

**EXAMINERS OF REPORTS OF GUARDIANS,
COMMITTEES AND CONSERVATORS**

2005 EDUCATIONAL SEMINAR

Sponsored by

**NEW YORK STATE SUPREME COURT
APPELLATE DIVISION, THIRD DEPARTMENT**

**HON. ANTHONY V. CARDONA
PRESIDING JUSTICE**

MENTAL HYGIENE LAW ARTICLE 81

2004 AMENDMENTS

**Marita L. McMahon, Esq.
Deputy Director
Guardian & Fiduciary Services
Office of Court Administration**

Mental Hygiene Law Article 81 2004 Amendments

Mental Hygiene Law Article 81 has been amended by Chapter 438 of the Laws of 2004 (approved September 14, 2004; effective December 13, 2004). The amendment enacts what might be considered substantive changes in the law, while also introducing some procedural changes and making a few technical corrections. What follows is a review of these changes and corrections with brief comments on their overall impact on Mental Hygiene Law Article 81 and guardianship practice.

§ 81.03. Definitions

Subdivision (e), which defines “available resources,” i.e. resources that provide for personal needs or property management as alternatives to the appointment of a guardian, *see* MHL § 81.02 (a)(2), adds “health care proxies,” *see* Public Health Law Article 29-C, as one among many *possible* available resources on a list not intended to be exhaustive.

Comment: The language of subdivision (e) has always defined available resources by offering specific examples. Although health care proxies were not included previously, these instruments, along with powers-of-attorney, *see* General Obligations Law §§ 5-1501, 5-1505 and 5-1506, have always been considered the most common alternative resources. This amendment, therefore, ratifies the already prevailing practice of including health care proxies among the checklist of alternative resources considered when alleging the absence of alternative resources in pleading the need for a guardian, *see* MHL § 81.02 (a)(2).

Subdivision (j) is new; it adds “life sustaining treatment” to the definitions section of the statute, defining it as “medical treatment which is sustaining life functions and without which, according to reasonable medical judgment, the patient will die within a relatively short time period.”

Comment: The definition of life sustaining treatment is copied from MHL § 81.29 (e) and repeated in MHL § 81.03 (j). Contrary to the recommendation of the Law Revision Commission, the definition was not deleted from MHL § 81.29 (e), *see The New York State Law Revision Commission 2004: Recommendation Relating to Amending Article*

81 of the Mental Hygiene Law in Relation to the Appointment of Guardians for Personal Needs and/or Property Management (hereinafter “*Law Revision Commission Recommendation*”), p.3, footnote 3.) Notwithstanding the apparently unintended repetition, the inclusion of life sustaining treatment in the definitions section clearly distinguishes such treatment from other major medical treatment, as defined by MHL § 81.03 (i), and emphasizes that major medical treatment does not include withholding or withdrawing life sustaining treatment. This will be underscored by the new cross-reference of MHL § 81.22 (a)(8) to MHL § 81.29 (e), which makes a guardian’s power to consent to major medical treatment subject to, and limited by, the law and precedents of the Common Law governing third-party consent to withholding or withdrawing life sustaining treatment. Without a judgment or order of a court rendered or issued in accordance with the Common Law, *see Matter of O’Connor*, 72 NY2d 517, the statutory power of MHL Article 81 to consent to, or refuse, major medical treatment does not authorize third-party consent to the withholding or withdrawal of life sustaining treatment.

Subdivision (k) is new; it adds “facility” to the definitions section and cross-references its meaning to the definitions of facility, hospital, school or alcoholism facility in MHL § 1.03; substance abuse program in MHL Article 19; adult care facility in SSL § 2; residential care facility or general hospital in PHL § 2801.

Comment: Previously, this same definition was repeated throughout the statute, *see* MHL §§ 81.05; 81.06; 81.07; 81.09; 81.31; 81.33. In an effort to simplify statutory language, these repetitions are deleted and a single definition is added to MHL § 81.03. It should be noted that the “Assisted Living Reform Act” became law on October 26, 2004, and will be effective 120 days thereafter, adding an Article 46-B to the Public Health Law. This new law, which is intended to regulate assisted living facilities, includes a definition of previously unregulated “congregate residential housing with supportive services in a home-like setting. . . [as] an integral part of the continuum of long term care.” It would appear that assisted living facilities are of a similar nature to other facilities defined in MHL § 81.03 (k) and should be included in that subdivision. Until that is done, best practice would seem to dictate that assisted living facilities should voluntarily be treated the same way as those facilities defined in MHL § 81.03 and referred to throughout the statute.

Subdivision (l) is new; it adds “mental hygiene facility” to the definitions section and cross-references its meaning to the definition of mental hygiene facility in MHL § 1.03.

Comment: For the same reason of simplification of statutory language applied to the addition of subdivision (k), this new subdivision is added as a definition of a term to be used throughout the statute.

§ 81.04. Jurisdiction

Subdivision (b): This provision establishes the jurisdiction of the Surrogate’s Court in MHL Article 81 proceedings to appoint a property management guardian for a person “entitled to money or property as a beneficiary of [an] estate, or entitled to the proceeds of an action as provided in section 5-4.1 of the estates, powers and trusts law, or the proceeds of a settlement of a cause of action brought on behalf of an infant for personal injuries.” Surrogate’s jurisdiction in these type cases was previously limited to an interested person who was a resident of, or physically present in, the county where the proceeding was pending. New language has been added to extend this jurisdiction to an interested person who “has any property” in the county where the proceeding is pending.

