COURT EXAMINER UPDATE

APPELLATE DIVISION OF THE SUPREME COURT
THIRD JUDICIAL DEPARTMENT

GUARDIAN & FIDUCIARY SERVICES
OFFICE OF COURT ADMINISTRATION

OFFICE OF THE INSPECTOR GENERAL
MANAGING INSPECTOR GENERAL OF FIDUCIARY APPOINTMENTS
OFFICE OF COURT ADMINISTRATION

NOVEMBER, 2009

APPELLATE DIVISION OF THE SUPREME COURT
THIRD JUDICIAL DEPARTMENT

COURT EXAMINER UPDATE
November 10, 2009

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Part 36 of the
Rules of the Chief Judge

Guardian & Fiduciary Services
25 Beaver Street Suite 1110
New York, New York 1004
www.nycourts.gov/ip/gfs
212-428-5505

Overview and Rationale

- Appointments to be fair, impartial and beyond reproach
- Merit selection
- No favoritism, nepotism or politics
- Compensation limitations
- Publication of appointments and compensation

Categories of applicability in guardianship

- Guardians
- Court Evaluators
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- Court Examiners
- Supplemental Needs Trustees

Secondary Appointees

- Persons or entities performing services for guardians
  - Counsel to guardian
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  - Property manager for guardian
  - Real estate broker for guardian

Exceptions to Part 36 (guardianship)

- Guardian who is a relative
- Guardian nominated by the ward
- Guardian proposed by a party
- SNT trustee nominated by beneficiary
- SNT trustee proposed by trust proponent
- One with legal duty (DSS)

Exceptions cont'd:

- Not-For-Profit as personal or property guardian
- Not-For-Profit as court evaluator
- Bank or trust company as depository or SNT trustee
- Appointments without compensation

Appointments

- Must be made by judge
  - Secondary appointments included
- Must be from lists
  - Judge may appoint non-list if:
    - Written finding of "good cause"
    - Filed with fiduciary clerk
    - Judge must send copy to Chief Administrator

Disqualifications from Appointment

- Judges, housing judges, town and village justices
- Relatives of judges AND relatives of the spouses of judges
- Within the 4th degree (1st cousin)
- JHOs on panel "in a court in a county"
- Court employees (salary grade 24) and their close relatives (district-wide or statewide)

Disqualifications continued:

- Political party chair, executive director or equivalent; state or county; and close relatives
  - 2 year prohibition for politician and family
  - Includes members, associates, counsel and employees of law firm or entity (only during period of association)
- Judicial candidate's campaign staff and their close relatives by that judge

Disqualifications continued:

- Former judges and close relatives within jurisdiction for 2 year period
- Disbarred or suspended attorneys during suspension or disbarment
- Felons unless certificate of relief
- Misdemeanants for 5 years post sentencing

Important guardianship disqualifications

- Guardian (or receiver) may not be appointed own counsel to guardian
- Law firm associate of guardian (or receiver) may not be counsel to guardian
- UNLESS court finds "compelling reason"

Important guardianship disqualifications cont'd:

- Attorney for AIP may not be guardian or counsel to guardian (absolute ban)
- Court evaluator may not be appointed guardian
  - UNLESS court finds "extenuating circumstances"
    - In writing
    - Filed with fiduciary clerk

Limitations based upon compensation

- "The caps"
- $15,000 Rule
- $75,000 Rule
- Exception: necessary to maintain
  - Continuity of representation or service
  - Must be same person or entity

Compensation defined:

- Written court order signed by judge
- Awards: fees, commissions allowances, etc.
- Excludes: costs and disbursements
- Date of the court order is the date of compensation

May I accept this appointment? $15,000 Rule

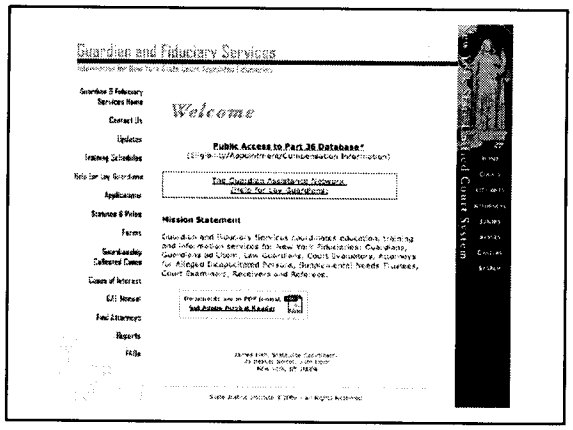
- Do I anticipate this appointment will result in compensation exceeding $15,000 in ANY calendar year?
  - If "no", then appointee may accept; the $15,000 does not apply
  - If yes, then appointee must look at all appointments in current calendar year

May I accept this appointment? $15,000 Rule continued:

- Current appointment compensation anticipated to exceed $15,000
- Did I accept an appointment in the current calendar year in which compensation is anticipated to exceed $15,000?
  - If "no", then appointee may accept
  - If "yes", then appointee must decline

May I accept this appointment? $75,000 Rule

- Add all Part 36 compensation awards
- Prior calendar year
- If exceeds $75,000, then appointee may not accept compensated appointment in current calendar year
- Not a *per se* compensation cap
- A consequence if exceed $75,000 in one year
- New appointments only, may keep inventory

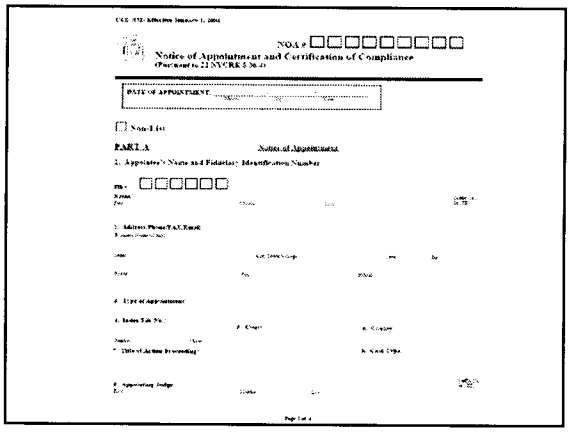


Part 36 Paperwork
UCS 872

- UCS 872 Notice of Appointment / Certificate of Compliance
  - Sent to appointee by court
  - Appointee must sign
  - Appointee returns to fiduciary clerk
  - Fiduciary clerk enters receipt into data base

UCS 875 UCS 826

- UCS-875: Statement of Approval of Compensation
  - Court generated
  - Does not apply to court examiners
- UCS-826: Annual statement by the judge for court examiners



UCC-872: Effective January 1, 2004

INSTRUCTIONS TO APPOINTEE

- Review the information in Part A of the Office of Administrative Services' [illegible] and sign and return, as [illegible]
- [illegible] Social Security Number [illegible]
- [illegible]
- Appointment BEGINS upon receipt of Compliance Form [illegible] in accordance with Part B
- Appointment METHODS compensation, Compliance Form [illegible] in accordance of Compliance, [illegible] Part B

* Appointment METHODS compensation, the UCC Compliance Form [illegible] in accordance of Compliance, [illegible] signature in Part B
Date ..... Signature .....

- Return receipt of form [illegible] to the [illegible] Clerk [illegible]

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

PART B — **CERTIFICATE of Compliance**

1. Non-Attorney in Part A: If the compensation [illegible] in any single calendar year [illegible] in Column E.

A Index File No. (Number - year)	B Caption	C Court	D Attorneys Index	E Attorney's Compensation of $[illegible] or more
.....	.....	.....	.....	☐

Page 1 of 1

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2. **Part A attorneys: RECEIVED during CURRENT calendar year**

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

A Index File No. (Number - year)	B Caption	C Court	D Attorneys Index	E Anticipated Compensation of $15,000 or more
.....	.....	.....	Judge	☐
.....	.....	.....	Judge	☐
.....	.....	.....	Judge	☐
.....	.....	.....	Judge	☐
.....	.....	.....	Judge	☐
.....	.....	.....	Judge	☐
.....	.....	.....	Judge	☐
.....	.....	.....	Judge	☐
.....	.....	.....	Judge	☐
.....	.....	.....	Judge	☐

Page 1 of 1

UCC-872: Effective January 1, 2004

3. **Paid 18 appointments for which compensation was AWARDED during PRIOR calendar year**

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

A Index File No. (Number - year)	B Caption	C Court	D Attorneys Index	E Compensation Awarded
.....	.....	.....	Judge	$ .....
.....	.....	.....	Judge	$ .....
.....	.....	.....	Judge	$ .....
.....	.....	.....	Judge	$ .....
.....	.....	.....	Judge	$ .....
.....	.....	.....	Judge	$ .....
.....	.....	.....	Judge	$ .....
.....	.....	.....	Judge	$ .....
.....	.....	.....	Judge	$ .....
.....	.....	.....	Judge	$ .....

