup. Ct. NY Cty. 2011) (Visitation-Lewis, J.)

A community guardian sough to permanently place an IP in a skilled nursing facility in which he was already residing, relinquish his apartment, judicially settle the final account and be relieved as guardian. The nursing home sought to intervene as a party. MHLS opposed all aspects of the motion. Among other things, the court held that: (1) the nursing home could not intervene, reasoning: (1) the fact that it had been served with notice of the proceeding did not provide a statutory entitlement to intervention, especially since it was not even entitled to be served with the petition, and it was not affected by the outcome such that it could be an aggrieved party with standing to appeal; and (2) that in any event, the issue whether the IP should be permanently place raises a conflict of interest for the nursing home which benefits from the Medicaid payments it would receive for the care of the IP.

Matter of Astor, 13 Misc.3d 862; 827 N.Y.S.2d 530 (Sup. Ct., NY Cty., 2006)

Where adult son who was sole presumptive distributee of the AIP and the holder of the POA and HCP received notice pursuant to MHL 81.07(g) and was directly affected by the TRO issued by the court, the court found that he was entitled to make a cross-motion over the objection of the petitioner and respondent that he lacked standing because he was not a party. This Court rejected Matter of Allen, 10 Misc3d 1072A as distinguishable because in Allen, the intervenor sought to file an answer after the hearing had already been held.

In re Glass, 29 A.D.3d 347; 815 N.Y.S.2d 36 (1st Dept., 2006)

Appellate Division reversed an order granting the landlord of a rent controlled apartment permission to intervene in an Article 81 proceeding. The landlord sought to intervene to protect against being adversely affected if the AIP's grandson later claimed succession rights to the AIP's apartment. The AIP's grandson had been named in the original Order appointing the guardian which gave the guardian permission to allow the grandson to reside in the AIP's apartment when while she was living in the nursing home. That order was later modified by Supreme Court to clarify that this arrangement would not give the grandson succession rights. The Appellate Division reversed the order permitting intervention because there was no possibility that the Landlord would be adversely affected by the disposition in the Article 81 case both because of the modification of the prior order and also because a claim of succession would fail under other provisions of the Rent Stabilization Law.

I. Sanctions

Matter of James H., N.Y. App. Div. LEXIS 166 (3rd Dept. 2019)

During the pendency of a protracted probate proceeding relating to the estate of the AIP's mother, the AIP sought to have his trustee of several trusts, including an SNT, removed and replaced with an Art 81 guardian. In so doing, the AIP asserted that had been unable to meet his basic financial needs under the existing arrangement. The Supreme Court appointed a Guardian and ordered the Guardian to pay the Court Evaluator's fee. The Guardian reported to the Court that he was unable to pay the fee as the funds in the guardianship estate were insufficient. The Supreme Court issued an ex parte order directing the Trustee to pay the Court Evaluator's fee from the SNT and, when the Trustee did not pay, held him in contempt and ordered sanctions against him. On appeal by the Trustee, the App. Div. held that he could not be either held in contempt or subjected to sanctions for failing to pay the Court Evaluator's fees because the SNT was unexecuted and unfunded and, under such circumstances, the legal standards for contempt and sanctions were not satisfied.

Matter of K.B. 50 Misc3d1219(A); 2016 NY Slip Op 50161(U); 2016 N.Y. Misc. LEXIS 429 (Sup. Ct. Dutchess Cty. 2016)

Petition dismissed for pleading opinion rather than meaningful facts sufficient to meet the pleading requirements set forth in MHL 81.08. Although the petition was dismissed, the prayer for costs, fees and expenses was denied.

Matter of Marion C.W., 135 AD3d 777; 24 N.Y.S. 3d 665 (2nd Dept., 2016)

Appellate Division upheld the trial court's decision to require extraordinarily litigious co-guardians to seek leave of court before filing further motions or commencing any new proceedings relating to the instant guardianship and related trust, finding that these litigants had forfeited free access to the courts by abusing the judicial process with repeated motions seeking to relitigate matters previously decided against them.

Matter of Korer (Dworecki), 134 AD3d 64; 19 N.Y.S. 3d 228 (1st Dept., 2015)

After apparently freely and voluntarily consenting to the appointment of co-guardians on behalf of the AIP, who was not present in the courtroom, counsel for the AIP subsequently moved to stay entry of an order appointing such co-guardians. Counsel argued that he had in fact not consented and, in strong language, accused the court of fraud and "trampling on the rights" of the AIP. The trial judge sanctioned counsel for the frivolous behavior of denying his consent that clearly appeared on the record. Counsel appealed the sanctions. On appeal, the majority, responding to a strong dissent, upheld the sanctions (in part), holding that while it was indeed error for the trial court to have accepted the AIP's consent in her absence, that error did not excuse counsel's frivolous behavior of falsely denying such consent in the face of a clear record of same.

<u>Matter of Alice D.</u>, 113 A.D.3d 609; 979 N.Y.S.2d 77 (2nd Dept., 2014)

Appellate Division held that the Supreme Court erred by partially granting a guardian's cross motion for an award of costs and the imposition of sanctions relating to two separate actions that the IP's daughter had commenced against him in other courts and/or under other index numbers, noting that, according to 22 NYCRR 130-1.1 sanctions could only be imposed by the guardianship court in a proceeding before that court Furthermore, the Supreme Court erred by awarding, without a hearing, compensation to the guardian in view of the existence of an issue of fact as to the propriety of his actions on behalf of his ward. Finally, the Appellate Division noted that the Supreme Court erred in awarding legal fees to the guardian's attorney when it was unclear that the legal services he provided were not duplicative of compensation awarded to the guardian, who was also an attorney. Accordingly, the Appellate Division remanded the matter back to the Supreme Court for further proceedings.

<u>Matter of Kaminester</u>, 17 Misc.3d 1117(A) (Sup. Ct. NY Cty 2007), *aff'd and* modified, <u>Kamimester v . Foldes</u>, 51 A.D.3d 528; 2008 NY App Div LEXIS 4315 (1st Dept.), *lv dismissed and denied* 11 N.Y.3d 781 (2008) ; *subsequent related case*, <u>Estate of Kaminster,</u> 10/23/09, N.Y.L.J. 36 (col.1)(Surr. Ct., NY Cty)(Surr. Glen)

After the death of the IP it was discovered by the Executrix of his estate that his live in girlfriend had secretly married him in Texas and transferred his property to her name in violation of a temporary restraining order that had been put into effect during the pendency of the Art 81 proceeding. These acts in violation of the temporary restraining order took place before the trial court had determined, following a hearing, whether the AIP required the appointment of a guardian. Upon the petition of the Executrix to the Court that had presided over the guardianship proceeding, the court "voided and revoked" the marriage and transactions and held the AIP's purported wife in civil and criminal contempt of court and ordered her to pay substantial fines. On appeal by the purported wife, the Appellate Division held that under the circumstances and upon the proof, the marriage had been properly annulled. In the subsequent case, arising in Surrogate's Court during the probate of the IP's Last Will, the Executrix sought a determination of the validity of the spousal right of election exercised by the purported spouse, arguing that her marriage to decedent had taken place 2 1/2 months after a Texas court had appointed a Temporary guardian, during the pendency of the NY Article 81 proceeding and 2 ½ months before the IP died. Moreover, in the earlier reported decision of Supreme Court, the court had found that there was a need for a guardian based on the IP's cognitive deficits and had posthumously declared the marriage revoked and voided due to his incapacity to marry. The purported wife argued that her property rights and marriage could not be defeated by the posthumous annulment because under DRL Sec. 7(2) a marriage involving a person incapable of consenting to it is "voidable," becoming null and void only as of the date of the annulment in contrast to MHL 81.29(d) permitting the Article 81 court to revoke a marriage "void ab initio," a distinction critical to the purported wife's property right. The Surrogate ultimately held , based upon both statutory and equitable theories, that the marriage had been "void ab initio," thus extinguishing the purported wife's property rights, including her spousal right of election.

(i) Frivolous Conduct

Matter of Ruth S. (Stein), 181 AD3d 943 (2nd Dept., 2020)

The Supreme Court providently exercised its discretion in imposing sanctions upon the appellants for frivolous conduct.

Matter of Gerken, NYLJ, 9/06/19, at p. 21, col. 12 (Sup. Ct., Bronx Cty.), (Johnson, J)

Proceeding was brought by a nursing home to address the outstanding residential debt of the AIP. The Court Evaluator advised the court that the AIP had the capacity to enter a new power of attorney (a prior one designating her brother as attorney in fact could not be located). After the AIP executed a new POA, however, the nursing home refused to withdraw the petition. Although the court did not find that the nursing home's commencement of the proceeding was inappropriate or ill-advised insofar as the nursing home was entitled to be paid for the services it provided, the court held that the nursing home's refusal to withdraw the petition after the AIP had executed the new POA constituted frivolous conduct. Consequently, the court held the nursing home responsible for the fees generated by the AIP's counsel subsequent to the execution of the POA. **Matter of I.V., 39 Misc. 3d 1232(A); 971 N.Y.S.2d 71 (Sup. Ct., Bronx Cty. 2013)(Hunter, J.)**

In the context of a guardianship proceeding in which the petitioner had been appointed as temporary guardian and authorized to commence a personal injury action on behalf of his wife/AIP, the Court was "outraged" by petitioner's counsel's misrepresentation that the AIP was in a "virtual vegetative state" while she was in fact ambulatory and able to receive service of process, as well as by the attorney's failure to inform the court that the petitioner/temporary guardian was an "illegal alien." The Court, sua sponte, set the matter down for a hearing to determine the imposition of sanctions as required by 22 NYCRR 130.11(d).

Juergens v. Juergens, 2008 N.Y. Slip Op 30991 (U); 2008 N.Y. Misc. LEXIS 10629 (Sup. Ct. Nassau Cty. 2008) (Brandveen, J.S.C.)

Supreme Court granted attorney fees and sanctions against the plaintiff under 22 NYCRR 103.1.1 for bringing frivolous litigation. The plaintiff against whom the sanctions were assessed was the second wife of the IP who was presently engaged in a divorce proceeding against the IP. She filed a Verified Complaint for, *inter alia*, a *prima facie* tort against the plaintiff and breach of duty to the IP against the IP's daughter who was his Article 81 guardian. The Complaint alleged that while the daughter was his Temporary Guardian she abused her position by misappropriating her father's assets in an unspecified way. The defendant daughter, who was by the time of this proceeding the full plenary guardian, argued that the plaintiff lacked standing because she was alleging harm to the IP not herself and that only the guardian was in a position to pursue a civil action on behalf of the IP, that the claim lacked specificity and that the allegation of *prima facie* tort fell because it lacked a showing of intention infliction of harm and sole motivation of malevolence by the defendant.

Matter of Ernestine R., 61 A.D.3d 874; 877 N.Y.S.2d 407 (2nd Dept. 2009)

The trial court issued an order directing the AIP's siblings, including her brother who held her POA, to pay attorney fees and the CE fee as sanctions for cross-petitioning against the guardianship petition brought by the AIP's husband who was seeking to be made the guardian. The brother and AIP's other siblings had cross-petitioned arguing that there was no need for a guardian because the POA was in place and, in the alternative, that if there must be a guardian, that the brother who held the POA be appointed. The husband petitioner mentioned to his counsel that the brother had a felony conviction. The husband's counsel told the petitioner that this fact disqualified the brother from serving. The siblings and the brother had not realized the significance of the felony and had not told their attorney about it. Soon after learning the impact of the felony, the cross-petitioning siblings withdrew their petition and consented to the appointment of the husband. The husband later moved against the siblings for sanctions for frivolous litigation by the siblings and the trial court directed such sanctions to be paid. The siblings appealed and the Appellate Division reversed finding that under the circumstances, the siblings behavior was not frivolous, especially in light of the withdrawal of the petition when they became aware of the relevance of the felony conviction.