Comment: It is to be emphasized that MHL § 81.04 establishes subject matter jurisdiction. It is not a venue provision. The amendment of subdivision (b) now permits a Surrogate’s Court to entertain property management guardianship proceedings for beneficiaries of estates, wrongful death actions and infants’ compromise proceedings when the interested person has property in the county where the Surrogate’s proceeding has been commenced, which, of course, would include the property interest that is the subject of the Surrogate’s proceeding. No longer does a foreign guardian first have to seek an order of the Supreme or County Court appointing the foreign guardian a property management guardian in New York, pursuant to MHL § 81.18, before the foreign guardian can appear in the Surrogate’s Court on behalf of his/her ward who is not resident of, nor physically present in, the State, *see Matter of Bowers*, 164 Misc.2d 298.

Although the amendment resolves confusion concerning jurisdiction of the Surrogate’s Court, it may raise questions about jurisdiction in the Supreme or County Court, pursuant to subdivision (a) of section 81.04. While adding property as a basis of jurisdiction for Surrogate’s Court, the Legislature did not disturb the bases for subject matter jurisdiction in Supreme or County Court, pursuant MHL § 81.04 (a). The jurisdictional bases remain: 1. residence in New York; 2. a nonresident’s physical presence in New York; 3. a nonresident’s foreign guardianship, pursuant to MHL § 81.18. By amending Surrogate’s Court jurisdiction without changing Supreme or County Court jurisdiction, has the Legislature confirmed its clear intent not to recognize New York State property as a sole basis for jurisdiction in Supreme or County Court, *cf. Matter of Mary S.*, 234 AD2d 300?

§ 81.05. Venue

Subdivisions (a) and (b): The definition of facility is deleted due to the addition of MHL

§ 81.03 (k). The word “guardian” is added as a technical correction to subdivision (b), which had previously provided for the venue of modification proceedings for all kinds of guardians (temporary, special, *et al.*), but not a **guardian**.

Comment: Some confusion may still be created by the Legislature maintaining the last sentence of MHL § 81.05 (a), which reads: “If the person alleged to be incapacitated is not present in the state, or the residence of such person cannot be ascertained, the residence shall be deemed to be in the county in which all or some of such person’s property is situated.” Care must be taken to remember that this is a venue provision. Otherwise, it might be confused as expanding the jurisdiction of MHL § 81.04 (a). A suggested reading of this provision consistent with its purpose and in harmony with the rest of the statute is: 1. a nonresident not physically present in the State would venue a foreign guardian application in the county where his/her property is situated, and 2. a resident not physically present in the State, who may have voluntarily or involuntarily left the State with no intent to relinquish residency, would **for venue purposes** be deemed a resident of the county where property is situated. Except for Surrogate’s Court jurisdiction in MHL § 81.04 (b), which is specifically cross-referenced in MHL § 81.05 (a), these venue provisions are not intended to suggest a reliance on property alone as having created jurisdiction in Supreme or County Court. A person not physically present in this State will only be deemed a resident of a county **for the purpose of venue** if, in fact, he/she is a resident of this State, or, if a nonresident, has a foreign guardian.

The Legislature’s revisit of MHL § 81.05 (b) for the sole purpose of making a necessary deletion and a technical correction evidences a legislative intent to maintain the venue provisions for modification proceedings, and, particularly, the automatic change of venue provision when an incapacitated person has relocated to a facility. Convenience of the incapacitated person to appear at the modification hearing seems to be the paramount concern, *but see* MHL § 81.26 (c) and its amendment permitting modification for increased powers without a hearing. It could be the facility’s convenience, but this is unlikely, because there is seldom an appearance by the facility on such applications. Whatever the reason, it is clear that this automatic change of venue provision is left unchanged. Unfortunately, the procedural problems it may cause are not addressed. For example, since a modification application is properly made in a pending proceeding, must there be an order transferring the proceeding and the county clerk’s file, and assigning a new index number? From what court do you seek that order? Once the modification application is disposed and there must be further proceedings in the court of original instance (e.g., an annual accounting), must there be another transfer order? Are the procedures of CPLR 511 applicable or appropriate here? What, if any, is the interplay between MHL Article 81 and RPAPL Article 17? The sale of real property is a

modification application. Is the application entertained in the Article 81 proceeding and venued in accordance with MHL § 81.05 (b), or must it be entertained in a new RPAPL Article 17 proceeding and venued where the subject real property is situated? What about removal or termination proceedings, which are modification applications, could not the automatic change of venue provision for facility residents be used to accommodate forum shopping?

§ 81.06. Who may commence a proceeding

Subdivision (a)(7): The definition of facility is deleted due to the addition of MHL § 81.03 (k). The amendment allows the designee of a chief executive officer of a facility to commence a proceeding.

Comment: The amendment acknowledges the reality that facility executives are seldom the appropriate or practical persons to commence such proceedings. (Although there is a subdivision (a), there is no need to look for subdivision (b), because there is none.)

§ 81.07. Notice

Subdivision (a): Commencement of a guardianship proceeding under MHL Article 81 shall be by filing the petition.

Comment: Note that the proceeding is commenced by filing the petition only, and not the order to show cause, which is often not filed until after the conclusion of the hearing.

Subdivision (b)(1): The date on which the hearing on the petition shall be held must be set by the court for no later than 28 days after the signing of the order to show cause.