- Total compensation awarded during prior calendar year [illegible] from Column E: $ .....

4. I certify that I am in compliance with [illegible] of the Rules of the Chief Judge (22 NYCRR) for the appointment in Part A of this form.

Date: ..... Signature: .....

Return Court Clerk's signature to: Appellate Practice Unit, 27 Beaver Street, Room 440, New York, NY 10004

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PART 36. APPOINTMENTS BY THE COURT

§ 36.0 PREAMBLE

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

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

§ 36.1 APPLICATION

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

(1) guardians;
(2) guardians ad litem, including guardians ad litem appointed to investigate and report to the court on particular issues, and their counsel and assistants;
(3) law guardians who are not paid from public funds, in those judicial departments where their appointments are authorized;
(4) court evaluators;
(5) attorneys for alleged incapacitated persons;
(6) court examiners;
(7) supplemental needs trustees;
(8) receivers;
(9) referees (other than special masters and those otherwise performing judicial functions in a quasi-judicial capacity);
(10) the following persons or entities performing services for guardians or receivers:
  (i) counsel
  (ii) accountants
  (iii) auctioneers
  (iv) appraisers
  (v) property managers
  (vi) real estate brokers
(11) a public administrator within the City of New York and for the counties of Westchester, Onondaga, Erie, Monroe, Suffolk and Nassau and counsel to the public administrator, except that only sections 36.2(c) and 36.4(e) of this Part shall apply, and that section 36.2(c) shall not apply to incumbents in these positions until one year after the effective date of this paragraph.

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

(1) appointments of law guardians pursuant to section 243 of the Family Court Act, guardians ad litem pursuant to section 403-a of the Surrogate's Court Procedure Act, or the Mental Hygiene Legal Service;
(2) the appointment of, or the appointment of any persons or entities performing services for, any of the following:
  (i) a guardian who is a relative of (A) the subject of the guardianship proceeding or (B) the beneficiary of a proceeding to create a supplemental needs trust; a person or entity nominated as guardian by the subject of the proceeding or proposed as guardian by a party to the proceeding; a supplemental needs trustee nominated by the beneficiary of a supplemental needs trust or proposed by a proponent of the trust; or a person or entity having a legally recognized duty or interest with respect to the subject of the proceeding;
  (ii) a guardian ad litem nominated by an infant of 14 years of age or over;
  (iii) a nonprofit institution performing property management or personal needs services, or acting as court evaluator;
  (iv) a bank or trust company as a depository for funds or as a supplemental needs trustee;
  (v) except as set forth in section 36.1(a)(11), a public official vested with the powers of an administrator;
  (vi) a person or institution whose appointment is required by law;
  (vii) a physician whose appointment as a guardian ad litem is necessary where emergency medical or surgical procedures are required.
(3) an appointment other than above without compensation, except that the appointee must file a notice of appointment pursuant to section 36.4(a) of this Part.

§ 36.2 APPOINTMENTS

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

(b) Use of lists.

(1) All appointments pursuant to this Part shall be made by the appointing judge from the appropriate list of applicants established by the Chief Administrator of the Courts pursuant to section 36.3 of this Part.
(2) An appointing judge may appoint a person or entity not on the appropriate list of applicants upon a finding of good cause, which shall be set forth in writing and shall be filed with the fiduciary clerk at the time of the making of the appointment. The appointing judge shall send a copy of such writing to the Chief Administrator. A judge may not appoint a person or entity that has been removed from a list pursuant to section 36.3(e).
(3) Appointments made from outside the lists shall remain subject to all of the requirements and limitations set forth in this Part, except that the appointing judge may waive any education and training requirements where completion of these requirements would be impractical.

(c) Disqualifications from appointment.

(1) No person shall be appointed who is a judge or housing judge of the Unified Court System of the State of New York, or who is a relative of, or related by marriage to, a judge or housing judge of the Unified Court System within the fourth degree of relationship.
(2) No person serving as a judicial hearing officer pursuant to Part 122 of the Rules of the Chief Administrator shall be appointed in actions or proceedings in a court in a county where he or she serves on a judicial hearing officer panel for such court.
(3) No person shall be appointed who is a full-time or part-time employee of the Unified Court System. No person who is the spouse, sibling, parent or child of an employee who holds a position at salary grade JG24 or above, or its equivalent, shall be appointed by a court within the judicial district where the employee is employed or, with respect to an employee with statewide responsibilities, by any court in the state.
(4) (i) No person who is the chair or executive director, or their equivalent, of a state or county political party, or the spouse, sibling, parent or child of that official, shall be appointed while that official serves in that position and for a period of two years after that official no longer holds that position. This prohibition shall apply to the members, associates, counsel and employees of any law firms or entities while the official is associated with that firm or entity.
  (ii) No person who has served as a campaign chair, coordinator, manager, treasurer or finance chair for a candidate for judicial office, or the spouse, sibling, parent or child of that person, or anyone associated with the law firm of that person, shall be appointed by the judge for whom that service was performed for a period of two years following the judicial election. If the candidate is a sitting judge, the disqualifications shall apply as well from the time the person assumes any of the above roles during the campaign for judicial office.
(5) No former judge or housing judge of the Unified Court System, or the spouse, sibling, parent or child of such judge, shall be appointed, within two years from the date the judge left judicial office, by a court within the jurisdiction where the judge served. Jurisdiction is defined as follows:
  (i) The jurisdiction of a judge of the Court of Appeals shall be statewide.
  (ii) The jurisdiction of a justice of an Appellate Division shall be the judicial department within which the justice served.
  (iii) The jurisdiction of a justice of the Supreme Court and a judge of the Court of Claims shall be the principal judicial district within which the justice or judge served.
  (iv) With respect to all other judges, the jurisdiction shall be the principal county within which the judge served.
(6) No attorney who has been disbarred or suspended from the practice of law shall be appointed during the period of disbarment or suspension.
(7) No person convicted of a felony, or for five years following the date of sentencing after conviction of a misdemeanor (unless otherwise waived by the Chief Administrator upon application), shall be appointed unless that person receives a certificate of relief from disabilities.

(8) No receiver or guardian shall be appointed as his or her own counsel, and no person associated with a law firm of that receiver or guardian shall be appointed as counsel to that receiver or guardian, unless there is a compelling reason to do so.
(9) No attorney for an alleged incapacitated person shall be appointed as guardian to that person, or as counsel to the guardian of that person.
(10) No person serving as a court evaluator shall be appointed as guardian for the incapacitated person except under extenuating circumstances that are set forth in writing and filed with the fiduciary clerk at the time of the appointment.

(d) Limitations on appointments based upon compensation.
(1) No person or entity shall be eligible to receive more than one appointment within a calendar year for which the compensation anticipated to be awarded to the appointee in any calendar year exceeds the sum of $15,000.
(2) If a person or entity has been awarded more than an aggregate of $75,000 in compensation by all courts during any calendar year, the person or entity shall not be eligible for compensated appointments by any court during the next calendar year.
(3) For purposes of this Part, the term "compensation" shall mean awards by a court of fees, commissions, allowances or other compensation, excluding costs and disbursements.
(4) These limitations shall not apply where the appointment is necessary to maintain continuity of representation of or service to the same person or entity in further or subsequent proceedings.

§ 36.3 PROCEDURE FOR APPOINTMENT

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

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

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

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

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

§ 36.4 PROCEDURE AFTER APPOINTMENT

(a) Notice of appointment and certification of compliance.
(1) Every person or entity appointed pursuant to this Part shall file with the fiduciary clerk of the court from which the appointment is made, within 30 days of the making of the appointment, (i) a notice of appointment and (ii) a certification of compliance with this Part, on such form as promulgated by the Chief Administrator. Copies of this form shall be made available at the office of the fiduciary clerk and shall be transmitted by that clerk to the appointee immediately after the making of the appointment by the appointing judge. An appointee who accepts an appointment without compensation need not complete the certification of compliance portion of the form.
(2) The notice of appointment shall contain the date of the appointment and the nature of the appointment.
(3) The certification of compliance shall include:
(i) a statement that the appointment is in compliance with sections 36.2(c) and (d); and (ii) a list of all appointments received, or for which compensation has been awarded, during the current calendar year and the year immediately preceding the current calendar year, which shall contain (A) the name of the judge who made each appointment, (B) the compensation awarded, and (C) where compensation remains to be awarded, (i) the compensation anticipated to be awarded and (ii) separate identification of those appointments for which compensation of $15000 or more is anticipated to be awarded during any calendar year. The list shall include the appointment for which the filing is made.
(4) A person or entity who is required to complete the certification of compliance, but who is unable to certify that the appointment is in compliance with this Part, shall immediately so inform the appointing judge.