Matter of Dorothy N., 61 A.D.3d 871; 876 N.Y.S.2d 879 (2nd Dept. 2009)

Supreme Court did not improvidently exercise its discretion in determining that the petitioners conduct in commencing and maintaining the particular guardianship proceeding was frivolous within the meaning of 22 NYCRR 130-1.1(c), thus warranting the imposition of costs.

Matter of Monahan, 2007 N.Y. Misc. LEXIS 6886; 238 NYLJ 68 (Sup. Ct., Nassau Cty) (Iannucacci, J.)

Where the petition was: (1) false in at least one material fact in that it alleged that the AIP was in need of 24 hour care when she was already receiving 24 hour care; (2) commenced only to gain a financial advantage in a pending proceeding in Surrogate's Court; and, (3) not withdraw by the petitioner after it had become clear that there was no merit to the allegations causing undue delay and costs, the court held that the petitioner had engaged in frivolous conduct as defined by 22 NYCRR 130-1.1 and directed the petitioner to pay all counsel fees and the court evaluator fee by a date certain. The court further held that if said fees were not paid by that date each counsel could enter a money judgement for the amount awarded without further notice upon an affirmation of non-compliance and the clerk shall enter judgement accordingly.

Matter of Arnold "O", 226 A.D.2d 866; 640 N.Y.S.2d 355 (3rd Dept., 1996) *lv. to app. denied,* 88 N.Y.2d 810, 649 N.Y.S.2d 377 (1996)*, related proceeding,* 256 A.D.2d 764; 681 N.Y.S.2d 627 (3rd Dept., 1998)

Upon dismissal of petition, Supreme Court properly imposed award of counsel fees for frivolous conduct, pursuant to 22 NYCRR 130-1.1 where petition to remove guardian was filed approximately six months after entry of prior order which denied petitioners' cross motion to remove guardian.

Petitioners' conclusory allegations of guardian's misconduct were unsupported by any evidence. It was clear from record that petitioners disagreed with guardian's choice of health care facility for IP. It was equally clear that prior cross motion to remove guardian and instant petition for the same relief, together with petitioners' threatening and harassing conduct directed at guardian and staff of health care facility where IP resides, were product of petitioners' frustration and anger.

Matter of Elizebeth R., 228 A.D.2d 445; 643 N.Y.S.2d 224 (2nd Dept., 1996)

Petitioner commenced proceeding to have guardian appointed on behalf of her sister, alleging that AIP was incapable of handling her personal and financial needs due to use of drugs and alcohol. Court properly dismissed petition and imposed sanctions upon petitioner finding that commencing and continuing of this proceeding was frivolous pursuant to 22 NYCRR 130-1.1.-*see related case*, Matter of Rocco, 161 Misc.2d 760; 615 N.Y.S.2d 260 (Sup. Ct., Suff. Cty., 1994).

Matter of Slifka, Index No. 00757/96, Sup. Ct., Westchester Cty., Pallella, J., 6/6/96, NOR

Court granted AIP's motion to dismiss petition but denied motion to impose sanctions on petitioner. Petition was for guardianship over trust to pay for AIP's inpatient care; however he left hospital voluntarily, rendering petition moot. Because it should have been discontinued at that point "obviating the necessity for the motion to dismiss," court did order petitioner to pay costs of proceeding plus court evaluator's fee.

(ii) Discovery

Matter of Schwartz v King, 81AD3d 737; 921 NYS2d 861 (2nd Dept., 2011)

Appellate Division dismissed a proceeding pursuant to CPLR Article 78, inter alia, in the nature of mandamus to compel the court presiding over an Article 81 hearing to direct the respondent to produce all discovery items sought by the petitioners noting that the petitioner had failed to demonstrate a clear legal right to the relief sought

Matter of Mary XX, 33 A.D.3d 1066; 822 N.Y.S.2d 659 (3rd Dept. 2006)

Petitioner, guardian of the IP's person but not property, moved for a compulsory accounting by the trustees of the IP's funds. The trust provided that during the IP's lifetime the trustees were to pay the income to the IP and, in their discretion, to pay the principal as needed "to provide adequately and properly for the support, maintenance, welfare and comfort of [the IP]." The order appointing petitioner as guardian of the person authorized her to direct the trustees to pay for the IP's care and maintenance and to examine all the relevant circumstances, including the opinion of treating health professionals, the existing financial circumstances, and the existing physical environment as to what may be the best place for...[IP] to reside and the best arrangements for her continued care and treatment. The trustees, however, refused to provide petitioner with financial documents when she requested same, therefore, petitioner commenced a proceeding for a compulsory accounting in order

to fulfill her obligation as guardian. Supreme Court denied the requested relief, holding that petitioner's powers as guardian of the person were limited to making demands of the trustees for payment of expenses and that the guardian of the person had no powers relative to the financial assets of the IP. The Appellate Division reversed finding that petitioner had made a sufficient showing that the requested accounting is necessary in order to carry out her duties as guardian citing four factors that justify ordering a compulsory accounting and explaining why they were met on these facts: (1) a fiduciary relationship, (2) entrustment of money or property, (3) no other remedy, and (4) a demand and refusal of an accounting. The Appellate Division also noted that authorizing the accounting was not giving the guardian of the person powers over the property because petitioner was not given the power to manage the financial but only information to exercise those particular, limited powers conferred upon her in the guardianship order.

Estate of Lawrence Bennett, NYLJ, 2/26/03(Surr. Ct., Queens Cty.)

Motion by alleged distributes of an estate for copy of Court Examiner's file - granted.

Matter of Hart, 237 A.D.2d 145; 654 N.Y.S.2d 143 (1st Dept., 1997)

Imposition of $1,500 sanction was proper exercise of discretion in view of precarious health of appellant's 91-year-old client and counsel's failure to comply with two court orders intended to facilitate findings on exact nature of her disabilities.

Matter of Donald F.L. (Mollen), 242 A.D.2d 536; 662 N.Y.S.2d 75 (1st Dept., 1997)

Courts refusal to remove guardian unless IP appear for psychological evaluation by court- appointed psychiatrist and for deposition was not improper. Further, there was insufficient evidence to support finding that IP had become able to provide for his personal needs or manage his affairs.

J. Discontinuance

Matter of Lee J.P. (Bond), 45 A.D.3d 774; 847 N.Y.S.2d 110 (2nd Dept., 2007)

Where the AIP died before the proceedings were completed and a guardian was appointed, the court issued an order and judgement terminating the proceeding. That same Order and judgement also directed one of the AIP's sisters to repay a sum of money to the AIP's estate based upon the allegation that she had misappropriated those funds. The Appellate Division held that the latter directive must be reversed because the trial court had no authority to proceed beyond a dismissal of the proceeding as academic except for allowing reasonable compensation to the court evaluator and counsel.

Matter of Chackers (Shirley W.), 159 Misc.2d 912; 606 N.Y.S.2d 959 (Sup. Ct., NY Cty., 1993)

Court concludes that discontinuance is proper although Art. 81 makes no specific provision for same. Legislature surely did not intend to cause needless hearings. Even without hearing, if all factors suggest that no guardian is needed, and all parties agree, Legislature's purpose is met. Discontinuance must be by court order not stipulation.

Matter of Krishnasastry, NYLJ, 8/25/95, p. 25, col. 1 (Nassau Sup.)(Rossetti, J.)

Petitioner husband, involved in divorce action, instituted and then discontinued guardianship proceeding for his wife. At issue was who should pay fees of court-appointed evaluator and attorney. It apparently was unlikely that incapacity of the wife could have been proven. Court, noting petitioner's partially self-interested motivation for instituting guardianship proceeding and noting wife's lack of cooperation, ruled that husband must pay two-thirds and his wife must pay one-third.

Matter of Falick (Mann), NYLJ, 1/19/96, p. 25, col. 6 (Sup. Ct., NY Cty., Miller, J.)

Hospital had petitioned for guardian for an 85-year-old stroke victim. Prior to court's determination, she was discharged to nursing home. On recommendation of court evaluator, proceeding was discontinued because patient continued to functionally improve in therapy and executed a durable power of attorney to her "devoted, responsible, and caring" niece. Court evaluator also felt that her remaining functional limitations did not impact on her personal needs and property management as she can pay her bills and resides in a facility near her niece.

Matter of Naimoli (Rennhack), NYLJ, 9/8/97, p. 25 col. 4 (Sup. Ct., Nassau Cty., 1997)

Petitioner's sought discontinue over objection of AIP's counsel. AIP's attorney opposed petitioner's request for discontinuance since it was his position that determination should be made on merits as to AIP's alleged incapacity. Court permits discontinuance, stating that no substantial rights of AIP have been affected and AIP has not been prejudiced. Although Article 81 does not specifically deal with voluntary and unilateral discontinuance, CPLR 3217 (b) does and it controlled. Since no evidentiary hearing in matter had been conducted nor was case in any way yet submitted for determination of facts, court found it unnecessary to have parties stipulate to discontinuance, provided, however, that same was accomplished by court order upon terms and conditions deemed proper. Discontinuance was to be conditioned upon petitioner's payment of fees to both court evaluator and to AIP's counsel because court finds that petitioner's claim was malicious and likely unfounded.

K. Death of AIP

Matter of Ralph C. (Cavigliano), _AD3d_, 2019 NY Slip Op 06335, (4th Dept., 2019)

The Appellate Division reversed so much of an order and judgment as denied the guardian's motion seeking reimbursement for the counsel fees it incurred in connection with the guardianship, noting that MHL § 81.44 (e), relating to proceedings upon the death of an IP, provides that a guardian may retain guardianship property equal in value to the claim for administrative costs, liens and debts, and that these include reasonable counsel fees. The court remitted the matter to the Supreme Court to fix a reasonable award of counsel fees.

Matter of Rose V. (Scali), _AD3d_; 2019 NY App. Div. LEXIS 2871; 2019 NY Slip Op 02886, (2nd Dept., 2019)

The Appellate Division reversed an order of the Supreme Court and denied the successor guardian's motion seeking to surcharge the original guardian, noting that the successor guardian had filed his motion after the IP's death, and that, in the absence of an order empowering the successor guardian to represent the IP's estate, he lacked the authority to do so.

Matter of Kornicki, 2018 NYLJ LEXIS 3788 (Sup. Ct. Nassau Cty.) (Diamond, J.S.C.)

Prior to the death of the IP, her then Property Guardian entered into a Stipulation of Settlement wheren it was agreed that certain real property owned by the IP would be transferred to one of her daughters. Due to delays caused by the IP's daughters, the transfer did not occur during the IP's lifetime. After the IP's death, one daughter moved to enforce the Stipulation. The Court held that although the transfer of property should have occurred during the IP's lifetime, the Property Guardian now lacked the authority to effectuate the transfer because the only powers a guardian retains after an IP's death are those necessary to wind down the guardianship including: paying funeral/burial expenses [MHL 81.21 (a)(14) and MHL 81.36(e)]; retaining an accountant [MHL 81.21 (a)(18)]; paying bills [81.21(a)(19)]; and defending or maintaining any judicial action pending the appointment of an executor/administrator [MHL 81.(a)(20)]. The Court concluded that transferring the real property did not qualify as an act necessary to wind down the guardianship.

Matter of Zofia, 136 AD3d 818; 26 N.Y.S. 3d 95 (2nd Dept. 2016)

Death of IP rendered moot a challenge by the IP's son to have his sister removed as guardian but the issues as to reasonableness of counsel and court evaluator fees was held not academic and, on appeal, it was found that the trial court had failed to provide, in writing, a clear and concise explanation for its award, requiring the issue to be remitted back to the trial court for a hearing as to the reasonableness of counsel and court evaluator fees.