Comment: A new timeline is established for the hearing. Rather than 28 days from the date of filing the petition, the time begins to run from the date of signing the order to show cause. An expedited hearing remains the priority of the statute, since discretion for an earlier hearing is granted and good cause must be shown for an adjournment beyond the 28 days. The amendment, however, recognizes that there may be delays between filing the petition and signing the order to show cause. Since notice to the alleged incapacitated person, his/her attorney, the court evaluator and other interested persons must follow upon signing the order to show cause, the new timeline provides for a reasonable, though expedited, period to prepare for the hearing.

Subdivisions (b)(3) and (4): A change in subdivision (b)(3) and the addition of subdivision (b)(4) effect a significant amendment of the service and notice provisions of MHL Article 81. The order to show cause, with a copy of the petition and all supporting papers, shall be served upon the alleged incapacitated person, his/her attorney and the court evaluator, along with notice of the proceeding. Courts are prohibited from requiring that the supporting papers contain medical information.

Comment: The persons entitled to service of all the papers in the proceeding, i.e. the order to show cause, pleadings and supporting documents, along with the notice of the proceeding, as set forth in MHL § 81.07 (f), are strictly limited to the alleged incapacitated person, his/her attorney and the court evaluator. Other interested persons are only entitled to the notice of the proceeding, *see* MHL § 81.07 (g)(1), and a copy of the order to show cause, *see* MHL § 81.07 (g)(2). This suggests that those in the latter group are noticed as interested persons, who may, but need not, appear in the proceeding. Due process, of course, demands that the alleged incapacitated person, who is the responding party, and his/her attorney be served with a full set of papers, and the court evaluator, as the court's independent, investigative witness, necessarily receives the same. A question may be raised whether this provision is intended to preclude an interested person under MHL § 81.07 (g) from ever receiving copies of the petition and supporting papers, or only in the first instance. What if such an interested person appears in the proceeding or serves a cross-petition? Is he/she never to have an opportunity to see the other pleadings? Another issue may be raised regarding provisional remedies. For example, if an injunction is issued against a person only entitled to notice of the proceeding under MHL § 81.07 (g), is he/she not entitled to service of the papers supporting the grant of injunctive relief? It would seem so. For that reason, a better practice that has long been adopted by many practitioners may now be necessary for all, i.e. not to include provisional remedies in orders to show cause, but to prepare separate *ex parte* orders based upon separate supporting papers. These orders and the papers supporting them can, therefore, be served upon the enjoined person without violating MHL § 81.07 (b)(3).

The conflict among trial courts regarding the need to include medical information in support of the petition is resolved. The amendment makes clear that medical information is not a pleading requirement and a petition cannot be found to be insufficient for failure to supply such information, nor can the signing of an order to show cause be refused solely because of the absence of medical information. This not only comports with the focus of MHL Article 81 on functional limitations, *see* MHL § 81.02 (c), but also avoids potential violations of patient-physician privilege under state and federal law at the outset of the proceeding

when the alleged incapacitated person is unrepresented and unable to assert and protect that privilege.

Much care has been taken in the amendment of MHL § 81.07 to protect the confidentiality of the alleged incapacitated person at the commencement of the proceeding. The prohibition against including medical information in the pleadings or in support of the pleadings and the limitation on those who are to receive a full set of papers is proof of this. As to the latter limitation, however, there is a real question of its effectiveness. Without amending MHL § 81.14 (d) and the presumption that guardianship records are public unless sealed upon good cause shown on motion at the hearing, while, at the same time, adding that the petition be filed in order to commence a proceeding, *see* MHL § 81.07 (a), the Legislature continues to allow full publication of the very information it has suggested should be protected as confidential. It has only succeeded in making access to this information more inconvenient for some, but has not protected this information from public disclosure. It is all there in the county clerk's office.

Subdivision (e): This is almost an entirely new provision, which sets forth the persons to be *servd* with, and the manner of *service* of, the order to show cause. The alleged incapacitated person must served by personal delivery at least 14 days prior to the hearing date, unless the court, in its discretion, directs a shorter time period for good cause shown. If it is shown that the alleged incapacitated person has refused to accept service by personal delivery, the court may order an alternative means of service. The prior provision has been deleted for serving a person of suitable age and discretion with a copy of the order to show cause at the alleged incapacitated person's residence when service is not made upon the alleged incapacitated person at his/her residence. How and when to serve the court evaluator and attorney for the alleged incapacitated person has been completely revised: fax or personal delivery or overnight delivery service within 3 ***business*** days of appointment of the court evaluator or appointed attorney for the alleged incapacitated person, or the appearance of the retained attorney for the alleged incapacitated person. As with the alleged incapacitated person, the court may shorten the time for service.

Comment: Although MHL § 81.07 (e) is entitled “Service of the order to show cause, “ remember the MHL § 81.07 (b)(3) and (4) require service of the petition and supporting papers with the order to show cause, as well as a notice of the proceeding. Note that the period of service upon the court evaluator and attorney is 3 *business* days. Note, also, that there has been renumbering within MHL § 81.07.

Subdivision (f): The form of notice of the proceeding required by MHL §§ 81.07 (b)(4); (g) must include: 1. name and address of alleged incapacitated person; 2. name and address of petitioner; 3. names of persons to be given notice of the proceeding; 4. time and place the order to show cause will be heard; 5. the object of the proceeding and the relief sought, and 6. name and address of petitioner’s attorney.