(b) Approval of compensation.
(1) Upon seeking approval of compensation of more than $500, an appointee must file with the fiduciary clerk, on such form as is promulgated by the Chief Administrator, a statement of approval of compensation, which shall contain a confirmation to be signed by the fiduciary clerk that the appointee has filed the notice of appointment and certification of compliance.
(2) A judge shall not approve compensation of more than $500, and no compensation shall be awarded, unless the appointee has filed the notice of appointment and certification of compliance form required by this Part and the fiduciary clerk has confirmed to the appointing judge the filing of that form.
(3) Each approval of compensation of $5,000 or more to appointees pursuant to this section shall be accompanied by a statement, in writing, of the reasons therefor by the judge. The judge shall file a copy of the order approving compensation and the statement with the fiduciary clerk at the time of the signing of the order.
(4) Compensation to appointees shall not exceed the fair value of services rendered. Appointees who serve as counsel to a guardian or receiver shall not be compensated as counsel for services that should have been performed by the guardian or receiver.

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

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

(e) Approval and Reporting of Compensation Received by Counsel to the Public Administrator.
(1) A judge shall not approve compensation to counsel to the public administrator in excess of the fee schedule promulgated by the administrative board of the public administrator under SCPA 1128 unless accompanied by the judge's statement, in writing, of the reasons therefor, and by the appointee's affidavit of legal services under SCPA 1108 setting forth in detail the services rendered, the time spent, and the method or basis by which the requested compensation was determined.
(2) Any approval of compensation in excess of the fee schedule promulgated by the administrative board of the public administrator shall be reported to the Office of Court Administration on a form promulgated by the Chief Administrator and shall be accompanied by a copy of the order approving compensation, the judge's written statement, and the counsel's affidavit of legal services, which records shall be published as determined by the Chief Administrator.
(3) Each approval of compensation of $5,000 or more to counsel shall be reported to the Office of Court Administration on a form promulgated by the Chief Administrator and shall be published as determined by the Chief Administrator.

§ 36.5 PUBLICATION OF APPOINTMENTS.

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

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

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

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

1. APPLICABILITY

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

A. GUARDIANS

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

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

B. GUARDIANS AD LITEM

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

C. LAW GUARDIANS

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

D. COURT EVALUATORS, ATTORNEYS FOR ALLEGED INCAPACITATED PERSONS, COURT EXAMINERS

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

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

E. SUPPLEMENTAL NEEDS TRUSTEES

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

F. RECEIVERS

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

G. REFEREES

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

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

because the $750 total compensation results from two separate appointments which are below the statutory threshold of $500 for each appointment (up to $250 for computation; $500 for sale).

H. Secondary Appointments Of Guardians And Receivers: Counsel, Accountants, Appraisers, Auctioneers, Property Managers, Real Estate Brokers

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

I. Public Administrator And Counsel To Public Administrator

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

2. APPROVED LISTS: APPLICATION, ENROLLMENT, USE

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

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

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

3. DISQUALIFICATIONS

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

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

b. a judicial hearing officer in a court in a county in which he or she serves as a judicial hearing officer;

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

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

e. a person who currently serves, or has served within the last two years (commencing January 1, 2003), as chair, executive director, or the equivalent, of a state or county political party; the spouse, brother/sister, parent or child of such political party official; or a member, associate, counsel or employee of a law firm or entity with which such political party official is currently associated;

f. a former judge or housing judge of the Unified Court System who left office within the last two years (commencing January 1, 2003) and who is applying for appointment within the jurisdiction of prior judicial service, as defined by section 36.2(c)(5) of the Rules of the Chief Judge; or the spouse, brother/sister, parent or child of such former judge;

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

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

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

j. a person who has been removed from an appointment list of the Chief Administrator of the Courts for unsatisfactory performance or conduct incompatible with appointment.

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

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

be appointed counsel. Similarly, if there are extenuating circumstances, such as the unavailability of others to be appointed guardian and a familiarity and trust developed between court evaluator and incapacitated person, a court evaluator may be appointed guardian upon a written finding by the court of extenuating circumstances.

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

4. LIMITATIONS ON APPOINTMENTS BASED UPON COMPENSATION

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

A. The $15,000 Rule

Section 36.2 (d)(1) prohibits appointees from receiving more than one appointment in the same calendar year (i.e., January 1 to December 31) for which compensation in excess of $15,000 is awarded in that calendar year or anticipated to be awarded in any calendar year. Two examples illustrate the rule. 1) If appointed as attorney for an alleged incapacitated person in 2003, and compensation of, for example, $20,000 for that appointment is awarded or anticipated to be awarded in that same year, then the appointee is precluded from receiving another appointment in 2003 for which compensation in excess of $15,000 is anticipated either in 2003 or in any single future year. 2) If appointed as guardian in 2003, for which an annual commission of, for example, $20,000 is anticipated to be awarded in the following year (2004), the appointee is precluded from receiving another appointment in 2003 for which compensation in excess of $15,000 is anticipated to be awarded either in 2003 or in any single future year.

B. The $75,000 Rule

Section 36.2 (d) (2) establishes a limitation on appointments based on an annual, aggregate amount of compensation. For calendar year 2007 and thereafter, if compensation is awarded in an aggregate amount of more than $75,000 during any calendar year (no matter what year the appointment was made), the appointee will be ineligible for any compensated appointments during the next calendar year. It is the year of the award of compensation, and not the year of its actual receipt, that activates the application of the rule. Like its $15,000 counterpart, the $75,000 rule is a limitation on appointments, and not on compensation; nothing in the $75,000 rule prevents a court's award, or an appointee's receipt, of total compensation exceeding $75,000 in any calendar year. Excess compensation in one year simply prevents compensated appointments in the following year.

5. PROCEDURE AFTER APPOINTMENT

A. Combined Notice Of Appointment And Certification Of Compliance

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

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

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

B. Approval Of Compensation

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

appointee. This will keep the database current for periodic publication under section 36.5.

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

6. REPORTING LAW FIRM COMPENSATION

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

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

7. PUBLICATION

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

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How to be an Effective Court Examiner – Red Flags, Pitfalls and Guardian Compliance

How not to let this happen on your watch:

"A brazenly dishonest guardian, neglectful court examiners and a guardianship system riddled with loopholes led to the theft of over 2 million from the estates of vulnerable victims who relied on that very system to protect them." (February 2004)

"Manhattan District Attorney Robert M. Morgenthau announced the indictment of a Brooklyn based-based lawyer and his law firm for stealing over $4 million from guardianship accounts the lawyer supervised for incapacitated people." (January 2009)

As the court examiner you are "the eyes and years of the court." Accordingly, you should be aware of the remedies for, and if necessary address, guardian non-compliance. The following enumerated items are presented in no particular order and are simply topics for today's discussion:

1. Sec. 81.35 MHL – Motion made on notice to the guardian and all interested parties, there are 3 grounds for removal – failure to comply with a court order; misconduct and "any other cause which to the court shall appear just," and may be made by the IP, the court examiner or any other person entitled to commence a proceeding under this article (almost anyone?);

2. Cursory examinations versus back up documentation;

3. Must meet guardians face-to-face at least once;

4. Using the internet to find people, places and things: ACRIS, County Clerk's records, NYS Comptroller's Office, Accurint, Westlaw, USPS and much more;

5. Is the IP (or guardian) dead? Social Security Death Index;

6. Court appointed and licensed appraisers only;

7. How to skim off the top: buying and selling real estate; paying too much for something; exorbitant parties; stolen cars and insurance proceeds; cash transactions; household help; hiring relatives; paying bills; adding information to checks after the check has cleared; phony receipts;

8. Lumping expenses together – "rent, insurance & utilities" = "household expenses";

9. Wills: if there is ANY evidence that the IP has a will, the time to track down the original and file it in Surrogate's court is when the IP is still alive; find out who drafted it; find out who the executor is; look for conflicts; find the attorney-draftsman; find the witnesses; instruct the guardian to bring the proceeding in Surrogate's Court;

10. Major unresolved issues can't wait for the next accounting cycle;

11. "Civility," "collegiality" and "being enforcement minded";

12. Compensation cap versus caseload cap.

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MHL ARTICLE 81 LEGAL UPDATE
November 2009

INTERESTING CASES

Matter of William C., 64 AD3d 277, 880 N.Y.S.2d 317, NY App Div LEXIS 4068 (2nd Dept 2009)

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

In re New York Foundation (Schoon), 14 A3d 317; 787 NYS2d 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.