<u>Matter of Shannon</u>, 25 NY3d 345; 34 N.E. 3d 351 (Ct. of App.)(2015)

At the time of her death, in addition to the unpaid administrative expenses of the guardianship, the IP had an outstanding debt to Medicaid and another debt to the nursing home for the balance owed it over and above its Medicaid reimbursement. At the time of her death, her guardian held assets insufficient to pay both debts in their entirety. The guardian petitioned the court to settle its final account and sought instructions as to how to deal with the unpaid Medicaid and nursing home bills. The trial court directed the guardian to pay DSS. The nursing home appealed and the Appellate Division reversed, holding that the nursing home should be paid because its debt accrued before the Medicaid lien and the guardian was empowered to pay it pursuant to MHL 81.44(d) as it was not constrained by that section to pay only the administrative expenses of the guardianship. The dissent at the Appellate Division opined that if all the funds are turned over to the estate, the DSS debt would, by statute, be a preferred claim. The Court of Appeals reversed the Appellate Division, not based on the dissent's argument about preferred claim status but, rather, because the Legislative history of MHL 81.44 (d) is clear that the Legislature intended that a guardian lose all authority over an IPs assets at the time of death except to the extent of holding back only sufficient funds to pay the administrative expenses of the guardianship.

<u>Martin v Ability Beyond Disability</u>, 2014 N.Y. Misc LEXIS 5094; 2014 NY Slip Op 33021(U) (Sup. Ct., Westchester Cty.) (Giacomo, J.S.C.)

The incapacitated person died, and was buried, without notice to his family, at a cemetery that was not of their choosing, necessitating their exhumation and reburial of the IP' body. Subsequently, the family commenced an action seeking monetary damages against both the facility in which the IP resided, and his Article 81 guardian. The plaintiffs asserted two causes of action against the guardian. The plaintiffs' first cause of action was a common law negligence claim seeking monetary damages for loss of sepulcher. The plaintiffs' second cause of action was based upon their claim that they had suffered emotional damages due to the guardian's failure to comply with the provisions of Article 81 (by failing to notify them of the IP's death, failing to consult with them regarding the IP's care, failing to afford the IP the greatest amount of independence possible, failing to visit the IP, and by failing to file annual reports). The guardian moved to dismiss the complaint, arguing that litigation cannot be commenced against him, as guardian, without first seeking permission from the Court; that the plaintiffs lacked standing to assert claims based upon his alleged failure to comply with the provisions of Article 81; and that Article 81 provides guardians with immunity from any such claims. The Court denied that branch of the guardian's motion which sought to dismiss the first cause of action, noting that it would grant the plaintiffs permission to assert their potentially viable claim seeking damages for loss of sepulcher, *nunc pro tunc*. However, the Court granted that branch of the guardian's motion which sought to dismiss the plaintiffs' second cause of action seeking damages for the guardian's alleged failure to comply with the provisions of Article 81. In so doing, the Court noted that the plaintiffs did not possess standing to assert that cause of action insofar as the guardian owed no independent duty to them. The Court added that the available remedy was not an action seeking damages against the guardian, but rather a motion pursuant to MHL § 81.35 to remove him for misconduct. Moreover, any penalty for the guardian's alleged failure to file annual

reports would be the reduction of his fees.

Matter of Dandridge (Aldo D.), 120 AD3d 1411; 933 N.Y.S.2d 125 (2nd Dept. 2014)

Where the AIP died during the pendency of an appeal of an order which, among other things, found him to be incapacitated, appointed a guardian for him and voided his marriage to his caregiver, the Second Department remanded the case to the guardianship court for further findings holding that although death ordinarily abates a guardian's powers and the authority of the court hearing the guardianship proceeding, under the facts of the instant case, the guardianship court should continue since his capacity to marry was at issue in the guardianship proceeding and would be at issue in the Surrogate's proceeding and, in addition to considerations of judicial economy, the court that heard the guardianship proceeding had an opportunity to observe the AIP while he was still alive.

Matter of Soto, 91723/11, NYLJ 1202617140588 at *1 (Sup. Bx, Decided Aug., 2, 2013) (Hunter, J.)

More than one year after having been awarded fees that she had been unable to collect, a Court Evaluator moved before the trial judge in the guardianship proceeding for an order directing the Petitioner to pay the court ordered fees for her services as the Court Evaluator and also now her legal fees incurred by her need to bring that motion. Petitioner, the IP's daughter, who had been named as the guardian, had been unable to marshal her father's assets prior to his death due to many well documented delays caused by her attorney's errors in settling the order and obtaining a Commission. The Court determined that because the guardianship was properly brought for the benefit of the IP, the Court Evaluator's fees should be paid from the IP's assets but since the guardian had not become commissioned prior to the IP's death the Court Evaluator would have to submit her claim in the probate proceeding to collect her fee. The Court did however direct the petitioner to personally pay the Court Evaluator's legal fees for bring this motion.

Estate of Buchwald, 38 Misc.3d 1225A; 967 N.Y.S.2d 865 (Surr. Ct., Queens Cty. 2013) (Surr. Kelly)

Guardian may not marshal assets or carry out the duties set forth in the appointing order after the IP had died except for certain statutorily approved actions relating to the IPs death and must notify the necessary parties of the death of the IP as required by MHL 81.44. Any such actions would no longer be for the benefit of the IP.

Matter of Vita V. (Cara V.), 100 AD3d 913; 954 N.Y.S. 2d 582 (2nd Dept., 2012)

In a guardianship proceeding where the guardian of the person petitioned pursuant to MHL § 81.43 to recover property withheld from the IP's estate, and where, two days after the conclusion of the trial, the IP died, but the Supreme Court nevertheless entered a money judgment in favor of the guardian, in her capacity as guardian, the Appellate Division noted that the Supreme Court should have granted the appellant's motion to vacate the judgment, citing MHL §81.36 (a)(3) and noting that following the IP's death, the guardian was without authority to continue to represent the IP's

person and property, in the absence of a further order from the court modifying her authority to allow for the representation of the IP's estate in the proceeding.

Matter of Marion C. W., 83 AD3d 1087; 922 N.Y.S.2d 173 (2nd Dept., 2011)

Where the AIP died after a hearing had been held and a decision had been issued determining her need for a guardian, but her death occurred prior to the entry of the judgment, the Appellate Division found that Supreme Court had the authority to award counsel fees because entry of the judgement was merely a ministerial act.

Estate of Lawrence Edwards, 3/31/2010 NYLJ 34, (col. 2) (Surr. Ct. Bronx Cty.) (Surr. Holzman)

In this proceeding, the Public Administrator sought the issuance of letters of administration and an order directing the Article 81 guardian of the decedent's property to turn over all of the decedent's assets in its control less a reserve in the sum of $50,000 to pay any expenses. In the absence of any appearance in opposition, the application was granted in its entirety.

Estate of Ofelia Lopez, 3/26/2010 NYLJ 38, (col. 3) (Surr. Ct. Bronx Cty.) (Surr. Holzman)

In this proceeding, the Public Administrator sought the issuance of letters of administration and an order directing the Article 81 guardian of the decedent to turn over all of the decedent's assets in his control, less a reserve in the sum of $10,000 to pay any expenses in the Article 81 proceeding. In the absence of any appearance in opposition, the application was granted in its entirety.

Estate of Edgar Ekis, 12/10/2009, NYLJ 36, (col. 4)(Surr. Ct. Bronx Cty.)(Surr. Holzman)

This is an application by the Public Administrator seeking the issuance of letters of administration and an order directing the A**rticle 81** guardian of the decedent's property to turn over to the petitioner all of the decedent's assets in her possession, except for a reserve for any outstanding expenses in the guardianship proceeding. The guardian appeared by counsel and consented to the granting of the application provided that the guardian is permitted to retain a reserve of $7,500. The petitioner consented to a reserve in that amount.

Estate of William T. Lukas, 11/25/09, NYLJ 35 (col. 3) (Surr. Ct., Bronx Cty.) (Surr. Holzman)

Surrogate granted an application by the Public Administrator requesting that the former Art 81 guardian be directed to turn over to the Public Administrator all funds under his control less a $20,000 reserve to cover outstanding commissions and obligations in that proceeding.

Estate of Irving Israel, Deceased, 10/22/2009 N.Y.L.J. 34, (col. 1) (Surr. Ct., Bronx Cty.) (Surr. Holzman)

Upon an application by the Public Administrator seeking the issuance of letters of administration and an order directing the Article 81 guardian of the property of the decedent to turn over to the petitioner all of the decedent's assets, less a reserve of $25,000 for any outstanding expenses in the guardianship proceeding, within 20 days of service upon that guardian of a certified copy of the decree to be entered hereon, in the absence of any appearance in opposition, the application was granted in its entirety notwithstanding the default of the Article 81 guardian.

Article: The Article 81 Guardian and the Personal Representative, by Colleen Carew and John Reddy, Jr., NYLJ 8/20/08

Good article addressing a 2008 amendment to MHL 81.34 and new section MHL 81.44 concerning the division of responsibilities with respect to an IP's estate between an Art 81 guardian and the personal representative of a deceased IP. Also discussed is the newly enacted prohibition in MHL 81.29 against pre-death probating of a will during the pendency of an Art 81 proceeding.

Matter of Peer (Digney), 50 A.D. 3d, 1511; 856 N.Y.S. 385 (4th Dept. 2008)

Upon the death of the AIP during the Article 81 proceeding, the matter should have been transferred to Surrogate's Court because ultimately that court must determine distribution of the AIP's estate.

Estate of Carey, 5/22/08, NYLJ 45 (col. 2)(Surr. Ct., Queens Cty.)(Surr. Nahman)

Surrogate directed former guardian of deceased AIP to turnover unused portion of guardianship estate to the Commissioner of Finance of the City of New York for the benefit of the next of kin of the decedent.

Estate of Brook Astor, 2007 N.Y. Misc. LEXIS 8143; 238 N.Y.L.J. 97 (Surr. Ct., Westchester Cty.)(Surr.Scarpino)

After the IP's death, a bank, which had served for over a year as the Art. 81 guardian of the property applied to Supreme Court and was granted an extension of its powers until a temporary or permanent administrator of the estate was appointed. Thereafter, the Surrogate Court appointed the bank as temporary co-administrator of the estate because it's intimate familiarity with the assets would avoid costly duplicate efforts by a new administrator to familiarize itself with the assets.

Matter of Lee J.P. (Bond), 45 A.D.3d 774; 847 N.Y.S.2d 110 (2nd Dept., 2007)

Where the AIP died before the proceedings were completed and a guardian was appointed, the court issued an order and judgement terminating the proceeding. That same Order and judgement also directed one of the AIP's sisters to repay a sum of money to the AIP's estate based upon the

allegation that she had misappropriated those funds. The Appellate Division held that the latter directive must be reversed because the trial court had no authority to proceed beyond a dismissal of the proceeding as academic except for allowing reasonable compensation to the court evaluator and counsel.

In the Matter of Enna D., 30 A.D.3d 518; 816 N.Y.S.2d 368 (2nd Dept., 2006)

Following the death of the AIP, the guardianship proceeding abated. Thereafter, Supreme Court lacked the authority to award an attorney's fee to the attorney retained by the petitioner, as §81.10[f], §81.16[f] do not authorize such an award, following the death of the AIP to attorneys other than those appointed by the court.