Comment: The language of MHL § 81.07 (b)(3) and (4) suggests that the order to show cause in a guardianship proceeding is a separate paper from the notice of the proceeding. This suggestion is continued upon comparison of MHL § 81.07 (f) (Form of the notice of the proceeding) and MHL § 81.07 (c) (Form of the order to show cause). Clearly, the order to show cause contains more and different information than the notice of the proceeding. Nevertheless, since every person entitled to either service, MHL § 81.07 (b)(4), or receipt of the notice, MHL § 81.07 (g)(1), is also entitled to service or receipt of the order to show cause, *see* MHL §§ 81.07 (b)(4); (g)(2), there would appear to be no harm in combining the order to show cause and notice.

Subdivision (g): The person entitled to *notice* of the proceeding, as distinguished from those entitled to *service*, remain essentially unchanged with a few exceptions. Court evaluator and attorney for the alleged incapacitated person have been moved from those entitled to notice to those entitled to service, *see* MHL § 81.07 (e)(1)(ii) and (iii). Mental Hygiene Legal Service must be given notice if the alleged incapacitated person is in a mental hygiene facility, unlike previously when notice had to be given if the alleged incapacitated person was in a facility, as is currently defined in MHL § 81.03 (k). Notice, with a copy of the order to show cause, must be *mailed* at least 14 days prior to the hearing date, MHL § 81.07 (g)(2), unless the court shortens the period for good

cause, MHL § 81.07 (g)(3). There is no longer an option for delivery of the notice.

References to powers-of-attorney in the General Obligations Law have been renumbered to create consistency with the renumbering in that statute.

Comment: There are minimal changes in the subdivision to the extent that it identifies persons to receive notice of the proceeding. Nevertheless, the provision as a whole emphasizes that these are interested persons receiving *notice* of the proceeding, which is less than *service*.

Prior provisions about the manner of service in former MHL § 81.07 (d)(2) have been deleted and reworked, as already discussed, in the renumbered subdivisions (e) and (g).

Be careful. This very long section of the statute makes bold distinctions between the served and the noticed, and seems early on to distinguish between the served parties receiving all the papers, i.e. order to show cause, petition, supporting documents and notice of the proceeding, and the noticed persons, MHL § 81.07 (g)(1), receiving the notice of the proceeding, MHL § 81.07 (f). One could be misled by the titles to subdivisions (e) and (g) to think that noticed persons do not receive a copy of the order to show cause. They do, but the section does not reveal this until the second to the last paragraph of many paragraphs, *see* MHL § 81.07 (g)(2).

§ 81.08. Petition

Subdivision (a)(2) and (5): The amendment of this subdivision adds two pleading requirements: 1. the name, address, telephone number and relationship of any person to be served with the order to show cause, and 2. information required by MHL § 81.21 (b) in support of any request for the power to transfer the alleged incapacitated person's property.

Comment: Does the amended MHL § 81.08 (a)(2) really mean what it says? It says "served" with the order to show cause. Is it continuing the distinction made in MHL § 81.07 between those served, MHL § 81.07 (e)(1), and those who receive a copy of the order to show cause as noticed persons, MHL § 81.07 (g)(2)? Or by adding the phrase "and the nature of their relationship to the alleged incapacitated person," is it referring to anyone who receives the order to show cause? It would appear to be the latter, because the alleged incapacitated person is *served* with the order to show cause, as are the court evaluator and attorney, MHL § 81.07 (e)(1).

Alleging the self-relationship would be absurd, and alleging the identity and relationship of court evaluator and, at least, appointed attorney would be impossible.

The second additional pleading requirement encourages early Medicaid and estate planning. It may not be possible, however, to marshal all the information necessary to set forth such plans in the petition and satisfy the showing required by MHL § 81.21 (b). A further application is often necessary. The amendment of MHL § 81.08 (a)(5) raises the question whether a petitioner may request leave to make transfers pursuant to a Medicaid plan, subject to submission of a detailed plan. This device has been used to lock in the transfer as of the date of the order to show cause. If, however, the request for such relief may not be included in the petition without satisfying MHL § 81.21 (b), has the amendment foreclosed the opportunity to request transfer relief subject to a further submission?

§ 81.09. Appointment of court evaluator

Subdivision (b)(1): This subdivision conflates what were paragraphs (1) and (2) into a single paragraph (1) to achieve two ostensible purposes: 1. to add a not-for-profit corporation to the list of persons or entities eligible for appointment (the list remains inclusive rather than exclusive), and 2. to clarify that Mental Hygiene Legal Service is no longer limited in its eligibility for appointment as court evaluator to cases in which the alleged incapacitated person is in a facility or mental hygiene facility. There is another language change in the amendment of this subdivision, *viz.*, “the name of the court evaluator *shall* be drawn from a list maintained by the office of court administration.” *Emphasis supplied.* Previously, the statutory language read: “[T]he court *may* appoint as court evaluator any person drawn from a list maintained by the office of court administration”, *emphasis supplied.*

Comment: Although under the former subdivision not-for-profit corporations were eligible for appointment as court evaluators, the amendment specifically acknowledges this eligibility and statutorily confirms the practice of appointing not-for-profit corporations where available. Likewise, the amendment confirms the practice of many courts of appointing Mental Hygiene Legal Service as court evaluator for persons in the community, as well as those in facilities. This practice was based on a statutory reading that appointment of Mental Hygiene Legal Service in the latter cases was specifically

authorized, and in the former not specifically prohibited. The new language clarifies that it is authorized in both.