In re Heckle (Aida C) In re Heckl, --- N.Y.S.2d ----, 2009 WL 3153021 (4th Dept.), 2009 N.Y. Slip Op. 06897

Granddaughter was appropriate guardian; conflict of interest disqualified personal assistant from serving as guardian over IP's person; appointing corporate counsel as guardian over property was warranted; and court did not violate IP's due process rights by requiring her to testify at hearing.

Matter of Ada (John D) 885 N.Y.S.2d 194, 2009 N.Y. Slip Op. 29368 (Sup Ct Cortland 2009

Petition was filed for appointment of guardian for former patient who was not presently incapacitated. Eugene E. Peckham, J., held that appointment of guardian was warranted.

In the Matter of Willie L.C. (Anonymous), 65 A.D.3d 683, 884 N.Y.S.2d 468, 2009 N.Y. Slip Op. 06323 (2nd Dept 2009)

AIP's daughter brought petition to declare him incapacitated and to be appointed guardian of his person and properly. AIP's sister cross petitioned to be appointed guardian. Proposed stipulation was contrary to public policy, and Supreme Court providently exercised its discretion in appointing sister as guardian.

In the Matter of DAVID J.Z. and Nahal Z (Emile Z) , Slip Copy, 24 Misc.3d 1241(A), 2009 WL 2633740 (N.Y.Sup.), 2009 N.Y. Slip Op. 51841(U) (Sup Ct Nassau 2009)

Court denies request for transfer of assets. Court will permit household budget.

COURT EXAMINER ISSUES, COMPENSATION OF GUARDIAN

Matter of Lillian A. (Wells), 56 AD3d 767; 2008 N.Y. App. Div LEXIS 9035 (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 William J.J., 32 A.D.3d 517; 820 N.Y.S. 2d 318 (2nd Sept 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.

Matter of Mary XX, 33 AD3d 1066; 822 NYS2d 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.

COMPENSATION

Seth Rubenstein v. Cynthia Ganea, 41 AD3d 54; 833 NYS2d 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 Anne M. T., __AD3d___; 2009 N.Y. App. Div. LEXIS 5860 (2nd Dept. 2009)

Appellate Division upwardly modifies order for counsel fees after finding that the trial 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 noteworthy 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 AD3d 531; 874 NYS2d 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 Audrey J.S., 34 AD3d 820; 825 NYS2d 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 Lukia QQ., 27 AD3d 1021; 812 NYS2d 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 AD3d 1018; 804 NYS2d 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 AD3d 850; 803 NYS2d 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 AD3d 756; 804 NYS 2d 387 (2nd Dept 2005), modified after remittitur 33 A.D. 3d 1002; 822 NYS 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.

Matter of Maylissa, 5 AD3d 4992; 772 NYS2d 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 Enid B., 7 AD3d704, 777 NYS2d 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 AD3d 729; 768 NYS2d 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 AD2d 681; 756 NYS2d 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 Ad2d 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 Kunzelmann, 199 AD2d 1068; 605 NYS2d 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 AD2d 583; 646 NYS2d (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.

Estate of Rose BB, 16 AD3d 801; 791 NYS2d 201(3rd Dept. 2005), revised judgement affirmed 35 AD3d 1044; 826 NYS2d 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. 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."

COMPENSATION OF COURT EVALUATOR

Matter of Englemeyer, 49 AD3d 348; 842 NYS2d 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 Nebrich, 23 AD3d 1018; 804 NYS2d 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.

SURROGATE'S COURT

Matter of Peer (Digney), 50 AD 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.

In the Matter of Enna D., 30 AD3d 518; 816 NYS2d 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.

GENERAL ISSUES: APPOINTMENT, POWERS, NEED, HEARINGS

Matter of May Far C., 61 AD3d 680; 877 NYS2d 367 (2nd Dept. 2009)

Order and Judgment 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 Elisabeth S.Z., 56 AD2d 792; 2008 NY Slip Op 9412 (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 Kurt T., 64 A.D.3d 819, 881 N.Y.S.2d 688, 2009 (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 Gloria N., 55 AD3d 309; 865 NYS 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.

In re Kaminester, 51 AD3d 528; 2008 NY App Div LEXIS 4315 (App. Div. 1st Dept.)

After the death of the IP it was discovered by the Executrix of his estate that his live in girlfriend had married him and transferred his property to her own name in violation of a temporary restraining order put into effect during the pendency of the Art 81 proceeding. These acts took place after the trial court had already determined, following a hearing, and interim decision that the AIP required the appointment of a guardian. Upon the petition of the Executrix to the Court that had presided over the guardianship proceeding (IAS Court), the court voided the transactions and held the AIP's former girlfriend in civil and criminal contempt of court and ordered her to pay substantial fines. On appeal by the girlfriend, the Appellate Division held that revocation of transactions is an available remedy under MHL §81.29(d) and that based upon the

medical evidence and hearing testimony, the IAS court had properly found evidence of cognitive deficits, properly shifted the burden and properly found that the respondent had failed to rebut that finding with medical evidence of her own that the AIP had the capacity to enter into those transactions.

Matter of Bell, 57 AD3d 397; 869 NYS2d 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.

APPOINTMENT OF GUARDIAN, REMOVAL OF GUARDIAN

Matter of Joseph D., 55 ADd3d 907; 865 NYS 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.

Matter of Audrey D., 48 AD3d 3d 806; 2008 N.Y. App Div. LEXIS 1742 (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 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 Joshua H., 62 AD3d 795; 2009 NY App Div Lexis 3749 (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 Francis M., 58 AD3d 937; 870 NYS2d 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 Mary Alice C., 56 AD3d 467; 867 NYS2d 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.

In the Matter of Yehuda C., 63 AD3d 923; 2009 N.Y. App. Div. LEXIS 4995 (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.

SEALING OF COURTROOM / COURT RECORDS

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.

In the Matter of V.W., 20 Misc3d1106A; 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.

Matter of Phillip Marshall (Brooke Astor), 13 Misc.3d 1203A; 824 NYS2d 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.

FRIVOLOUS LITIGATION

Matter of Dorothy N., 61 AD3d 871; 876 NYS2d 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.

CONTEMPT

Matter of Peer (Digney), 50 AD 3d, 1511; 856 N.Y.S. 385 (4th Dept. 2008)

Civil contempt is where the rights of an individual have been harmed by the contemnor's failure to obey a court order. Penalty imposed is not to punish but to compensate the injured party or to coerce compliance with the court's mandate or both No reason to incarcerate one provided demanded documentation and information before the commitment order was issued. In addition, there no reason to incarcerate because the rights of a party to the litigation were not prejudiced. Did not establish an injury requiring vindication.

ACCOUNTING PROCEEDINGS

Matter of Harry Y., 62 AD3d 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 NYS2d 165 (2nd Dept. 2009)

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

In the Matter of Campione, 58 AD3d 1032; 872 NYS 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 AD3d 983; 860 NYS 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 AD3d 1066; 822 NYS2d 659 (3rd Dept. 2006)

Matter of Carl K.D., 45 AD3d 1441; 846 NYS2d 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.

PUBLIC BENEFITS / MEDICAID

Matter of Ruben N., 55 AD3d 257; 863 NYS 2d 789 (1st Dept 2008)

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).

Wong v. Daines et al, 2008 U.S. Dist LEXIS 75453 (SDNY 2008)

In calculating Medicaid benefits, only income already contained in a payback SNT, which 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 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.

COMPENSATION

ATTORNEYS, COURT EVALUATORS AND GUARDIANS

Compensation for court evaluator

MHL 81.09 (f)

- When the judgment grants a petition, the court may award a reasonable compensation to court evaluator payable from the assets of the AIP.
- When the petition is denied or dismissed, the court may award a reasonable allowance to a court evaluator...payable by petitioner or by AIP.
- If AIP dies before determination made, court may award reasonable allowance to a court evaluator, payable by the petitioner or estate of AIP or by both in proportion as court determines is just.
- If petition is granted and AIP is indigent, there is no statutory provision or fund for payment.

Compensation for attorney for alleged incapacitated person

MHL 81.10 (f)

- Court determines reasonable compensation for attorney for AIP.
- AIP must pay for counsel unless indigent.
- If petition is dismissed (i.e., no guardian is appointed), court may also direct petitioner to pay compensation for the attorney for AIP.
- If AIP dies before determination, court may award reasonable compensation payable by petitioner or estate of AIP or by both in proportion as court determines is just.
- If AIP is indigent, payment through County Law 18-B might be possible (contact the county finance department)

Compensation for attorney for petitioner

MHL 81.16 (f)

- When petition is granted court may award reasonable compensation for attorney for petitioner (includes attorney general or DSS attorney) payable from assets of AIP.
- Whenever court deems it appropriate (including petition dismissed or discontinued), court may award reasonable compensation for attorney for petitioner (includes attorney general or DSS attorney
- If AIP indigent, no provision for payment.