Estate of Rose BB, 16 A.D.3d 801; 791 N.Y.S.2d 201 2005 (3rd Dept., 2005), revised judgement affirmed 35 A.D.3d 1044; 826 N.Y.S.2d 791(3rd Dept. 2006)

IP died and the guardianship proceeding was transferred to the Surrogate's Court and consolidated with a probate proceeding. The parties to the guardianship proceeding enter into a Stip on the records agreeing that the Surrogates Court would determine the fees due the guardianship proceeding. Guardian submitted final accounting in the Surrogates Court and it was later approved by the Appellate Division. Petitioner in the Art 81 proceeding moved in Surrogates Court for counsel fees pursuant to the Stip. and after hearing the Surrogates Court enters an order directing payment of fees to be paid by the respondent in this appeal who was the other party to the stip. Respondent argues that the petitioners fee was untimely but court finds that it was delayed by appeals, some of which were required due to respondents behavior. Second, respondent argues that the Surrogates Court cannot determine the fees due from the guardianship proceeding but the Appellate Division rejects that argument holding that "when appropriate, counsel fees may be awarded in situations where the misconduct of a fiduciary brings about the expense."

Estate of Josephina Howard, NYLJ, 9/22/04, p. 26 (Surr. Ct. , NY Cty.) (Surr Roth)

Where there was an accounting of an Art 81 being conducted in Supreme Court when the probate proceedings was commenced, and there was a discovery motion in Surrogate's Court dealing with the same issues involved in the accounting proceeding, Surrogate Court marked the motion off the calendar and referred the parties to Supreme Court.

In the Matter of the Accounting of by Russell Artuso and Patrick Artuso as co-Guardians, 4 Misc.3d 1003A; 791 N.Y.S.2d 867 (Surr. Ct., Monroe Cty., 2004) (Calversuo, J.)

Acknowledging that ordinarily, guardianship terminates with the death of the IP, Court permits guardianship to continue in this case to enable counsel for the guardian to continue prosecuting a civil action where there was no fiduciary yet named for the estate. The attorney' contingency fees in the civil action was deemed a claim against the estate rather than an administrative expense of the estate.

Matter of Miriam Shapiro, NYLJ, 9/4/03, p.22 (Surr. Riordan)

Where IP died, her attorney for the Art 81 proceeding should submit bill for services to the Art 81 court, not the Surrogate's court during probate.

Estate of Borglum, NYLJ, 3/21/03, p. 19, col. 2 (Surr. Ct.)

Administrator brings motion in Surrogate's Court accusing guardian of breaching fiduciary duty and seeking in addition to request that funds be turned over. Guardian seeks to have expenses of action paid from IP/descendent's funds. Surrogate's Court says the issue of payment of expenses must be decided by Supreme Court when settling final accounting for guardianship.

Matter of Klasson, 290 A.D.2d 223; 735 N.Y.S.2d 757 (1st Dept., 2002)

During the pendency of the appeal of order that modified an Art. 81 order to the extent of substituting the court evaluator for the guardian originally named, the AIP died. The Appellate Division, First Department held that the AIP's death rendered the appeal moot.

Matter of Francis Kleinman, NYLJ, 6/5/00, p.21,col. 3 (Sup. Ct., Nassau Cty.)(Rosetti, J.)

Removal of Art. 81proceeding at accounting stage was transferred to Surrogate's Court after death of AIP because there was an interrelationship between the Art.81 and the probate proceeding.

Estate of Irma Paige, NYLJ, 8/23/01, p. 19, (Surr. Ct., Bronx Cty.) (Surr. Holtzman)

Guardian whose ward has died must surrender responsibility for ward's assets to the fiduciary appointed for deceased ward's estate as soon as such fiduciary has been appointed. Guardian may file report with court projecting expenses for final administration of guardianship estate and court will fix appropriate reserve.

Matter of Burns (Salvo), 287 A.D.2d 862; 731 N.Y.S.2d 537 (3d Dept., 2001)

Death of IP during proceeding on petition by guardian to confirm charitable gift by IP did not deprive Supreme Court of jurisdiction and transfer to Surrogates Court was not required.

Matter of Kator, 164 Misc.2d 265; 624 N.Y.S.2d 348 (Sup. Ct., NY Cty., 1995)

Where court appointed co-conservators to manage property of now-deceased IP, and one conservator moved for an order distributing assets to himself to pay estate expenses and manage estate assets in his alleged role as administrator of estate prior to court approval of final account of conservators, notice of motion which was only served upon second conservator was patently insufficient. Article 81 fails to establish procedure for administration of an estate of a person deemed incapacitated pursuant to that statute.

Estate of Lawrence Bennett, NYLJ, 2/2/6/2003(Surr. Ct., Queens Cty.)

Motion by alleged distributes of an estate for copy of Court Examiner's file - granted.

Matter of Estate of Tilly Baron, 180 Misc.2d 766; 691 N.Y.S.2d 882 (Surr. Ct., NY Cty., 1999)

Court finds that although statute is silent as to when and how a Guardian whose ward has died must surrender responsibility for ward's assets to the fiduciary appointed for deceased ward's estate, Court directs Guardian to turn assets over as soon as such fiduciary has been appointed. However, Court permits guardian to retain a reserve pending disposition of final accounting under these circumstances. Court suggests that additional legislation is needed to facilitate orderly turnover of assets under these circumstances.

Matter of Saphier, 167 Misc.2d 130; 637 N.Y.S.2d 630 (Sup. Ct., NY Cty., 1995)(Lebedeff, J.)

Shortly after guardianship for petition was filed for AIP, a 90 year-old world famous violinist, her Stradivarius violin disappeared. AIP died shortly after special guardian was appointed to arrange for her care. After her death, the investigation of the missing Stradivarius continued because it was worth 3 million dollars and she had left her estate to many charities. Guardianship was continued under authority of Supreme Court so that special guardian could continue to protect property interests of deceased in recovering violin, as well as to place any other estate issues before proper Surrogate Court.
This Court too finds that statute is silent as to when and how a Guardian whose ward has died must surrender responsibility and for ward's assets to the fiduciary appointed for deceased ward's estate. Here, Court directs Guardian to turn assets over but permits guardian to retain a reserve pending disposition of final accounting. Court suggests that additional legislation is needed to facilitate orderly turnover of assets under these circumstances.

Matter of Rose "BB", 246 A.D.2d 820; 666 N.Y.S.2d 968 (3rd Dept., 1998), *subseq. appeal*, 262 A.D.2d 805; 692 N.Y.S.2d 237, *lv to app. denied*, 93 N.Y.2d 1039; 697 N.Y.S.2d 560 (1999)

Death of AIP rendered moot appeal of order appointing guardian.

Matter of Foley (Messina), 150 A.D.2d 884; 541 N.Y.S.2d 141 (3rd Dept., 1989)

Death of AIP rendered moot appeal of order appointing guardian.

Estate of Suvlien, NYLJ, 12/17/99, p. 32 (Surr. Ct., Kings Cty.)(Feinberg, J.)

Estate's administrator sought order pursuant to SCPA §§2103, 2105 to compel decedent's former guardian to turn over assets of estate. Although guardian filed final accounting of decedent's assets with Supreme Court, he retained them pending settlement of matter. Court granted order, acknowledging silence of both SCPA and Article 81 as to when turnover of assets should be made.

It followed very recent Manhattan Surrogate Court decision (Tilly Baron) holding that because authority of guardian terminates upon death of ward, ward's assets must be turned over to "duly appointed personal representative of such ward's estate once such fiduciary has been appointed." In this case, as in Tilly Baron, Court directs that Guardian should hold a reserve pending a final order discharging the guardian for funds that might reasonably needed to cover administration expenses or debts in the guardianship proceeding.

Vellosi v. Brady, 267 A.D.2d 695; 698 N.Y.S.2d 361 (3rd Dept., 1999)

Power of attorney and appointment as guardian were extinguished by operation of law upon father's death.

Matter of Tepperman (Bloom), NYLJ, 9/12/95, p. 30, col. 2 (Nassau Sup.)(Rossetti, J.)

After finding of incapacity and settlement but before entry of judgment, AIP died. Dispute about allegedly improper transfers of assets existed between petitioner, AIP's sister, and respondent friends of AIP. This was settled by stipulation during guardianship proceeding although no order was entered because AIP died. Court held that it could not enter order enforcing stipulation because guardianship proceeding was abated by AIP's death. However, as matter of statute (§81.16) and equity, court did have authority after AIP's death to order and fix court evaluator's and petitioner's attorneys' fees for proceeding as claims against estate.

L. Payment of Rent or hospital charges during pendency of Art. 81 proceeding - stay of evictions

Matter of Mozelle W., 2018 N.Y. App.Div, LEXIS 8227 (2nd Dept.)

Commissioner of DSS moved for the appointment of a guardian for AIP, a tenant facing eviction for non-payment, and was granted a temporary restraining order prohibiting the landlord from pursuing the eviction proceeding until 60 days after the guardian qualified. The Landlord moved for an order directing DSS to pay the AIP's rent arrears and use and occupancy during the period of the stay. The trial court denied that motion and the landlord appealed. On appeal, the Appellate Division upheld that order, holding that there was neither a statutory nor contractual obligation requiring DSS to apply public funds to pay the landlord, a private individual.

Efim Meker v. City of NY, 2008 NY Slip Op 51656U; 20 Misc. 3d 1128(A) (Sup Ct, Kings Cty.) (Miller, J.) (2008)

A landlord sued the city for rent that had accrued during the pendency of a stay of eviction issued in an Article 81 proceeding brought by DSS. The landlord argued that to deny him the rent amounted to an unconstitutional "taking" in violation of the 5th Amendment. The city moved to dismiss and the court dismissed the complaint , stating, *inter alia*: "There is a strong public interest in not evicting an incapacitated person. The purpose of MHL Article 81 is to provide guardians for

persons likely to suffer harm because they are unable to function in society ... the government has considerable latitude in regulating landlord-tenant relationships to preclude eviction in hardship cases, emergency and rent-control cases..."

3363 Sedgwick Avenue LLC, v. New York Foundation for Senior Citizens Guardian Services Inc., for Gail Feit, 12 Misc.3d 147A; 824 N.Y.S.2d 770(App. Trm., 1st Dept., 2006)

Elderly tenant's request for a brief continuance so as to allow the testimony of the case worker assigned to her under Article 81 of the Mental Hygiene Law should have been granted.The short continuance requested was not for purposes of delay and the case worker's testimony was material to the issues litigated at trial. The courts stated: "Liberality should be exercised in granting postponements or continuances of trials to obtain material evidence and to prevent miscarriages of justice..."

Matter of Seraphin M. (Eggelston), 17 A.D.3d 596; 793 N.Y.S.2d 153(2nd Dept., 2005)

DSS had petitioned under Article 81 for a guardians to be appointed for the AIP and during that proceeding, filed to stay an eviction proceeding until 90 days from the qualification of the guardian. The landlord intervened and moved to have DSS pay the rent during the period of the stay and the trial court granted the landlord's application. The Appellate Division reversed reasoning that there must be a legal obligation on the part of the municipality, either statutory or contractual, before public funds may be paid to individuals and that in this instance no statutory or contractual provision was identified requiring the DSS to pay the use and occupancy directed by the Supreme Court.

Matter of Stephen B. (Eggelston), 17 A.D.3d 584; 793 N.Y.S.2d 149(2nd Dept., 2005)

DSS had petitioned under Article 81 for a guardians to be appointed for the AIP and during that proceeding, filed to stay an eviction proceeding until 120 days from the qualification of the guardian. The landlord intervened and moved to have DSS pay the rent during the period of the stay and the trial court granted the landlord's application. The Appellate Division reversed reasoning that there must be a legal obligation on the part of the municipality, either statutory or contractual, before public funds may be paid to individuals and that in this instance no statutory or contractual provision was identified requiring the DSS to pay the use and occupancy directed by the Supreme Court.