The other language change in this subdivision is problematic, particularly when read in conjunction with Part 36 of the Rules of the Chief Judge, *see* 22 NYCRR Part 36. Part 36 governs fiduciary appointments, including court evaluators, § 36.1 (a)(4). Mental Hygiene Legal Service and not-for-profit corporations serving as court evaluators are exempt from Part 36, *see* § 36.1 (b)(1), (2)(iii). These two entities, therefore, do not appear on any list maintained by the Office of Court Administration, *see* §§ 36.2 (b)(1); 36.3. Moreover, § 36.2 (b)(2) authorizes non-list appointments under certain circumstances. It would seem that in order to comply with MHL § 81.09 (b)(1) courts will not be able to take advantage of permissible non-list appointments of court evaluators under Part 36, and court administration will have to develop an official court evaluator list for Mental Hygiene Legal Service and not-for-profit corporations, which will not be included among the Part 36 lists currently maintained by the Office of Court Administration in its Fiduciary Clerk Appointment System database.

Subdivision (c)(2): The duties of the court evaluator have been expanded to specifically include a determination of whether the alleged incapacitated person understands English or only another language.

Comment: This was always understood to be included in the duties of the court evaluator, since MHL § 81.09 (c)(2) had required, and still requires, that the court evaluator explain to the alleged incapacitated person the nature and possible consequences of the proceeding “in a manner which the person can reasonably be expected to understand.”

Subdivision (c)(3): Consistent with the emphasis adopted by the amendment of MHL §81.10 (a), the court evaluator is to specifically inquire about the alleged incapacitated person’s request for an attorney of his/her own choice.

Comment: See Comment to MHL § 81.10 (a).

Subdivision (c)(5)(xi): References to powers-of-attorney in the General Obligations Law have been renumbered to create consistency with the renumbering in that statute.

Comment: A technical correction.

Subdivision (d): The court evaluator may apply to the court for permission to inspect records of medical, psychological and/or psychiatric examinations of the alleged incapacitated person. If the court determines that such records are likely to contain information which will assist the court evaluator in completing the report to the court, the court may order the disclosure of such records to the court evaluator notwithstanding the physician/patient privilege, *see* CPLR 4504. The amendment adds the psychologist/patient and social worker/client privileges, *see* CPLR 4507; 4508.

Comment: *The Law Revision Commission Recommendations*, at p. 16, supported this change, stating, “This proposal also makes clear that by permitting the disclosure of medical information to the court evaluator, the court is acting notwithstanding privileges relating to psychologists and social workers as well as physicians.” Note that the court evaluator is authorized to seek medical, psychological and/or psychiatric records, and, as to those records, the social worker/client privilege may be waived. There is, however, no authorization to seek social work records and have that privilege waived.

Subdivision (e): The subdivision is amended to add a requirement that the court evaluator immediately advise the court if he/she has taken any action to preserve the property of the alleged incapacitated person.

Comment: MHL § 81.09 (e) invests the court evaluator with authority much like that of a temporary guardian of property to act to preserve any property of the alleged incapacitated person in danger of waste, misappropriation or loss. The statute has always contemplated that the court evaluator would act in an emergency without order of the court. How third-parties acknowledge and cooperate with such authority has been, and remains, unclear. Nevertheless, an immediate report to the court of any action taken is now required. This allows quick ratification, or an equally quick undoing of actions taken.

Subdivision (f): An award of a reasonable “allowance” for services has been changed to reasonable “compensation.”

Comment: This simply renders the language of MHL § 81.09 (f) consistent with MHL § 81.10 (f) where the statute speaks of compensation for the attorney for the alleged incapacitated person.

§ 81.10. Counsel

Subdivision (a): There is a change in language that shifts emphasis regarding counsel for the alleged incapacitated person. Previously, this subdivision statutorily recognized the right of the alleged incapacitated person to be “represented by legal counsel of the person’s choice.” Now, it is the right “to choose and engage legal counsel of the person’s choice.” Coupled with this shift in statutory emphasis, the following procedure is put into place: “[A]ny attorney appointed pursuant to this section shall continue his or her duties until the court has determined that retained counsel has been chosen freely and independently by the alleged incapacitated person.”

Comment: An alleged incapacitated person has always had the right to retain private counsel to defend against the petition. The amended language underscores this right by setting it forth in a more affirmative way that almost invites the choice and engagement of private counsel. In an acknowledgement of reality that the attorney for the alleged incapacitated person is sometimes retained by a third-party with adverse interests, the amendment also provides that if there is an appointed attorney he/she shall remain until the issue of representation is resolved. Presumably, this would also cover the situation where there is a retained attorney and no appointed attorney. In that case, there would be a court evaluator, *see* MHL § 81.09 (a), (c)(3), responsible for notifying the court that there is an issue of the independence of the retained attorney. In either case, the amended statute recognizes, without providing any procedure, that an early intervention *pendente lite* process is needed to address and resolve any issue of the independence of privately retained attorney.

Subdivision (c)(5): There is no longer the necessity of appointing an attorney for the alleged incapacitated person whenever *any* provisional remedy is granted, *see* MHL § 81.23. The amendment limits the necessity to the times when a temporary guardian is appointed, *see* MHL § 81.23 (a).

Comment: The Law Revision Commission observed that since injunctive relief is only available against third-parties, *see* MHL § 81.23 (b)(1), there is no need to appoint an attorney for the alleged incapacitated person because his/her interests are not at stake. On the other hand, the appointment of a temporary guardian does impact the alleged incapacitated person’s interests, and, because granted *ex parte*, requires the assistance of an attorney as soon as is reasonably possible. *See Law Revision Commission*

Recommendations, p. 20. The distinction does not seem to obtain in all circumstances. For example, what if there is injunctive relief against an attorney-in-fact or health care proxy; are not the alleged incapacitated person's interests impacted in being denied the use of these alternative resources? It must be remembered that MHL § 81.10 (c) only sets forth those circumstances under which an attorney must be appointed for the alleged incapacitated person, unless otherwise represented. These are at a minimum and certainly do not preclude appointments as due process would demand.