Compensation for counsel to guardian

- Guardian must have power to hire counsel.
- If the guardian is a Part 36 guardian (i.e. not family or friend), then counsel to guardian is a secondary appointment governed by Part 36, 36.1 (a) (10).
- Secondary appointment of counsel to guardian must be made by the judge.
- Court determines reasonable compensation.
- Compensation is paid from AIP's assets.

General Principles for Attorney Compensation

- Court has inherent authority to supervise the fees charged by attorneys in Article 81 proceedings.
- The court has broad discretion in determining the reasonable amount to award as attorney's fees in guardianship proceedings
- The trial court must explain its reasoning for attorney fees awarded with reference to the required factors set forth in *Matter of Freeman*, 34 N.Y.2d 1, 355 N.Y.S.2d 336, 311 N.E.2d 480.
- Court must provide "a clear and concise explanation in written decision". *Matter of Mavis L.*, 285 A.D.2d 509, 727 N.Y.S.2d 640 (2nd Dept. 2001)

Factors which determine reasonableness of attorney fees (Matter of Freeman):

- (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 Freeman*, 34 N.Y.2d 1, 311 N.E.2d 480, 355 N.Y.S.2d 336 (Ct App 1974) and
- *Matter of Potts* 213 App.Div. 59 (1925), affd 241 N.Y. 593 (1925).

Supreme Court, Appellate Division, First Department, New York.

In re NEW YORK FOUNDATION FOR SENIOR CITIZENS, GUARDIAN SERVICES, INC., Petitioner-Respondent,
As the Guardian of the Personal Needs and Property Management of Ronald Schoon, an Incapacitated Person, Respondent-Appellant.

Jan. 4, 2005.

Background: In proceeding under Mental Hygiene Law, guardian appointed over incapacitated individual's person and property filed motion to be discharged. The Supreme Court, New York County, Phyllis Gangel-Jacob, J., granted motion, and Mental Hygiene Legal Service appealed.

Holding: The Supreme Court, Appellate Division, held that modifying guardian's responsibilities, after incapacitated person had threatened to kill guardian's caseworkers, did not require hearing.

Affirmed.

Modifying responsibilities of guardian appointed over incapacitated individual's person and property, after incapacitated person had threatened to kill the guardian's caseworkers with guns he kept in his apartment, did not require hearing, given a record sufficient to show that incapacitated person's resistance to guardianship was such as to make provision of services impossible.

****288** Marvin Bernstein, Mental Hygiene Legal Service, New York (Felice Wechsler of counsel), for appellant.

Miller, Canfield, Paddock and Stone, P.L.C., New York (Susan I. Robbins of counsel), for respondent.

MAZZARELLI, J.P., ELLERIN, NARDELLI, MARLOW, CATTERSON, JJ.

***318** Order, Supreme Court, New York County (Phyllis Gangel-Jacob, J.), entered September 12, 2003, which, in a proceeding under Mental Hygiene Law article 81, granted the guardian's motion to be discharged to the extent of relieving it of most of its responsibilities, unanimously affirmed, without costs.

The Supreme Court appointed the New York Foundation for Senior Citizens the guardian in March 2003 with the usual powers over the incapacitated individual's person and property, in-

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cluding the power to defend him in a pending eviction proceeding alleging that the police had found drugs, weapons and live ammunition in his apartment. In June 2003, based upon allegations that the incapacitated person had threatened to kill the guardian's caseworkers with guns he keeps in his apartment, the court had the incapacitated person brought before it, and, after a hearing, referred him to a psychiatric hospital for evaluation (Mental Hygiene Law § 9.43). Several days later, the hospital found the incapacitated person not dangerous to himself or others, and it released him. In August, the guardian made the instant motion to be discharged, alleging, inter alia, that the incapacitated person had threatened to shoot and kill one of its caseworkers.****289** Based on that allegation, the prior proceedings herein and its recollection of the incapacitated person on the prior occasions he had appeared in court, the court found that while he remains in need of a guardian, "his hostile, threatening and perhaps dangerous personality makes it unwise and perhaps impossible for any guardian to safely render services." Thereupon, the court limited the guardian's responsibilities to responding to written requests personally made by the incapacitated person, being present at any eviction of the incapacitated person and reporting to the court with respect thereto, assisting in finding shelter for the incapacitated person if requested, inquiring of the Veterans' Administration concerning any guardianship services it might be able to provide, and nominating a substitute guardian or suggesting a substitute "plan of action in this unusual and troubling case." The Mental Hygiene Legal Service appeals, arguing that under Mental Hygiene Law § 81.36, the court lacked authority to restore powers to the incapacitated person without holding a hearing and without a finding that he had regained the capacity to exercise them, and that the guardian's safety is not a ground for modifying its responsibilities. We reject this argument, and hold that the guardian's safety is a ground for modifying its responsibilities. No hearing was necessary given a record sufficient to show that respondent's resistance to the guardianship ***319** was such as to make the provision of services impossible.

N.Y.A.D. 1 Dept.,2005.
In re New York Foundation for Sr. Citizens, Guardian Services, Inc.
14 A.D.3d 317, 787 N.Y.S.2d 288, 2005 N.Y. Slip Op. 00016

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Supreme Court, Appellate Division, Fourth Department, New York.

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

Oct. 2, 2009.

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

Holdings: The Supreme Court, Appellate Division, held that:
(1) granddaughter was appropriate person to appoint as guardian of IP's person;
(2) conflict of interest disqualified personal assistant from serving as guardian over IP's person;
(3) appointing corporate counsel as guardian over property was warranted; and
(4) court did not violate IP's due process rights by requiring her to testify at hearing.
Affirmed as modified.

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

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

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

MEMORANDUM:

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

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

[1] Pursuant to Mental Hygiene Law § 81.19(d), in appointing a guardian the court should consider, inter alia, the social relationship between the IP and the proposed guardian (§ 81.19[d][2]); the care provided to the IP at the time of the proceeding (§ 81.19[d][3]); the educational and other relevant experience of the proposed guardian (§ 81.19[d][5]); the unique requirements of the IP (§ 81.19[d][7]); and the existence of any conflicts of interest between the IP and the proposed guardian (§ 81 .19[d][8]). With respect to the IP's granddaughter, the record establishes that, although the IP mistakenly believes that she does not have grandchildren, the IP and her granddaughter had shared a very close and loving relationship. Although the IP was not aware that she was related to her granddaughter, she enjoyed an evening with her granddaughter and other family members at a restaurant, and the IP invited her granddaughter to visit her at her home. In addition, the record establishes that the IP's granddaughter has experience in caring for two elderly women and has taken a training course with respect to the duties and responsibilities of a guardian of the person. The IP's granddaughter testified at the hearing on the amended petition that she is willing to work with the IP's personal assistant and recognizes her grandmother's dependence upon him. We thus conclude that there is no basis upon which to disturb the court's appointment of the IP's granddaughter as coguardian of the IP's person (*see Matter of Anonymous,* 41 A.D.3d 346, 839 N.Y.S.2d 78).

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

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

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

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

--- N.Y.S.2d ----, 2009 WL 3153021 (N.Y.A.D. 4 Dept.), 2009 N.Y. Slip Op. 06897

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50 A.D.3d 1511, 856 N.Y.S.2d 385, 2008 N.Y. Slip Op. 03767
(Cite as: 50 A.D.3d 1511, 856 N.Y.S.2d 385)

Supreme Court, Appellate Division, Fourth Department, New York.

In the Matter of Marion Digney PEER, Petitioner-Respondent,
Pursuant to Article 81 of the Mental Hygiene Law
for the Appointment of a Guardian of the Person and Property of Beryl R.D., an Alleged Incapacitated Person.
Kevin A. Digney, Cross-Petitioner-Appellant.

April 25, 2008.

Background: Daughter initiated proceeding for appointment of guardian for allegedly-incapacitated mother. After appointment of a new guardian pursuant to a settlement agreement, the Supreme Court, Onondaga County, Anthony J. Paris, J., found son who had previously acted as guardian to be in civil contempt of court, and ordered him committed to correctional facility for a term of 90 days as punishment. Son appealed.

Holding: The Supreme Court, Appellate Division, held that trial court could not order son committed to correctional facility for 90 days as punishment for civil contempt.

Reversed; proceeding transferred.

****386** Cote, Limpert & Van Dyke, LLP, Syracuse (M. Joanne Van Dyke of Counsel), for Cross-Petitioner-Appellant.

Richard D. Grossman, Warren, Vermont, for Petitioner-Respondent.