In re: Bricker, 183 Misc.2d 149; 702 N.Y.S.2d 535 (Surr. Ct., Bronx Cty., 1999) (Surr. Holzman)

Where hospital commences proceeding in order to get IP to go to nursing home or otherwise accept discharge planing, bill shall be apportioned between AIP, or hospital or both depending on equities of situation.

M. Appeals

Matter of David J.D.(Azzi), 2016 N.Y. App.Div. LEXIS 5309 (4th Dept.. 2016)

AIP's siblings had been given notice of the Article 81 proceedings. Further, they held a financial stake in the outcome of the guardianship proceeding because a finding of incapacity might have resulted in the reversal of a transaction from which they had benefitted financially. Therefore they were both "interested parties" in the proceeding, and also were "aggrieved parties" who had standing to appeal.

Matter of Zofia, 136 AD3d 818; 26 N.Y.S. 3d 95 (2nd Dept. 2016)

Death of IP rendered moot a challenge by the IP's son to have his sister removed as guardian but the issues as to reasonableness of counsel and court evaluator fees was held not academic and, on appeal, it was found that the trial court had failed to provide, in writing, a clear and concise explanation for its award, requiring the issue to be remitted back to the trial court for a hearing as to the reasonableness of counsel and court evaluator fees.

Matter of Harold W.S., 134 AD3d 724; 22 N.Y.S. 3d 73 (2nd Dept 2015)

A non-party may be aggrieved by and have standing to appeal an order appointing an independent guardian.

Matter of Kiriakoula C., 112 AD3d; 976 N.Y. S.2d 666 (2nd Dept., 2013)

A non-party attorney appealed from an order of Supreme Court removing him as counsel to the AIP in an Article 81 proceeding. The Appellate Division dismissed his appeal holding that the order was not appealable as of right as it did not decide a motion made on notice, no application was made for permission to appeal and under the circumstances of the case, the Appellate Division declined to grant leave to appeal on its own motion.

James v. State of New York, 2013 U. S. Dist. LEXIS 64579 (EDNY)(2013) (Pohorelsky, M.J.)

Plaintiff, who had been adjudicated incapacitated in an Article 81 proceeding in State court filed a *pro se* complaint in Federal court challenging the State court proceedings, including the results of unsuccessful appeals taken through the state court system that had failed to establish her theory that the guardianship was part of a conspiracy to deprive her of certain property. She filed the matter in Federal Court *pro se* because her Article 81 guardians declined to prosecute the case on her behalf. The Federal Court held that: (1) this was in effect another appeal of the state court determinations and as such is prohibited by the Rooker-Feldman doctrine; (2) it was not obliged to appoint a *guardian ad litem* for her in Federal court since there was no substantial claim that could be brought in Federal Court which lacked subject- matter jurisdiction; and, (3) because she already had been adjudicated incapacitated and a guardian had been appointed, and there was no evidence that this

guardian was violating any duty toward her, the plaintiff may not initiate or prosecute a civil action on her own. The Court added that if she wished to challenge the actions of her guardian as violative of their duty toward her, she could still do so in the State court.

Matter of Barbara P., 8/6/2010, NYLJ, 40 (col 3.)(2nd Dept., 2010)

Appellate counsel was incorrectly assigned pursuant to Judiciary Law § 35 to represent an AIP in an appeal from an order issued under MHL Article 81. The Appellate Division later corrected itself to reflect that the appointment should have been made under MHL 81.10 and County Law 18-B.

In the Matter of V.W., 20 Misc.3d 1106(A);866 N.Y.S.2d 96 (Sup. Ct. Bronx Cty. 2008) (Hunter, J.)

The original petitioner, who was found to be unfit to serve as guardian, by motion sought a copy of the transcript and to have the court's file unsealed for the purpose of obtaining all orders contained in the court file related to the guardianship matter in order to perfect his appeal. The court held that the appeal could be made on a sealed record and since his inability to serve as guardian was a matter of law decided by the court, he had not sufficiently demonstrated why a transcript of the entire Article 81 hearing and other subsequent orders related to the guardianship would be relevant or necessary for him to file his appeal. Therefore, his requests for a copy of the transcript and to unseal the record to allow him to obtain copies of all orders contained in the file were denied.

Matter of Nelly M., 46 A.D.3d 904; 848 N.Y.S.2d 705 (2nd Dept., 2007)

Supreme Court appointed a temporary guardian without affording the attorney in fact notice and an opportunity to be heard. The attorney in fact appealed. The Appellate Division held that since the trial court subsequently made the appointment permanent after a hearing on notice to the appellant the error complained of has been rendered academic.

Matter of Carl KK., 42 A.D.3d 704; 838 N.Y.S.2d 454 (3rd Dept., 2007)

Respondent's death during the pendency of the appeal rendered the appeal moot and it was dismissed as moot without costs.

Matter of Carmen P., 32 A.D.3d 951; 820 N.Y.S.2d 809 (2nd Dept., 2006)

Subsequent to entry and appeal of an order appointing a temporary guardian, an order was entered appointing a plenary guardian. By its express terms, the order appointing a temporary guardian expired upon issuance of an order appointing a guardian; therefore, the appeal of the order appointing a temporary guardian was rendered academic.

In the Matter of Ollie D., 30 A.D.3d 599; 817 N.Y.S.2d 142 (2nd Dept., 2006)

Appellate Division found that although the trial court had made the appropriate findings of fact pursuant to Mental Hygiene Law § 81.15 concerning, inter alia, the necessity for the appointment of a guardian, it had failed to make sufficient findings on the record with respect to its determination to appoint a neutral third-party guardian. The Court reasoned that when the record on appeal permits the reviewing court to make the findings which the trial court neglected to make, it may do so and thus held that in the instant case, the record was sufficient for it to make the requisite finding that bitter dissension between the incapacitated person's family members justified the appointment of a neutral third-party guardian.

Matter of Sandra S., 13 A.D.3d 637; 786 N.Y.S.2d 349 (2nd Dept., 2004)

Appeal dismissed on grounds of mootness because order appointing guardian expired by its own terms before appeal was decided. Strangely, without determining that this case was for some reason an exception to mootness, the Appellate Division nevertheless finds that there was clear and convincing evidence supporting the finding below of incapacity.

Matter of Shirley I. Nimon, 15 A.D.3d 978; 789 N.Y.S.2d 596 (4th Dept., 2005)

Appellate Division substitutes it own judgment for trial court's determination stating that it could do so because the trial court improvidently exercised its discretion even though it had not abused its discretion.

Matter of Ronald N., 14 A.D.3d 567; 789 N.Y.S.2d 181 (2nd Dept., 2005)

Appeals was from so much of an order and judgment as stayed execution of a warrant of eviction against AIP for a period of 60 days following the appointment and qualification of as guardian. Appeal held to be moot since AIP had already vacated the premises by the time the appeal was heard and court found that this was not an exception to the mootness doctrine.

Matter of Mildred Jeraldine C., 14 A.D.3d 560; 789 N.Y.S.2d 180 (2nd Dept., 2005)

Where the trial court took evidence concerning both the need for a guardian and the proper choice of guardian, but made findings only as to the need for a guardian and neglected to make a finding as to the proper guardian, the Appellate Division, relying on the record, the made a finding as to the proper choice of guardian.

Matter of Grace R., 12 A.D.3d 764; 784 N.Y.S.2d 210 (3rd Dept., 2004)

Disabled son of AIP who lives with AIP seeks to appeal Art 81 order granting petition of guardianship over his mother and authorizing the guardian to placing her in a facility. App Div. dismisses appeal holding that he is not an " aggrieved party" just because (a) he received notice of

the application or (b) has a desire to continue living his mother. Court expressly points out that he was not the holder of a HCP, Living Will, or POA for his mother.

Matter of Mathew L., 6 A.D.3d 712; 775 N.Y.S.2d 170 (2nd Dept., 2004)

Appellant of the Art 81 Order and Judgement was the administratrix of the estate of the AIPs brother. The AIP was a litigant in the long-contested estate litigation. Appellant was not named as a party to the Art 81 proceeding but she did appear at the hearing to (1) oppose a TRO that was sought in the Art 81 proceeding that would enjoin enforcement of the judgement in the estate litigation and (2) oppose the appointment of the guardian on the merits as a mere subterfuge to avoid payment in the estate proceeding. Supreme Court found that she had a limited right to challenge the TRO but no right to challenge the appointment of the guardianship.

Court dismisses appeal finding that appellant is not aggrieved by the outcome of the Art 81 proceeding.

Matter of Abraham S., 291 A.D.2d 452; 737 N.Y.S.2d 542 (2nd Dept., 2002)

Where IP moved for termination of guardianship and IP's sons, originally the petitioners for the guardianship, did not oppose that motion, and could not appeal order terminating guardianship because they were not aggrieved parties under CPLR 5511.

Matter of Ruby Slater, NYLJ, 2/1/02, p.17, col. 3; *appeal dismissed,* 305 AD2d 690; 759 N.Y.S.2d 883 (2nd Dept.)

Court vacates power of attorney and will where AIP, who was totally dependant upon home health aides, executed these documents in favor of them and court finds that they were executed as a result of undue influence. Subsequently, App Div dismissed appeal brought by the nominated executrix because they said that the executrix is not aggrieved by the order and lacks standing to appeal.

N. Part 36 Rules

Matter of Caryl S.S. (Valerie L.S.), 47 Misc.3d 1201(A); 15 N.Y.S.3d 710(Sup. Ct. Bronx Cty., 2015)(Aarons, J.)

The court appointed an independent temporary guardian where, and the inception of the case, the cross -petitioner was in control of the AIP's liquid assets and bills and there were credible allegations of his mismanagement and undue influence. Toward that end the parties did not wish to further delay the proceedings with the appointment of a Part 36 Temporary Guardian unfamiliar with the case and all parties agreed to appoint the Court Evaluator, a CPA who was well versed in the circumstances and allegations of this complex matter. The Court therefore executed an order extending the duties of the Court Evaluator to include management of the AIP's funds during the

pendency of the proceedings and directed the cross petitioner to turn over the funds under his control.

Matter of Banks (Charlie B.H.), 108 AD3d 1055; 970 N.Y.S. 2d 141 (4th Dept., 2013)

The Appellate Division held that the Supreme Court erred in holding that the Part 36 rules precluded the guardian, the IP's cousin, from seeking counsel fees, noting that 22 NYCRR 36.1 (b) (2) (i) (A), provides that the Part 36 rules "shall not apply to . . . the appointment of, or the appointment of any persons or entities performing services for . . . a guardian who is a relative of . . . the subject of the guardianship proceeding" and, that neither of the exceptions set forth in 22 NYCRR 36.1 (b) applied.

Matter of Alice Zahnd, 27 Misc.3d 1215A; 910 N.Y.S. 2d 762 (Sup. Ct. Suff. Cty., 2010) (Luft, J.)

Court appointed a Special Guardian with powers relating to a particular piece of real property that was allegedly in violation of the town code. The court found that because the petitioner town had not requested any further powers relating to he AIP's overall needs, that the court was constrained in detailing all the powers appropriate for the AIP. The court therefore, appointed the Special Guardian not only to deal with the property at issue but also to investigate and identify any additional needs and to make the appropriate application to the court for such powers. The court also determined that pursuant to 22 NYCRR 36.2 (c)(8), the Special Guardian, who was himself an attorney, could serve as his own attorney for the purpose of making additional applications in this proceeding because there was a compelling need to avoid the additional expenses and complications that would arise if the special guardian was required to nominate counsel for appointment for each subsequent application.