Subdivision (e): Clarifies that Mental Hygiene Legal Service is no longer limited in its eligibility for appointment as attorney for the alleged incapacitated person to cases in which the alleged incapacitated person is in a facility or mental hygiene facility.

Comment: Consistent with MHL § 81.09 (b).

§ 81.11. Hearing

Subdivision (f): A small, but major change. No longer is “any party to the proceeding” entitled to demand a jury trial on the issues of incapacity. Now, only the incapacitated person or his/her attorney may file a jury demand.

Comment: The right to trial by jury was, and remains, authorized on the issues of incapacity only. The amendment effects a change that has long been recognized as needed by Bench and Bar. Since it is the liberty interest of the alleged incapacitated person that is in jeopardy, only he/she should have the right to decide whether a guardianship proceeding will be tried to a court or a jury.

§ 81.13. Timing of hearing

A decision on the petition must be rendered within seven days of the hearing, and not forty-five days as previously provided.

Comment: This amendment is in keeping with the expeditious nature of these proceedings. It does, however, create a confusing timeline. Unchanged is the time period for issuing a commission, i.e. fifteen days after decision, MHL § 81.13. A further amendment of MHL § 81.16 (e) requires that an order and judgment be entered and served within ten days of the signing of the order/judgment. If a decision is rendered within seven days of hearing and the judgment/order is timely entered and served within the next ten days, the time for issuing the commission has already expired, and the commission can only be issued after entry of the judgment/order and completion of other

steps it will direct, i.e. filing of a bond, MHL § 81.25, and designation, MHL § 81.26. Again, expedition is the laudable goal; it is just that the timeline must be set according to the known markers.

§ 81.15. Findings

Subdivisions (b)(7); (c)(9): If a guardian of person or property is appointed, a guardianship court must specifically find whether the incapacitated person is entitled to receive copies of initial, MHL§ 81.30, or annual, MHL § 81.31, reports.

Comment: The Law Revision Commission acknowledged that once a person is adjudicated incapacitated there is a real question whether that person, who is a party to the proceeding, should be entitled to receive further papers in the proceeding, and, specifically, the initial and annual reports that the statute requires. *See Law Revision Commission Recommendations*, p. 22. To serve an incapacitated person with those papers may be a meaningless act. Nevertheless, to deny a party that right without a finding of the court would be a violation of due process. The amendment balances reality against the demands of due process and requires a finding to support a denial of the right.

§ 81.16. Dispositional alternatives

Subdivision (e): Orders/judgments of guardianship must be entered and served within ten days of signing. An incapacitated person must be served personally with the order/judgment and have it explained by the court evaluator, his/her attorney or the guardian in a manner calculated to be understood by the incapacitated person. The provision that required the order/judgment to be read to the incapacitated person has been deleted.

Comment: Expedition is integral to the entire guardianship proceeding, *but see* MHL § 81.13. Again, reality dictates. Reading the order/judgment to the incapacitated is often a futile exercise. The statute now requires an understandable explanation, and adds the guardian as one of three people to make such an explanation, which makes most sense, because the guardian is the person who has been appointed with a prospective relationship to the incapacitated person.

§ 81.18. Foreign guardian for a person not present in the state

Comment: A technical correction of a typographical error.

§ 81.21. Powers of guardian; property management

Subdivision (a): Under the former provision, there were twelve items in the list of property management powers that could be granted. There are now twenty items, which continue to constitute a list, which the statute specifically states is not exhaustive. Most, if not all, of these additional powers have been standard for the longest time in judgments/orders of guardianship.

Comment: Among this list are three powers that continue the authority of the guardian after the death of the incapacitated person, *viz.*, pay funeral expenses, pay post-death bills where there was authority to pay such bills during the lifetime of the incapacitated person and defend or maintain litigation after death until a personal representative of the decedent's estate is appointed. These additional powers are the first attempt of the statute to deal with the real problem of the power of the guardian after the incapacitated person's death and the authority of the guardian to act until an estate representative is appointed. This is an area that needs further attention, because there is still much confusion about the guardian's post-death authority, which significantly affects the transition from guardianship estate to decedent's estate.

An unnumbered addition provides for the grant of any power previously granted conservators or committees. This is really a warning. Under prior law, conservators and committees may have *automatically* been granted powers by statutes other than MHL Articles 77 and 78. Pursuant to MHL Article 81, there can be no *automatic* grant of power. Although these powers in other statutes may be considered in fashioning relief in the discretion of the court, their previously *automatic* status is specifically removed by this provision.

§ 81.22. Powers of guardian; personal needs

Subdivision (a)(8): The power to consent to or refuse generally accepted routine or major medical or dental treatment is made "subject to the provisions of subdivision (e) of section 81.29 of this article dealing with life sustaining treatment".

Comment: See the Comment, *supra*, under MHL § 81.03 (j). By adding this cross-reference in MHL § 81.22 (a)(8) to MHL § 81.29 (e), the amendment makes clear that the grant of medical/dental decision making power does not, without more, include the power to consent to the withholding or withdrawal of life sustaining treatment. The MHL Article 81 guardian has no more authority than any other third-party in New York to make such decisions. He/she is subject to the same Common Law standard enunciated

in *Matter of O'Connor*, 72 NY2d 517, and the appointment as guardian does not elevate him/her to any higher degree of authority.