Costello, Cooney & Fearon, PLLC, Syracuse (Nicole M. Marlow of Counsel), for Respondent Warren W. Bader, as Public Administrator, C.T.A., of the Estate of Beryl R.D.

PRESENT: SCUDDER, P.J., HURLBUTT, SMITH, CENTRA, AND PINE, JJ.

MEMORANDUM:

***1511** Petitioner commenced this proceeding pursuant to article 81 of the Mental Hygiene Law seeking appointment of a guardian of the person and property of her mother, an alleged incapacitated person (AIP), and cross-petitioner, the AIP's son, moved to dismiss the petition and to continue to allow him to act as his mother's guardian and to allow his mother to continue to reside with him. The parties entered into a settlement agreement pursuant to which a third party was appointed as guardian for the AIP. The guardian raised issues concerning the propriety of certain transfers of property that were made by the AIP to cross-petitioner, and petitioner moved, inter alia, to hold cross-petitioner in contempt. Supreme Court, sua sponte, directed the guardian to retain an accounting firm to conduct an audit of certain financial accounts. Thereafter, the AIP died.

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[1] ***1512** We agree with cross-petitioner that the court abused its discretion in granting that part of petitioner's motion to hold cross-petitioner in contempt and ordering that he be committed to a correctional facility for a term of 90 days as punishment therefor. We note at the outset that, although the order does not specify whether****387** cross-petitioner was punished for criminal as opposed to civil contempt (*see* Judiciary Law §§ 750, 753; *Matter of Rose BB.,* 243 A.D.2d 999, 1000, 663 N.Y.S.2d 415; *Matter of Drimmer,* 97 A.D.2d 792, 793, 468 N.Y.S.2d 533), we conclude based on the court's reference to sections 756 and 761 of the Judiciary Law that he was in fact punished for civil contempt.

[2] "A civil contempt is one where the rights of an individual have been harmed by the contemnor's failure to obey a court order ... Any penalty imposed is designed not to punish but, rather, to compensate the injured private party or to coerce compliance with the court's mandate or both" (*Matter of Department of Envtl. Protection of City of N.Y. v. Department of Envtl. Conservation of State of N.Y.,* 70 N.Y.2d 233, 239, 519 N.Y.S.2d 539, 513 N.E.2d 706). Inasmuch as cross-petitioner complied with the court's orders, there was no reason to incarcerate him in order to coerce him to comply (*see* Judiciary Law § 774[1]; *N.A. Dev. Co. v. Jones,* 99 A.D.2d 238, 240, 472 N.Y.S.2d 363). Indeed, although the order recites that the finding of contempt was based upon cross-petitioner's willful failure to provide documentation and information to a forensic accountant as ordered by the court, it is undisputed that cross-petitioner provided such documentation and information before the commitment order was issued. In addition, there was no reason to incarcerate cross-petitioner herein inasmuch as "the rights of a party to the litigation [were not] prejudiced" (*Department of Envtl. Protection of City of N.Y.,* 70 N.Y.2d at 239-240, 519 N.Y.S.2d 539, 513 N.E.2d 706). Neither petitioner nor the guardian for the AIP established that they sustained "an injury requiring vindication" (*Matter of Aida C.,* 44 A.D.3d 110, 117, 840 N.Y.S.2d 516).

We further agree with cross-petitioner that the court should have granted his application, set forth in his opposition to petitioner's motion to hold him in contempt, seeking to transfer the remainder of the proceeding concerning the AIP to Surrogate's Court after her death (*see* N.Y. Const., art. VI, § 19 [a]). Because "Surrogate's Court must ultimately determine distribution of [the AIP's] estate and [we are] desirous of expediting the resolution of th[is] matter[ ], we find that the administration of justice will be better served by transferring the Mental Hygiene Law article 81 proceeding[ ] to Surrogate's Court" (*Matter of Rose BB.,* 262 A.D.2d 805, 807, 692 N.Y.S.2d 237, *lv. dismissed* 93 N.Y.2d 1039, 697 N.Y.S.2d 560, 719 N.E.2d 920).

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, that part of petitioner's motion to hold cross-petitioner in contempt is denied, cross-petitioner's application is granted and the remainder of the proceeding is transferred to Surrogate's Court, Onondaga County.

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Supreme Court, Cortland County, New York.

In the Matter of the **Application of ADA**, Shannon and Ann pursuant to
Art. 81 of the Mental Hygiene Law
for the appoint of a Guardian for John D.,
An Alleged Incapacitated Person.

Aug. 29, 2009.

Background: Petition was filed for appointment of guardian for former patient who was not presently incapacitated.

Holding: The Supreme Court, Cortland County, Eugene E. Peckham, J., held that appointment of guardian was warranted.
Petition granted.

***194** Adam Schaye, Esq., Miller Mayer, LLP, Ithaca, Attorney for Petitioners.

Joseph E. DeMari, Esq., Germain & Germain, Syracuse, Attorney for Respondent.

Mary E. Leonard, Esq., Leonard & Leonard, Cortland, Court Evaluator.

EUGENE E. PECKHAM, J.

A hearing was held on August 14, 2009, upon a petition under Article 81 of the Mental Hygiene Law for the appointment of a guardian for respondent John D. (hereafter, John). In a decision on the record, this Court found that John is not presently incapacitated, but that a protective arrangement in the form of a monitor of his financial affairs should be appointed. This decision is issued to fully explain the reasons for said decision, which is one of first impression in New York.

John has retired from his position as Senior Vice President of a large, publicly traded corporation. His assets are over $3,000,000.

The testimony established that respondent was hospitalized for severe depression. In December, 2007, he received therapy in the form of twenty-two electro-shock treatments. The electro-shock treatments apparently resolved his depression, but resulted in a period of hypo-mania. During the period of hypo-mania, he engaged in excessive and irrational spending.

Among other items, he loaned $130,000 to a friend for his restaurant business. The restaurant has gone out of business. He also loaned $5,000 to $10,000 to three individuals he just met which has not been repaid. He also purchased motorcycles, farm equipment and many gifts and appliances. In total, he estimates spending about $500,000 since February, 2008. This includes $120,000 for lake-front property and $70,000 for the Scott Hotel which needs extensive renovation. He testified he does not expect to make a profit from the Scott Hotel transaction, but rather

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to renovate it and then enter into a lease purchase with some other friends.

During his mental illness, his wife alleges he has threatened her and destroyed her art studio. As a result, she began a divorce action and obtained a protective order. John spent time in jail in June, ***195** 2008, for violation of the protective order and has pled guilty to two misdemeanors for violating the protective order. While in jail, he advanced bail money to two individuals he met in jail, some of which has been paid back.

Despite all this, John testified rationally and coherently about his mental illness and his reasons for these transactions. He also stated that since March, 2009, he has felt good and has recovered from his depression and hypo-mania. He keeps his doctor's appointments, but has been advised there is at least a 30% chance of a relapse. He makes his own investment decisions in consultation with a Merrill Lynch account executive. He is opposed to the appointment of a guardian because he claims it is not now necessary.

The Court Evaluator's report recommends that there is no need for any long-term guardianship and "that the role of any guardian be limited to protecting a certain amount of the principal and that John D. continue to have the right to participate in making investment decisions."

Article 81 of the Mental Hygiene Law represents a major change in the law of surrogate decision-making in New York. The guiding principle is the "least restrictive" form of intervention. "The legislature finds that it is desirable for and beneficial to persons with incapacities to make available to them the least restrictive form of intervention which assists them in meeting their needs but, at the same time, permits them to exercise the independence and self-determination of which they are capable". Further, the system is to be "tailored to the individual needs of that person ... which affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life" (MHL § 81.01).

In furtherance of this purpose, MHS § 81.16(b) provides for protective arrangements. The section provides the court may "ratify any transaction or series of transactions necessary to achieve any security, service or care arrangement meeting the foreseeable needs of the incapacitated person." Also that "before approving a protective arrangement ... The court shall consider the interests of dependents and creditors of the incapacitated person ..."

The leading treatise on guardianship in New York states in regard to this provision: "The court has a very broad selection of alternatives in addressing the case before it. It may ... (b) fashion a protective arrangement without appointing a guardian." Abrams, Guardianship Practice in New York, Chap. 1, § III(E)(3), p. 24. (1997).

The only similar case in New York is *Matter of Lambrigger,* N.Y.L.J., 5/31/94, p. 37, col. 1. In that case, the respondent suffered a stroke, was confined to a nursing home and was "unable to move about or communicate verbally." Nevertheless, the court found she was not incapacitated. The court then appointed a special guardian to assist her "in the preparation of any forms, documents or other papers necessary for her to implement any property management decisions she may make ..."