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

The court appointed the individual who had served as Court Evaluator to serve as a monitor under a MHL 81.16(e) protective arrangement providing an explanation of extraordinary circumstances as to why it was doing so, as per the Part 36 rules. See, Article: NYLJ, 1/25/10 - Trusts and Estates "John D.: Appointing Monitor Not in Keeping With Legislative Intent of Article 81" -- arguing that this decision is: "not in keeping with the legislative intent of Article 81 of the Mental Hygiene Law, and is the first step onto the slippery slope of invasion of the personal property rights of an Alleged Incapacitated Person wrought solely in an attempt to assist in the enforcement of a distributive award granted to an ex-spouse."

Judicial Ethic Opinion 07-126, NYLJ, July 25, 2008 p. 6, col. 4

A judge and the judge's staff may join a bar association's elder law committee, and the judge may appoint otherwise eligible attorneys who also are members of the committee to fiduciary and counsel positions in the judge's court in accordance with the Rules Governing Judicial Conduct and the Chief Judge's Rules Governing Appointments by the Court. Rules: 22 NYCRR 36.0; 100.3(E)(1); 100.3(C)(3); 100.4(A)(1),(3); 100.4(C)(3); Opinions: 06-121; 04- 78; 91-18 (Vol. VII); 88-100 (Vol.

II).

<u>Matter of V. W.</u>, 15 Misc.3d 1126A;841 N.Y.S.2d 222 (Sup. Ct., Bronx Cty., 2007) (Hunter, J.)

As a matter of law, pursuant to 22 NYCRR 36.2(C)(7) an individual who has been convicted of a felony and is serving parole, may not be appointed as a guardian under MHL Art 81 because, although he does possess a certificate of relief from disability as required by 22 NYCRR 36.(2) (7), that certificate is temporary and contingent upon his compliance with the conditions of parole.

<u>Matter of S.M</u>, 13 Misc.3d 582; 823 N.Y.S.2d 843 (Sup. Ct., Bronx Cty., 2006)(Hunter, J.)

Petitioner, the AIP's son sought to be appointed guardian. The petition failed to mention that he was a convicted felon. Although the Court Evaluator, who did address the conviction in her report, told the petitioner and his counsel that weeks before the hearing that Part 36 (22 NYCRR 36.2(c)) prohibited his appointment and that petitioner was not bondable, petitioner's counsel continued to advocate for his appointment. The Court, stated that *it was counsel's obligation to disclose the proposed guardian's felony conviction in the petition and during her examination of him on the stand* . The Court proposes several amendments to Part 36 to insure that those seeking appointment as guardians have not been convicted of a crime or abuse or neglect. Ultimately, the court appoints an independent guardian.

<u>Matter of GLM (Gloria Loise Meyers)</u>, NYLJ, 5/6/03, p19, col 2 (Sup. Ct., Kings Cty.,)(Leventhal, J.)

Court finds extenuating circumstances under **22 NYCRR 36.29(c)(10)** to appoint the court evaluator in a proceeding as the guardian for a 14 year old girl where there as $3.5 million involved, where the parents were financially unsophisticated and also divorced acrimoniously, where they both had a good relationship with the court evaluator and where the court evaluator was an experience elder law attorney whose office was near the home of both parents and the child. Of note is that the court did not identify why he could not find someone other than the court evaluator to appoint under the circumstances.

<u>Matter of Kurzman (Bilby)</u>, 2003 N.Y. Misc. LEXIS 567; 2003 N.Y.Slip Op 50871(U) (Sup. Ct., Kings Co., 2003)

Court finds compelling reason under **22 NYCRR 36.2 (c)(8)** to permit a guardian to being appointed counsel. Here, the court, upon motion by the guardian, authorized the guardian, who is also an attorney to act as counsel to the IP to perform a real estate closing that had been ordered by the court. The court reasons that the purpose of the Part 36 rules is to ensure that appointments are made on the basis of merit and without favoritism, nepotism, politics or other factors unrelated to the qualification of the appointment or the requirements of the case. The court finds that the legal work here is necessary, that the guardian is competent to perform a closing, and that the appointment of another attorney to represent the IP at the closing would waste the IP's financial resources because

the new attorney would have to review the work already done by the guardian to get up to speed. The court adds that the bill for legal services or guardian compensation under §36.4(b)(4)will be reviewed by the Court and its approval required before payment. The court ultimately concluded that the avoidance of wasting an IP's assets constitutes a compelling reason sufficient to allow the guardian to perform the closing of his ward's real property.

O. Secondary Appointments

(i) Counsel

Matter of Mario Biaggi, Jr., 33 Misc. 3d 1221A; 943 N.Y.S.2d 790 (Sup. Ct, Bronx Cty., 2011) (Hunter, J.)

The guardian, IP's stepson, was himself a lawyer. Without prior approval of the court, based on the authority he was given in the order of appointment to retain counsel, he hired an attorney with expertise in estate planning to draft a Will for the IP's multimillion dollar estate. In the face of an objection that the attorney's fee should be denied because the guardian should have sought prior court approval under Part 36 rules before hiring the attorney, the court held that Part 36 rules did not apply to this nominated guardian, however, he was required to have the court approve the amount of the fee. Since the Guardian had already realized his error in failing to have the fee pre-approved he had already submitted a nunc pro tunc request for the court to approve the fee which the court had already acted upon.

Matter of Lainez, 11 Misc.3d 1092A; 819 N.Y.S.2d 851 (Sup. Ct. Kings Cty., 2006) (Johnson, J.)

Counsel in a medical malpractice case applied to become co-GAL along with the incapacitated persons' husband. She agreed to serve without a fee. The court found that although she facially came under the exception to the strictures of Part 36 as a GAL serving without compensation [§36.1(b)(3)] she was seeking her sliding scale medical malpractice fee in the underlying action and that such fee was "compensation" under Part 36.2(d)(3), the standard of approval for compensation for both counsel and GAL being the fair value of the services rendered. [§ 36.4(b)(4)]. The court found no meaningful distinction between serving as an uncompensated GAL while at the same time seeking fees as attorney and held that an attorney seeking to serve as an uncompensated [GAL] and also recover a fee, whether denominated as legal fees or otherwise, must be appointed as provided in Part 36 of the Rules of the Chief Judge, notwithstanding the characterization of the compensation. Since this counsel for the med mal case was not on the Part 36 roster, she could not be appointed as the GAL.

Matter of Esta Ress, 8 A.D.3d 114; 778 N.Y.S.2d 489 (1st Dept., 2004)

22 NYCRR 36.2 (c)(8) prohibits a guardian from being appointed counsel to the IP, unless there is a compelling reason to do so. Here, the court held it permissible to authorize additional fees for

successful legal work done by the guardian, reasoning that there was a compelling reason to do so because the guardian was unable to find any other attorney who would take the matter on contingency due to a perceived unlikelihood of success.

Matter of Kurzman (Bilby), 2003 N.Y. Misc. LEXIS 567; 2003 N.Y.Slip Op 50871(U) (Sup. Ct., Kings Co.)

22 NYCRR 36.2 (c)(8) prohibits a guardian from being appointed **counsel** to the IP, unless there is a compelling reason to do so. Here, the court, upon motion by the guardian, authorized the guardian, who is also an attorney to act as counsel to the IP to perform a real estate closing that had been ordered by the court. The court reasons that the purpose of the Part 36 rules is to ensure that appointments are made on the basis of merit and without favoritism, nepotism, politics or other factors unrelated to the qualification of the appointment or the requirements of the case. The court finds that the legal work here is necessary, that the guardian is competent to perform a closing, and that the appointment of another attorney to represent the IP at the closing would waste the IP's financial resources because the new attorney would have to review the work already done by the guardian to get up to speed. The court adds that the bill for legal services or guardian compensation under §36.4(b)(4) will be reviewed by the Court and its approval required before payment. The court ultimately concluded that the avoidance of wasting an IP's assets constitutes a compelling reason sufficient to allow the guardian to perform the closing of his ward's real property.

P. Filing fees

Matter of Ficalora, 1 Misc.3d 602; 771 N.Y.S.2d 300 (Sup. Ct., Queens County, 2003) (Taylor, J.)

There is no exception to the CPLR §8020(a) $45 motion fee for the parties in an Article 81 proceeding, except for the court examiner who is an arm of the court. N.B. Therefore, when MHLS files a motion in an Article 81 proceeding as counsel decision, court evaluators must also pay the fee when filing motions, but, since a court evaluator is not a party, it is not likely that the C/E will be filing any motions.

Q. Parties / Non -parties

(i) Court Evaluator

Matter of Bednarek v. Ingersoll, 2019 N.Y. Misc. LEXIS 411 (Sup. Ct., Chemung Cty.) (Guy, J.)

Petition seeking an accounting was filed by the IP's daughter against the IP's other daughter who was the IP's agent under a Power of Attorney. The petition further sought to have the Power of Attorney revoked and a determination as to the propriety of certain transactions undertaken by the

agent-daughter. The agent-daughter argued that the Article 81 court lacked jurisdiction over her because she was merely "a person entitled to notice" and not a "party" in that proceeding. The Court held that the agent-daughter's formal appearance by counsel and active participation in the guardianship proceeding rendered her subject to the Court's jurisdiction in the Article 81 proceeding, despite her not having been named as either a petitioner or respondent in that proceeding.

Matter of Astor, 13 Misc.3d 862; 827 N.Y.S.2d 530 (Sup. Ct., NY Cty. 2006)

Where adult son who was sole presumptive distributee of the AIP and the holder of the POA and HCP received notice pursuant to MHL 81.07(g) and was directly affected by the TRO issued by the court, the court found that he was entitled to make a cross-motion over the objection of the petitioner and respondent that he lacked standing because he was not a party. This Court rejected Matter of Allen, 10 Misc3d 1072A as distinguishable because in Allen, the intervenor sought to file an answer after the hearing had already been held.

Matter of D.G., 4 Misc.3d 1025(A);798 N.Y.S.2d 343 (Sup Ct, Kings Cty., 2004) (Leventhal, J.)

The Court Evaluator is not an adversarial part. Even if the individual appointed is an attorney he/she he does not serve as an attorney. The Court Evaluator works as an arm of the court and the assessment made is of an independent nature. Therefore, the court denied petitioner's motion to strike the Court Evaluator's report and for the Court Evaluator to recuse herself for meeting with the petitioner without her counsel present.

55th Management Corp v. Goldman, NYLJ April 15, 2003 (Sup. Ct., NY Cty.) (Lebedeff, J.)

Out of court statements made to a court evaluator in an 81 proceeding are protected by the privileges afforded participants in judicial proceedings, therefore, a libel action against the informant did not lie. The court reasons that the court evaluator plays a vital fact finding role in the article 81process and his/her function cannot be hampered by the threat that anyone who talks to the C/E will be the subject of a libel suit.

Matter of Lula XX, 88 N.Y.2d 842; 644 N.Y.S.2d 683 (1996); 667 N.E.2d 333(1996)

The Court Evaluator is not a party to an Article 81 proceeding.

Matter of Lee "I" (Murphy), 265 A.D.2d 750; 697 N.Y.S.2d 385 (3rd Dept., 1999)

It is not role of court evaluator to be advocate for AIP but rather to be neutral advisor to court.

(ii) Individuals entitled to notice under MHL 81.07(e)

Matter of Allen, 10 Misc .3d 1072A; 814 N.Y.S.2d 564 (Sup. Ct., Tompkins Cty., 2005) (Peckham, J.)
Brother who was entitled to and did receive notice of the proceeding was not therefore a party. He would not be considered a party unless he filed a cross petition seeking relief that was not requested in the petition. Therefore, he could not be granted an adjournment nor could he submit an answer. While he could not participates party in the hearing on the central issue of the need for guardianship, he was considered a party to that part of the Order to Show that issued a TRO against him.