§ 81.23. Provisional remedies

Subdivision (b)(1, (2)): An injunction and temporary restraining order may be issued by the court, at any time prior to or after the appointment of a guardian or at the time of the appointment of a guardian, and may address issues of health and safety, as well as property management.

Comment: By adding “health” and “safety,” the amendment specifically includes in the prior language, “welfare of the incapacitated person or person alleged to be incapacitated,” personal needs concerns. Previously, MHL § 81.23 (b)(1), (2) seemed to be focused on property issues and could have been construed as limiting the court’s injunctive relief to such issues. The amendment avoids that construction and clarifies that this provisional remedy is available for personal needs, as well as property management concerns.

Since the injunctive relief of MHL § 81.23 (b)(1) is found in the section dealing with provisional remedies, it was possible to construe the statute as only permitting such relief *pendente lite*. The amendment specifically authorizes such relief prior to, after or at the time of, the appointment of a guardian. This is only practical. It is when a court has heard a case and appointed a guardian that it knows best that certain injunctive relief is needed.

§ 81.25. Filing of bond by guardian

Subdivision (a): In addition to a guardian, “a trustee of a trust created pursuant to this article” is subject to the bonding requirements of MHL § 81.25.

Comment: MHL § 81.16 (b) authorizes a guardianship court to direct or ratify the establishment of a trust. Often, these are supplemental needs trusts, *see* Omnibus Budget Reconciliation Act of 1993 (42 USC § 1396p(d)(4); EPTL § 7-1.12; SSL § 366 (2)(b)(2)(iii); 18 NYCRR § 360-4.5). Although the appointment of a trustee has always been available as a dispositional alternative to guardianship or as a complementary appointment in a guardianship, and although these trustees administer property that would otherwise have been guardianship property, former MHL § 81.25 did not provide for their bonding. Many guardianship courts appropriately viewed it within their discretion to order bonding under these circumstances. The amendment to MHL § 81.25 (a) makes it statutory law.

Subdivision (c): This is a new provision; it allows a court to order the deposit of guardianship assets into court or with a bank or trust company, subject to further order of the court. If the deposit is of part of the assets, the remaining assets may be bonded in accordance with MHL § 81.25.

Comment: This amendment imports into MHL Article 81, almost verbatim, the provisions of SCPA 803. It gives the guardianship court another mechanism for tailored relief in these cases. A family member may not be able to obtain a bond in the full amount of guardianship assets and could be precluded from appointment or require appointment of a co-guardian professional in order to qualify. This provision may permit the court to deposit assets that need not be accessible and only grant access to a bondable amount of assets. This could increase the opportunities to appoint family members, and to appoint them without the need or extra expense of a co-guardian. This may, however, add to the work of guardianship courts with an increased number of applications addressed to these deposits, *cf.* SCPA 1708.

Subdivisions (d), (e): Renumbered due to the addition of subdivision (c). Those subject to bonding are consistently repeated as guardian, special guardian, temporary guardian or trustee.

Comment: Technical corrections.

§ 81.28. Compensation of guardian

Subdivision (a): The reference to SCPA 2309 as a method for calculating guardianship compensation is deleted.

Comment: The previous reference to SCPA 2309, trustees commissions, was only suggestive. The statute always invested in the guardianship court complete discretion to fashion a method of compensation appropriate to the circumstances of the case. By referring to SCPA 2309, however, it was thought by some that this method was almost presumptive. Its deletion clarifies that if it ever was it is not now the case. At the same time, the amendment does not advance what has become a very difficult area of guardianship law and practice, i.e. compensation. There are as many methods as there are courts, or even cases, which may be more than appropriate. It is hard to apply a pattern to MHL Article 81, both in the choice of guardian and the powers to be granted. It only follows that a pattern of compensation is equally hard to apply.

§ 81.29. Effect of the appointment on the incapacitated person

Subdivision (d): This subdivision had previously empowered a court to invalidate a power, e.g. a power-of-attorney, if given during incapacity. The amendment extends the court's authority to invalidate such a power if it is determined that there has been a breach of fiduciary duty. Upon such determination, the court shall require an accounting

Comment: A discussion of the problem that precipitated this amendment may be found in the Practice Commentary to MHL § 81.29 by Rose Mary Bailly, and in cases like *In re Wingate*, 169 Misc2d 701, and *In re Rochester General Hospital*, 158 Misc2d 522. As noted in the *Law Revision Commission Recommendations*, at p. 31, MHL Article 81 proceedings often expose wrongdoing on the part of fiduciaries, such as attorneys-in-fact and health care agents. Although instruments were validly given during a period of capacity, subsequently, the agent either failed to act or acted to the detriment of his/her principal. The former statute did not address this situation, although courts resolved that they had inherent power to do so. The amendment leaves no doubt that the court may reach such wrongdoing and adds to it the jurisdiction to demand an accounting for acts and omissions during the entire period of agency. Within the MHL Article 81 proceeding, there is created a new cause of action and subject matter jurisdiction for an accounting of attorneys-in-fact found to have violated their fiduciary duties.

§ 81.30. Initial report

Subdivision (a): The amendment adds language that requires the initial report to be filed with the court that appointed the guardian.