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In the present case, the court finds that John is not now incapacitated. Nevertheless, he has suffered from depression and hypo-mania in the recent past and he himself testified there is a significant chance of relapse. A relapse could result in a return to irrational expenditures which would be detrimental to his wife's claim for equitable distribution in the divorce action. MHL § 81.16(b) enjoins the Court to consider in any protective arrangement the rights of creditors and dependents. Accordingly, ***196** the Court finds that a protective arrangement is necessary to monitor and oversee John's financial activities and medical needs and appointments in light of the possibility of relapse.

Mary Leonard, attorney at law, is appointed as monitor to perform such duties with compensation at her regular hourly rates. This arrangement constitutes the least restrictive form of intervention for John's situation.

The powers and duties granted to Ms. Leonard are:

1. To receive and review copies of all John's bank, brokerage and other financial records and to speak to and confer with employees of any institution holding his assets or accounts.
2. To receive and review all of John's physician, hospital and other medical records and to speak to and confer with his physicians, psychologists and other medical providers.
3. To review and approve or disapprove any financial transaction in excess of $50,000.

Such appointment shall be for a period of one year with Ms. Leonard authorized to apply to the Court for an extension of her appointment on notice to John. In furtherance of such Order, both John and any financial institution holding any assets or accounts of John's are hereby restrained from transferring, releasing or paying to John or any other person or entity any amount of $50,000 or more without the written approval of Ms. Leonard.

There is also an existing order issued by Hon. Philip Rumsey in the matrimonial action between John and his wife restraining his Merrill Lynch account. MHL § 81.16(b) mandates consideration of the rights of dependents and creditors, therefore, such restraining order is continued to protect John's wife.

Part 36 of the Rules of the Chief Judge provides that a Court Evaluator shall not be appointed as guardian except under extenuating circumstances that are set forth in writing by the Court. Mary Leonard, Esq. is the Court Evaluator, but the Court finds such extenuating circumstances exist for several reasons: 1) she is an attorney at law and officer of the Court; 2) she is appointed to monitor John's activities, not act as guardian; 3) both petitioners and respondent have agreed to her appointment; 4) she is on the Part 36 list of guardians for Cortland County; 5) she is familiar with the unique circumstances of this case, the parties involved, and has already reviewed his financial situation and also received authorization from this Court to consult John's physicians and review his medical records.

Submit Order for settlement on notice.

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NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Supreme Court, Nassau County, New York.

In the Matter of the Appointment of DAVID J.Z. and Nahal Z.,
as Co-Guardians for the Personal Needs and Property Management of
EMIL Z., an Incapacitated Person.

No. 27771-I-04.

Aug. 13, 2009.

JOEL K. ASARCH, J.

****1** On or about October 8, 2004, DAVID J.Z. commenced a proceeding pursuant to Article 81 of the Mental Hygiene Law for the appointment of a Guardian for his father, EMIL Z., an Alleged Incapacitated Person. The Petition alleged that as the result of a stroke occurring during a routine cardiac catherization, EMIL Z. (age 51) was currently residing in PENINSULA HOSPITAL CENTER (Head Trauma Unit), Far Rockaway, New York, in a "minimally responsive condition" and that he required assistance with all activities of daily living. Following a hearing conducted herein, the Court appointed the Petitioner, DAVID J. Z., and his mother, NAHAL Z., as the Co-Guardians for the Personal Needs and Property Management of EMIL Z., an Incapacitated Person, by Order and Judgment dated February 7, 2005.

During the ensuing years, EMIL Z. was transferred to PARK TERRACE REHABILITATION AND NURSING CENTER, Corona, New York for further rehabilitation, and ultimately discharged to his residence in Great Neck, New York. At home, the Co-Guardians utilized the assistance of MAXIM HEALTH CARE SERVICES, INC. to provide full-time home health care for EMIL Z.

By Decision and Order dated September 26, 2005, the Court denied an application to transfer to NAHAL Z. certain property belonging to the Incapacitated Person with leave to renew upon notice to the NASSAU COUNTY DEPARTMENT OF SOCIAL SERVICES, a necessary and interested party to such application. As the Court stated in such Decision and Order, "where the co-guardians seek to transfer investment property and an interest in a business to the community spouse, as well as income, in anticipation of the incapacitated person applying for Medicaid benefits, the local department social services is a necessary party and they should be heard on the issue of such transfers being exempt from any Medicaid penalty period. Cf. Mental Hygiene Law § 81.07(g)(1)(v)."

The Co-Guardians subsequently renewed their application on notice to the NASSAU COUNTY DEPARTMENT OF SOCIAL SERVICES for an Order permitting the Co-Guardians to engage

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in prudent Medicaid planning, and to transfer all of the assets of the Incapacitated Person to his community spouse pursuant to Mental Hygiene Law Section 81.21(b). The assets sought to be transferred consisted of the family residence (held as Tenants-by-the-Entirety); certain investment property consisting of a cooperative apartment and a condominium unit owned by EMIL Z. and located in Great Neck, New York; a 25% interest of EMIL Z. in a closely-held family business; a life insurance policy issued by New York Life Insurance Company; the right to receive a monthly stipend; the balance of a jointly-held checking account; and several motor vehicles. In reaching its conclusion to permit the transfer to the community spouse, the Court held

"A guardian's authority to transfer the assets of an incapacitated person to another is derived from Mental Hygiene Law § 81.21(a)" *In re Burns,* 267 A.D.2d 755, 699 N.Y.S.2d 242 [3rd Dept.1999] *appeal after remand* 287 A.D.2d 862. "Furthermore, in enacting Mental Hygiene Law article 81, the Legislature gave statutory recognition to the common-law doctrine of substituted judgment' (citations omitted) by expressly authorizing the transfer of a part of the incapacitated person's assets to or for the benefit of another person on the ground that the incapacitated person would have made the transfer if he or she had the capacity to act' (Mental Hygiene Law § 81.21[a])," *Matter of John XX,* 226 A.D.2d 79,83, 652 N.Y.S.2d 329 [3rd Dept.1996], *leave to appeal denied,* 89 N.Y.2d 814 (1997).

****2** In *In re Shah,* 95 N.Y.2d 148,159 (2000), a case involving interspousal transfers for Medicaid planning, the Court of Appeals held that:

In determining whether to approve a specific application for a transfer of assets, the court shall consider several factors, including: "whether the donees or beneficiaries of the proposed disposition are the natural objects of the bounty of the incapacitated person and whether the proposed disposition is consistent with any known testamentary plan or pattern of gifts" (*Mental Hygiene Law § 81.21[d][4]*); and "whether the proposed disposition will produce estate, gift, income or other tax savings which will significantly benefit the incapacitated person or his or her dependents" (*Mental Hygiene Law § 81.21 [d][5]*). Considering these factors, a court may grant the application if satisfied by clear and convincing evidence that, among other things, "a competent, reasonable individual in the position of the incapacitated person would be likely to perform the act or acts under the same circumstances" (*Mental Hygiene Law § 81.21[e][2]*). We agree with the common sense verity uttered by the Appellate Division that the transfer here was properly authorized because "[t]here can be no quarreling with the Supreme Court's determination that any person in Mr. Shah's condition would prefer that the costs of his care be paid by the State, as opposed to his family" (citation omitted).

It was clear to the Court that based upon the care and persistent encouragement which NAHAL Z. continued to provide to her husband, the financial support which the Incapacitated Person had provided to his family prior to his injury, the ongoing disability of the Incapacitated Person, and the long-term marriage of the parties (in excess of TWENTY-FIVE (25) years), NAHAL Z. was clearly the "natural object[ ] of the bounty of the incapacitated person" and EMIL Z., if possessed of the ability to make such transfer, would certainly have desired that his assets be trans-

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ferred to his wife, NAHAL Z., to enable her to continue to provide for their family in the marital residence. *See* Mental Hygiene Law Section 81.21(b)-(e). Accordingly, the transfer of assets as sought in such application was granted by this Court, with no opposition.

Thereafter, the Co-Guardians were successful in settling a medical malpractice action instituted on behalf of EMIL Z. in the gross amount of FIVE MILLION ($5,000,000.00) DOLLARS. After payment of attorneys' fees and disbursements, the balance of funds was distributed as follows: the sum of $1,000,000.00 to NAHAL Z. in settlement of all claims for her loss of consortium and society; the sum of $200,000.00 to PARK TERRACE CARE CENTER, INC. as and for outstanding facility charges; the sum of $116,581.10 to MAXIM HEALTH CARE SERVICES, INC. as and for home health care services rendered to EMIL Z. in his home (and as a result of a lawsuit instituted by said health care agency as against EMIL Z. and NAHAL Z. for unpaid invoices), with the balance of $2,921,303.20 transferred to the guardianship account established hereunder at MERRILL LYNCH. A surety bond in this sum with BERKLEY REGIONAL INSURANCE COMPANY as surety thereon was filed by the Co-Guardians.