R. Accounting Proceedings

In the Matter of Carl R., 93 A.D.3d 728; 939 N.Y.S.2d 879(2nd Dept 2012)

The Appellate Division held that a Referee had authority in this accounting proceeding to make a determination because the order of reference designating him to hear and determine all issues regarding the settlement of his final account was made upon consent of the parties. Thus, since the matter was referred to the Referee to hear and determine, an order confirm the Referee's report, was unnecessary.

In re Salvati, 90AD3d 406; 934 NYS 2d 22 (1st Dept. 2011)

The Appellate Division, 1st Department, unanimously reversed and remanded an order of Supreme Court, New York County that held that a non -party executor from whom MHL 81.34 approval was sought to close the guardianship was collaterally estoppel from objecting to the final accounting to the extent that it was based on accountings from 4 years that had already been approved by the court. The trial court had allowed discovery only as to the two years that were still open and not yet approved by the court because the guardian had not made out the defense of collateral estoppel. In this regard the court reasoned that the executor had not been party to the prior proceedings, and the guardian had not applied for interim accountings upon notice pursuant to MHL 81.33 and thus the annual accountings were merely ex parte proceedings that could not bind the executor.

Matter of George P., 83 A.D.3d 1079;921 N.Y.S.2d 531; 2011 N.Y. App. Div. LEXIS 3537 (2nd Dept, 2011)

Noting that, in an accounting proceeding, the objectant has the initial burden of producing evidence that the amounts set forth are inaccurate or incomplete, and that if the objections "raised disputed issues of fact as to the necessity of disbursements, reasonableness of fees, or management of assets," a hearing should be held, the Appellate Division held that the Supreme Court had properly denied, without a hearing, the appellant's objections to FSSY's final accounting insofar as she had failed to raise any disputed issues of fact.

Matter of Harry Y., 62 A.D.3d 892; 2009 NY App Div LEXIS 3906 (2nd Dept 2009)

The Appellate Division held that the trial court had erred in dismissing an interested party's objections to the guardian's final accounting and settling the account where the objection raised a question of fact concerning the guardian's possible mismanagement of the IP's portfolio due to a steep reduction of its value as compared to the inventory value. The Appellate Division remitted the matter for a hearing on this issue.

Matter of Swingearn (Nassau County Department of Social Services), 873 N.Y.S.2d 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, as pursuant to SSL 104.

In the Matter of Campione, 58 A.D.3d 1032; 872 N.Y.S. 2d 210 (3rd Dept. 2009)

The appellate court affirmed the orders of the trial court directing the former guardian to turn over certain assets to the administrator of the deceased IP' estate, denying her a commission and surcharging her for the cost of the accounting proceeding. The IP's heirs challenged the accounting and met their burden of going forward by submitting the final accounting of a successor guardian which detailed in excess of $700,000 in assets not contained in the former guardian's final accounting, which assets the former guardian admitted depositing into accounts in her own name.

Matter of Mary XX, 52 A.D.3d 983; 860 N.Y.S. 2d 656 (3rd Dept. 2008)

The Appellate Division had previously held that a guardian-of-the-person of this IP who had no powers over the property, was nevertheless entitled to an accounting by the trustee bank of a intervivos trust for the benefit of the IP because as guardian of the person she needed the information to determine how to best provide for the IP. The trustee bank prepared and filed the accounting and commenced this proceeding to judicially settle it. The trial court appointed a GAL protect the IP's financial interest in the accounting and the GAL filed objections to the accounting. The guardian of the person also filed objections. The trial court held that she was without standing to do so as she did not have any powers over the property and that the filing of objections went beyond the scope of the rationale set forth in the prior appeal for providing her with the information she needed to carry out her role as guardian of the person. On appeal by the guardian of the person, the Appellate Division affirmed . **See related case at : Matter of Mary XX, 33 A.D.3d 1066; 822 N.Y.S.2d 659**

(3rd Dept. 2006)

Matter of Sally A. M., 19 Misc.3d 1124A; 2008 NY Slip OP 50843U (Sup.Ct., Rensselear Cty, 2008)(Lynch, J.)

Upon allegations that an AIP's sister who was her attorney - in - fact was misusing the AIP's funds for her own benefit, the Court appointed a Temporary Guardian to marshal and protect the assets and directed a compulsory accounting by the attorney- in - fact . The court determined that it had jurisdiction to compel the accounting because : (1) a fiduciary relationship existed; (2) There were funds entrusted to the fiduciary ; (3) there was no other remedy; and (4) there had been a demand for and refusal of an accounting.

Matter of the Application of Rosen, 16 Misc.3d 1108A; 2007 N.Y. Misc.. LEXIS 4833 (Sup. Ct., Otesego Cty., 2007)

Counsel appointed for an IP in a contested accounting proceeding which had occasioned by allegations that the guardian first appointed had been self-dealing, did not approve of the proposed terms of settlement of the accounting. However, the guardian appointed subsequent to the removal of the first guardian did approve of the terms of the settlement. The court held that it was the approval of the current guardian that controlled because it is not counsel but the client who approves of a settlement and, this client being incapacitated has a guardian who by statute (MHL 81.21(a)(20), and by the language of the order granting her powers, has the power to defend and maintain a judicial action to its conclusion.

Matter of Allen, 16 Misc.3d 1104A; 2007 NY Misc. LEXIS 4573; 237 N.Y.L.J. 116 (Sup. Ct., Kings Cty, 2007) (Tomei , J.)

Following a hearing on a contested accounting proceeding upon a final accounting filed by a temporary guardian, the court addressed item by item various improper acts and expenditures made by the temporary guardian and directed that the temporary guardian return certain amounts to the guardianship estate. The discussion includes, but is not limited to: checks written on and deposits made into the guardianship account by the temporary guardian after she had been relieved of her duties; checks written on the guardianship account by the temporary guardian after the IP's death; checks written by the Temporary Guardian to reimburse herself, without prior court approval, for substantial fees under an undisclosed retainer agreement which were also billed as hourly expenses, settlement of an action on behalf of the IP made without prior approval and possibly for an insufficient sum, gifts made without authorization, assets of the IP accessed far beyond the limits authorized in the order directing the temporary appointment which did not require the filing of a bond and more.

Matter of Buxton, 1 Misc.3d 903A; 781 N.Y.S.2d 628 (Surr. Ct., Westchester Cty. 2003)(Surr. Scarpino)

Surrogate ordered a "defacto fiduciary" to account for how she managed an individual's financial affairs prior to the appointment of an Art 81 guardian, holding that a person may be deemed to be a fiduciary, even though he or she never qualified to act in a fiduciary capacity, if that person undertook duties and responsibilities ordinarily assumed by a fiduciary.

S. Contempt

Matter of Gerken, NYLJ, 9/06/19, at p. 21, col. 12 (Sup. Ct., Bronx Cty.), (Johnson, J)

Proceeding was brought by a nursing home to address the outstanding residential debt of the AIP. The Court Evaluator advised the court that the AIP had the capacity to enter a new power of attorney (a prior one designating her brother as attorney in fact could not be located). After the AIP executed a new POA, however, the nursing home refused to withdraw the petition. Although the court did not find that the nursing home's commencement of the proceeding was inappropriate or ill-advised insofar as the nursing home was entitled to be paid for the services it provided, the court held that the nursing home's refusal to withdraw the petition after the AIP had executed the new POA constituted frivolous conduct. Consequently, the court held the nursing home responsible for the fees generated by the AIP's counsel subsequent to the execution of the POA.

Matter of James H., N.Y. App. Div. LEXIS 166 (3rd Dept. 2019)

During the pendency of a protracted probate proceeding relating to the estate of the AIP's mother, the AIP sought to have his trustee of several trusts, including an SNT, removed and replaced with an Art 81 guardian. In so doing, the AIP asserted that had been unable to meet his basic financial needs under the existing arrangement. The Supreme Court appointed a Guardian and ordered the Guardian to pay the Court Evaluator's fee. The Guardian reported to the Court that he was unable to pay the fee as the funds in the guardianship estate were insufficient. The Supreme Court issued an ex parte order directing the Trustee to pay the Court Evaluator's fee from the SNT and, when the Trustee did not pay, held him in contempt and ordered sanctions against him. On appeal by the Trustee, the App. Div. held that he could not be either held in contempt or subjected to sanctions for failing to pay the Court Evaluator's fees because the SNT was unexecuted and unfunded and, under such circumstances, the legal standards for contempt and sanctions were not satisfied.

Matter of S.B. (E.K.), 60 Misc.3d 735 (Sup. Ct., Chemung Cty.)(2018)(Guy, AJSC)

The petitioner primarily sought court ordered visitation with her mother, the AIP, under MHL 81.16(c)(4)-(6) ("the Peter Falk amendment"), and secondarily sought the appointment of a guardian of her mother's person/property. The petitioner urged that even if no guardian were appointed, the Peter Falk amendment gives the court the authority to direct visitation. The Court held that the

Legislature's placement of this amendment in MHL 81.16(c), entitled "Appointing a guardian," rather than in MHL 81.16(b), which provides for protective arrangements and single transactions, indicates that it was intended to apply only in the event that a guardian is appointed. The court further looked to references in the legislative history of the amendment concerning an AIP's right to determine one's own visitation and found no language suggesting that a court can order visitation where the petitioner has not sustained her burden of establishing the need for a guardian. The court, noting that it was constrained to examine visitation from the AIP's perspective rather than that of the petitioner, stated that even in a guardianship based on the AIP's consent, the AIP would ultimately remain in control of whom she visits, as fulfillment of her wishes and desires is required in applying the least restrictive alternative standard.

*Note - the Supreme Court's order, which granted the AIP's motion to dismiss the petition, was later reversed in Matter of Elizabeth T.T. (Suzanne Y.Y. - Elizabeth Z.Z.), 177 AD3d 20 (3rd Dept., 2019), based upon the Appellate Division's finding that an issue of fact existed regarding whether the arrangements that had been put in place to protect the AIP's personal and property needs were the product of undue influence.

Matter of Maria F, 35 Misc. 3d 1240A; 2012 N.Y.Misc. LEXIS 2770 (Sup. Ct. Bronx Cty. 2012) (Hunter, J)

The trial court denied a petition for guardianship and directed the petitioner to, *inter alia*, pay the Court Evaluator's fee. After several months of the Court Evaluator attempting to collect her fee, she moved before the court that had presided over the guardianship proceeding for an order compelling petitioner to pay or in the alternative for the court to enter judgement against the petitioner. Petitioner's counsel argued that he had filed for an extension of time to appeal the order that directed payment of those fees and the Court Evaluator demonstrated that the motion to extend was filed only after the instant proceeding to collect her fees. The trial court directed payment of the Court Evaluator's fee within 20 days and ordered that if the fee was not paid, petitioner would be held in contemp of court.

Matter of Chiaro, 28 Misc.3d 690; 903 N.Y.S.2d 673 (Sup. Ct, Suffolk Cty.)(Leis, J.)

One of the IP's sons, Dennis Chiaro, moved for a contempt order against his brother David Chiaro. The court noted the rights of each of the four sons, as remaindermen of the Chiaro Family Revocable Trust, was a matter the parties focused on in reaching a compromise in this contested Article 81 proceeding. The parties had stipulated in open court that the trust would be amended to include all four brothers as equal 25 percent beneficiaries. The court noted that after a review of the record of prior proceedings it was clear that David, as property management guardian for his mother, the IP, was required to amend the trust, and his failure to comply with the clear mandate resulted in Dennis's motion to hold David in contempt. Despite David's inaction, however, the court concluded that same was insufficient to support a finding of civil contempt because, David never effectively had the power to amend the trust. The court explained that pursuant to the language of the trust instrument, the IP lost the power to amend the trust once she because incapacitated, and the appointment of a

guardian did not restore this power to her. As the IP had no power to amend the trust, a guardian, who can only assume powers actually held by the IP, could hold no derivative power. Thus, since David's willful disregard of the court's mandate did not defeat, impair, impede or prejudice Dennis' rights, the court denied Dennis' motion. Nevertheless, the court ruled that the stipulation was to be construed to reflect that the trust assets would be divided equally among the four sons without the need for amendment.