Comment: Previously, the subdivision only required filing with the court. It did not specify which court. Nevertheless, practice presumed that it was the court of appointment. The amendment, therefore, could be said simply to have confirmed this presumption. There is more to it than that, however, particularly given the venue provisions of § 81.05 (b). Since modification proceedings for facility residents must be venued in the county where the facility is located, there is a need to be precise about the place of filing the initial report. Otherwise, there could be confusion in those cases where the incapacitated person has relocated to a facility in a county other than where the guardian was appointed.

Subdivisions (e)-(i): These are new and set forth those persons who must receive a copy of the initial report, unless the court in its findings "orders otherwise." They are the incapacitated person, the court evaluator and the attorney for the incapacitated person at the time

of the hearing on guardianship, the court examiner, the chief executive officer of any facility in which the incapacitated person may reside and, if the incapacitated person resides in a mental hygiene facility, Mental Hygiene Legal Service in the judicial department where the facility is located. The manner of service on the incapacitated person is by mail, but is not specified as to others.

Comment: These are minimum service provisions for the initial report, which may be waived by the court. Nothing prevents the court from adding persons or entities to the service list.

It is significant that the court evaluator and attorney for alleged incapacitated person are served with the initial report. This is a means of double-checking the inventory that appears in the initial report. If there is any variance from what was pleaded or proved at the guardianship hearing, the court evaluator and attorney who appeared at the hearing will have the opportunity to note this for the court and its court examiner, who will not have appeared at the guardianship hearing and may not have the capacity to make appropriate comparisons.

There is some confusion in the statutory language. When speaking of the court otherwise **ordering** a waiver of service, it cross-references to MHL § 81.15, which is the section regarding findings of fact and not orders or judgments. The cross-reference probably should have been to MHL § 81.16 (c)(3). Moreover, in MHL § 81.30 (f), it cross-references to MHL § 81.15 (b)(7) and (c)(9) in support of a waiver of service upon the court evaluator and attorney for the alleged incapacitated person, whom those two subdivisions do not mention.

§ 81.31. Annual report

Subdivision (c): Similar, but not identical, service provisions have been added for the annual report. Unless the court orders otherwise, the annual report shall be served by mail upon the incapacitated person. A copy shall be sent to the court examiner and to the chief executive officer of any facility where the incapacitated person resides. If the incapacitated person resides in a mental hygiene facility, there shall be service upon Mental Hygiene Legal Service in the judicial department where the facility is located. Additionally, if Mental Hygiene Legal Service was court evaluator or attorney for the alleged incapacitated person at the guardianship

proceeding, the annual report shall be served upon Mental Hygiene Legal Service in the judicial department where the hearing was held, which the court may otherwise waive. The definition of facility is deleted due to the addition of MHL § 81.03 (k).

Comment: The different service provisions for the annual report, in comparison with the initial report, are evidence that the guardianship is now in a different “chapter” of the proceeding. No longer are the court evaluator and attorney for the alleged incapacitated person required to be served. That requirement in MHL § 81.30 made sense for the period of transition from the guardianship hearing to the guardianship itself, when continuity and consistency of information were needed. At this stage, only those persons interested in the ongoing guardianship must be served.

It is not clear why Mental Hygiene Legal Service, as attorney for the alleged incapacitated person or court evaluator, is given a different status than all other attorneys and court evaluators. The Service is otherwise given notice of the annual report if the incapacitated person is a resident of a mental hygiene facility, which would satisfy its interest in the ongoing guardianship. The same reason that other attorneys and court evaluators are not served with the annual report appears applicable to Mental Hygiene Legal Service in those roles.

Subdivision (d): Consistent with MHL § 81.30 (a), annual reports are to be filed with the clerk of the court of the guardian’s appointment. The amendment deletes a curious provision about residents of New York City.

Comment: See the Comment to MHL § 81.30 (a). Remember, if there has been a modification proceeding for a facility resident, there may have been some kind of change of venue, including a transfer of the file and an index number in another county. Nevertheless, the annual report must be filed, and presumably examined, in the county of original appointment. How does the venue get changed again for the examination of the annual report? There cannot be two venues, two files, two index numbers.

§ 81.33. Intermediate and final report

Subdivisions (a), (b): The amendment clarifies that when a report is filed pursuant to MHL § 81.33 upon the death of the incapacitated person it shall conform to the requirements of MHL § 81.31 for annual reports excluding information about the personal care of the incapacitated person required by MHL § 81.31 (b)(5), (6).

Comment: Technical correction.

Subdivision (f): In the service provision for an incapacitated person in a facility, deletion of the definition of facility due to MHL § 81.03 (j).

Comment: Technical correction.

§ 81.36. Discharge or modification of powers of guardian

Subdivision (c): The amendment adds language that permits the court for good cause shown to dispense with a hearing under this section, provided that if it is an application to increase powers the factual basis for dispensing with the hearing shall be set forth by the court.

Comment: The amendment is ostensibly a practical response to a common circumstance. An increase of powers is needed, e.g. to sell real property; there is no objection, and the incapacitated person cannot meaningfully participate in any hearing. The court is statutorily authorized, in its discretion, to grant such relief without a hearing. The language of the amendment, however, is anomalous. It allows the court to dispense with a discharge hearing, MHL § 81.36 (a)(1), or an increased powers hearing, MHL § 81.36 (a)(2). Nevertheless, it only requires the court to set forth reasons for dispensing with the hearing where there is an increased powers application. It would appear the dispensing with a discharge hearing would equally require such findings, and, in some circumstances, be even more necessary.

Conclusion

Guardianship practice has evolved since the effective date of Mental Hygiene Law Article 81 in April, 1993. Its many new amendments are proof of the Legislature's continued interest in this area of practice and commitment to its improvement.