Matter of Peer (Digney), 50 A.D.3d 1511; 856 N.Y. S. 385 (4th Dept. 2008)

A guardian raised issues concerning the propriety of certain monetary transfers made by the IP's son from her assets and was directed by the court to hire forensic accountants to conduct an audit of the financial records. The son initially failed to produce the financial records required but eventually did so. The trial court, nevertheless, after the records were produced, held him in civil contempt and ordered that he be committed to a correctional facility for a term of 90 days as punishment. On appeal, the Appellate Division reversed the finding of contempt and the commitment holding that a civil contempt is proper only where the rights of an individual have been harmed by the contemptor's failure to obey a court order and that any penalty imposed is designed not to punish but rather to compensate the injured party or to coerce compliance with the court mandate or both. The court found that since the son had turned over the records prior to the issuance of the contempt order, there was no reason to incarcerate nor was any injury sustained that required vindication.

Matter of Kaminester, 17 Misc.3d 1117(A) (Sup. Ct. NY Cty 2007), *aff'd and* modified, Kamimester v . Foldes, 51 A.D.3d 528; 859 N.Y.S.2d 412(1st Dept., 2008), *lv dismissed and denied* 11 N.Y.3d 781 (2008) ; *subsequent related case*, Estate of Kaminster, 10/23/09, N.Y.L.J. 36 (col.1)(Surr. Ct., NY Cty)(Surr. Glen)

After the death of the IP it was discovered by the Executrix of his estate that his live in girlfriend had secretly married him in Texas and transferred his property to her name in violation of a temporary restraining order that had been put into effect during the pendency of the Art 81 proceeding. These acts in violation of the temporary restraining order took place before the trial court had determined, following a hearing, whether the AIP required the appointment of a guardian. Upon the petition of the Executrix to the Court that had presided over the guardianship proceeding, the court "voided and revoked" the marriage and transactions and held the AIP's purported wife in civil and criminal contempt of court and ordered her to pay substantial fines. On appeal by the purported wife, the Appellate Division held that under the circumstances and upon the proof, the marriage had been properly annulled. In the subsequent case, arising in Surrogate's Court during the probate of the IP's Last Will, the Executrix sought a determination of the validity of the spousal right of election exercised by the purported spouse, arguing that her marriage to decedent had taken place 2 1/2 months after a Texas court had appointed a Temporary guardian, during the pendency of the NY Article 81 proceeding and 2 ½ months before the IP died. Moreover, in the earlier reported decision of Supreme Court, the court had found that there was a need for a guardian based on the IP's cognitive deficits and had posthumously declared the marriage revoked and voided due to his incapacity to marry. The purported wife argued that her property rights and marriage could

not be defeated by the posthumous annulment because under DRL Sec. 7(2) a marriage involving a person incapable of consenting to it is "voidable," becoming null and void only as of the date of the annulment in contrast to MHL 81.29(d) permitting the Article 81 court to revoke a marriage "void ab initio," a distinction critical to the purported wife's property right. The Surrogate ultimately held, based upon both statutory and equitable theories, that the marriage had been "void ab initio," thus extinguishing the purported wife's property rights, including her spousal right of election.

Matter of Heckl, 44 A.D.3d 110; 840 N.Y.S.2d 516 (4th Dept., 2007)

The Court held that an AIP who refused to be interviewed by the Court Evaluator although specifically ordered to do so by the court could not be held in contempt for her refusal to speak because there was no disobedience of a lawful and unequivocal mandate of the court by a party to the proceeding as required by Judicairy § 753 [A] [3]. The court held that although the AIP was the subject of the proceeding, she was not a respondent and therefore is not a party to the proceeding.* Thus, the provisions of Judiciary Law § 753 (A) (3) permitting the court to punish a party for the disobedience of a lawful mandate did not apply to the AIP and that in any event, even assuming that the AIP was a party to the proceeding, the lawful mandate of the court ordering that the Court Evaluator meet with the AIP immediately was directed at the Court Evaluator, not the AIP. Furthermore, "[c]ivil contempt has as its aim the vindication of a private party to litigation and any sanction imposed upon the contemptor is designed to compensate the injured private party for the loss of or interference with the benefits of the mandate" and the Court Evaluator, is not a party to the proceeding.

* This seems to be an unusual construction of the statute since an AIP is a party for the purpose of taking an appeal.

T. Annual Reports/Court Examiners

Matter of Sherneika B., _AD3d_, 2019 NY Slip Op 03042 (2nd Dept., 2019)

The Appellate Division reversed an order which had granted the Court Examiner's informal application seeking the appointment of a forensic accountant to prepare the annual reports for the trust, reasoning that the order authorizing the appointment, made without any formal notice to the trustee/guardian and decided without the benefit of a court conference or hearing, deprived the trustee/guardian of an opportunity to be heard in relation thereto. In any event, the need for the services of a forensic accountant was not supported by the record.

Matter of Albert K. (D'Angelo), 96 AD3d 750: 946 N.Y.S. 2d 186 4262 (2nd Dept., 2012)

The Appellate Division affirmed the trial court's decision to: (a) impose a surcharge against the guardian, (b) deny the guardian's commission and attorney fees, and (c) direct the Guardian to personally pay the Court Examiner's fee at an amount in excess if the statutory guidelines set forth in 22 NYCRR 806.17(c) but reversed the trial's court decision to deny the Public Administrator's

application for the guardian to also pay 9% interest on the sums surcharged. The "covert self dealing" engaged in by this guardian included: the guardian appointing and paying his own wife to serve as the geriatric care manager, that care manager continuing to provide and manage home health aides while the IP was in a nursing home without prior court approval, preparing a Will for the IP naming himself as executor, which will was witnessed by his own wife and mother, and bequeathing the IPs entire $3 million estate to a trust for which he would serve as trustee. The court also held that the Court Examiner's fees in excess of the statutory guideline schedule was justified by the "extraordinary circumstance" of the covert nature of the guardians's self dealing.

United States Fire Insurance Company, etc. v. Camille A. Raia, et al, 95 A.D.3d 420; 942 N.Y.S.2d 542 (2nd Dept., 2012)

In an action by the bonding company against the Court Examiner for legal malpractice and breach of fiduciary duty for failing to discover a guardians's misappropriation of the IP's funds, the Appellate Division Second Department affirmed the trial court's dismissal of the Complaint on two grounds: (1) a cause of action for legal malpractice does not lie against a Court Examiner because there is no attorney-client relationship between either the Court Examiner and the IP or the Court Examiner and the bonding company and an attorney cannot be liable to third parties for harm caused by professional negligence and (2) a cause of action for breach of fiduciary duty also does not lie because there is no fiduciary relationship between the between either the Court Examiner and the IP or the Court Examiner and the bonding company.

In re Salvati, 90 AD3d 406; 934 N.Y.S. 2d 22 (1st Dept., 2011)

The Appellate Division, 1st Department, unanimously reversed and remanded an order of Supreme Court, New York County that held that a non -party executor from whom MHL 81.34 approval was sought to close the guardianship was collaterally estoppel from objecting to the final accounting to the extent that it was based on accountings from 4 years that had already been approved by the court. The trial court had allowed discovery only as to the two years that were still open and not yet approved by the court because the guardian had not made out the defense of collateral estoppel. In this regard the court reasoned that the executor had not been party to the prior proceedings, and the guardian had not applied for interim accountings upon notice pursuant to MHL 81.33 and thus the annual accountings were merely ex parte proceedings that could not bind the executor.

Matter of Steven Siegel, 5/30/08, Index #18311/06 (Sup. Ct., Suff. Cty.)(Sgroi, J.) (unpublished)

Where the Article 81 petition sought only the protective arrangement/single transaction of the establishment of an SNT funded by a lump sum retroactive social security payment, under MHL 81.16 (b) no Court Examiner was appointed. However, the trustee's annual accounts could were to be examined "in a manner similar to that required by MHL 81.32 by one of the individuals qualified to serve as a Court Examiner pursuant to CPLR 4212 in the capacity of a referee.

Matter of Carl K.D., 45 A.D.3d 1441; 846 N.Y.S.2d 846(4th Dept., 2007)

Supreme Court appointed a conservator in 1988 prior to the enactment of Art. 81. Subsequently, in 2000, the Surrogate's Court appointed the same individual as guardian of the person and property of the IP. For the next 4 years the guardian submitted accountings only to the Surrogate Court and said accountings were not in compliance with the requirements of MHL 81.33(b). In 2007, the petitioner in the Art 81 proceeding moved in Supreme Court to compel the guardian to file annual reports in Supreme that were in compliance with MHL Art 81.33 (b) and to collect his fees. The guardian cross-moved in Supreme Court to vacate the original 1998 order appointing her as conservator nunc pro tunc to 2000 when the Surrogate's Court appointed her as guardian. Supreme Court granted that cross- motion without a hearing as required by MHL 81.36 (c) and did not direct the guardian to file annual reports that met the requirements of MHL 81.33(b). The Appellate Division reversed and remitted to Supreme Court to determine the motion and cross- motion in compliance with Art 81.

U. Order to Gain Access

Matter of Eugenia M., 20 Misc.3d 1110A; 867 N.Y.S.2d 373 (Sup.Ct. Kings Cty., 2008) (Barros, J.)

Application for an Order to Gain Access pursuant to SSL §473 - c.1 permitting APS to enter AIP's residence with a locksmith was denied where: (a) the petition did not allege danger or risk to the AIP sufficient to warrant the access order; (b) the alleged need to enter the apartment was motivated by petitioner's desire to obtain additional evidence to use against the AIP to meet its burden of proving the need for a guardian; (c) the AIP in fact did open her door to speak to APS through the door and also did leave her apartment each day to go shopping thus APS already had access to the AIP's person; and, (d) APS had already evaluated the AIP and determined that she was in need of protective services. The court clearly held: "***to use an Order to Gain Access to collect evidence in an MHL Article 81 proceeding is impermissible. The sole permitted use of an Order to Gain Access is for assessing an individual's need for adult protective services***." (emphasis added.)

V. Commission and Bond

Matter of Karen T., 91755/10, NYLJ 1202500683817, at *1 (Sup, Ct. Bx, Cty. Decided June 14, 2011)

A guardian moved for an order reducing the amount of the bond required for one year from the date of the entry of such order. The guardian had applied to obtain a bond in the amount initially required however, the surety company was unable to issue a bond in that amount because the current value of the guardianship assets was less than the required amount. The assets were a structured settlement, paid in increasing monthly sums, the full amount of which was not fully realized in the

first year. Accordingly, the guardian sought to have the bond reduced to reflect the actual amount of the current guardianship assets. Citing MHL §81.25(a) the court reduced the amount required but ordered that upon expiration of the one year period, the guardian shall once again make application to the court after a recommendation by the court examiner and submission of a copy of the annual accounting, as to whether or not the bond should remain the same or be increased.

Matter of C.C., 27 Misc.3d 1215(A); 2010 N.Y. Misc. LEXIS 917 (Sup. Ct. Bronx Cty. 2010)(Hunter, J)

A guardian was appointed but failed to file for a Commission or file a bond as required by the order appointing her. After spending the IPs money to pay the IPS bills, including legal fees for petitioner's counsel, the purported guardian then applied to resettle the order to, among other things, reduce the amount of the bond required since there was now less money in the account than when the order was originally signed. The court declined to resettle the order to reflect the lower bank balance since, at the time of its order, the full amount was in the account and the guardian had expended it without proper authority.

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