****3** The Co-Guardians now seek authority from this Court to reimburse themselves for individual sums advanced by them and to transfer the sum of $2,121,303.20 (less allowed reimbursements) from guardianship funds to NAHAL Z. as community spouse, thereby leaving a balance remaining of $800,000.00 in the guardianship account(s). Pursuant to the Amended Stipulation and Compromise Order which was "So Ordered" by the Hon. Edward W. McCarty, III, J.S.C., dated November 21, 2008, and issued in connection with the aforesaid medical malpractice action, the within application for such allocation and distribution of the remaining settlement proceeds was permitted to be made before the Guardianship Part.

Throughout this guardianship proceeding, this Court has been impressed by the unwavering devotion of the Co-Guardians to EMIL Z. NAHAL Z. visited her husband daily while he was a resident of the skilled nursing facility, and went to great lengths to monitor his care and encourage his progress, to be an outspoken advocate on his behalf, and to ensure that every option and/or treatment was considered. DAVID J. Z., too, has shown great commitment to his father--in essence, postponing his budding career to ensure his availability to assist with his father's continuing needs.

The Court recognizes the taxing nature of an unexpected and devastating incapacity, and fully appreciates the great lengths to which NAHAL Z. has gone to ensure that her husband was eventually able to return home--privately securing additional speech, occupational, cognitive/sensory, acupuncture, and hyperbaric therapies for his benefit, as evidenced by the bills attached to the moving papers. The Court also notes that NAHAL Z. expended individual funds to purchase a van to ensure the safety and comfort of EMIL Z. while being transported; to renovate and modify the home to make such environment handicapped-accessible; to secure the services of home health aides (a portion of which cost (to wit: $116,581.18) was paid from the medical malpractice settlement, as stated hereinabove); and to retain nurse practitioners and nursing assistants to care for her husband. In addition, NAHAL Z. sought professional counsel in connection with

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certain Medicaid issues and litigation against the closely-held family corporation. DAVID J.Z. also expended personal funds for the necessary general household expenses for the family.

The Co-Guardians each request reimbursement of such expenditures, and further request that the balance of the malpractice settlement (with the exception of $800,000.00) be transferred to NAHAL Z., as community spouse, thereby constituting a Medicaid exempt transfer. The Co-Guardians contend that the sum to remain in the guardianship account(s), to wit: $800,000.00, would be sufficient to care for the Incapacitated Person for a period of FIVE (5) years.

In reviewing the requests for reimbursement, it is clear that individual (non-guardianship) funds were expended by NAHAL Z. for the direct benefit of EMIL Z. as follows:

****4** (1)The cumulative sum of $87,337.00 for various therapies while he was residing at PARK TERRACE REHABILITATION AND NURSING CENTER during the period from February 7, 2005 through November 14, 2007. EMIL Z. was provided with cognitive/sensory therapy [August 6, 2006 through October 6, 2006]; hyperbaric oxygen therapy [April 2, 2007 through October 18, 2007]; acupuncture [March 1, 2006 through February 23, 2007]; occupational therapy [March 2, 2006 through November 12, 2007], and speech therapy for dysphasia [December 21, 2005 through September 20, 2007];

(2)The sum of $156,645.00 to PARK TERRACE REHABILITATION AND NURSING CENTER on account of the cost of care and room and board for EMIL Z. from February 7, 2005 through November 14, 2007, which sum was paid between June 20, 2006 and October 26, 2007. The balance owed to such facility was paid as part of the medical malpractice action settlement as stated hereinabove (to wit: $200,000.00);

(3)The sum of $46,594.86 to MAXIM HEALTHCARE SERVICES, INC. representing the difference between the amount billed ($163,176.04) and the amount paid as part of the medical malpractice action settlement (to wit: $116,581.18) for full-time home health aide assistance for EMIL Z. during the period from November 19, 2007 and May 31, 2008;

(4)The sum of $29,721.25 for the purchase of a Ford E250 van to transport EMIL Z. to various appointments. The Court notes that the family does own other motor vehicles; and

(5)The sum of $111,280.00 paid to licensed nurse practitioners and nurse assistants to assist with EMIL Z.'S care at home during the period from June 7, 2008 through February 28, 2009.

In reviewing copies of the Annual Reports and Accounts of the Co-Guardians for calendar years 2005 and 2006, the Court finds that these expenses do not appear to be duplicative. Accordingly, it is the decision of this Court that these expenditures totaling the sum of $431,578.11 should be reimbursed to the Co-Guardian, NAHAL Z., from the assets of the Incapacitated Person, EMIL Z.

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Similarly, in preliminarily reviewing the aforesaid accountings, it appears that DAVID Z. advanced from his personal funds the total sum of $63,583.15 to assist with the care and maintenance of his father and the payment of certain household expenses, and for which he appears to have been reimbursed the sum of $15,000.00. Notwithstanding further review by the Court Examiner and any adjustments required after analyzing the Annual Reports and Accounts through calendar year 2008, the Co-Guardians may reimburse DAVID J.Z. at the present time in the total sum of $45,000.00 from the assets of the Incapacitated Person.

The Court declines to reimburse Co-Guardian, NAHAL Z., for the cost of renovating the house which was previously transferred to her as community spouse pursuant to the Order of this Court dated November 30, 2005. As NAHAL Z. received the sum of $1,000,000.00 individually from the settlement of the medical malpractice action, a portion of such sum should be utilized for the modification of the real property that is now titled to her individually.

****5** Further, the issue of reimbursement of attorneys' fees paid to FREDERICK J. KRAMER, ESQ. for legal services rendered between March 31, 2008 and April 7, 2009; to COFFINAS & COFFINAS, LLP as specified in the written communication dated March 18, 2009; and THOMAS A. SIPP, ESQ., as detailed in the time sheets covering the period from October 10, 2005 through March 5, 2009 as attached to the moving papers, is denied without prejudice. It is the practice of this Court to have attorney fee requests reviewed by the Court Examiner, who then makes recommendations concerning same as part of his or her review of the Annual Reports and Accounts. In the present case, the Court Examiner shall review the various fee requests for services rendered by counsel, and shall make recommendations as to which such services directly benefitted EMIL Z. and the amount of the fees which the Court should allow to be paid from the funds of the Incapacitated Person for same. It should be noted that the Court is disinclined to reimburse the costs of litigation incurred in connection with the family-held corporation, as the ownership interest of same was previously permitted to be transferred to NAHAL Z. as community spouse.

Finally, with respect the that portion of the application seeking to transfer the remaining medical malpractice assets (with the exception of $800,000.00) to the community spouse, such application is also denied. The Court has considered the previous request and the Decision and Order granting the motion to transfer significant real estate and other assets to the community spouse in order to support her and her family during her husband's incapacity. The transfer of the remaining malpractice assets, however, does not fall within the same category.

While it is clear that the Co-Guardians are each devoted to EMIL Z. and have made certain that his significant needs are being met, the Court is concerned that two different service providers resorted to court intervention in order to receive payment for services rendered, as both the skilled nursing facility and the home health agency had outstanding charges satisfied from the malpractice settlement proceeds. While issues may have existed as to the propriety of the bill from the skilled nursing facility, the amount eventually compromised was, in essence, the outstanding principal amount. Similarly, MAXIM HEALTHCARE SERVICES, INC. had to wait a

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significant period of time to be paid the balance owed to them, notwithstanding the availability of substantial assets previously gifted to NAHAL Z. Therefore, the Court is hesitant to permit the transfer of additional assets of the Incapacitated Person, thus rendering him unable to pay for the cost of his own care and thereby compelling him to rely upon the discretion of others outside the jurisdiction of this Court with regard to the manner of payment and/or the timing thereof.

While the Court is not aware of any case law directly on point, it is clear that the funds allocated to EMIL Z. from the medical malpractice action (after payment of attorneys' fees, his outstanding obligations, and the sum earmarked for NAHAL Z.) were intended to and should generally encompass the future needs of the Incapacitated Person and should therefore remain in a vehicle(s) established for his benefit. *See e.g.,* C.P.L.R. 5031(c). Based upon the profound disability of EMIL Z., the cost of full-time assistance and supervision henceforth will be substantial--a factor which was likely contemplated in the course of settling the malpractice action. The monies recovered herein due to injuries sustained by EMIL Z. must be treated differently than those assets amassed during the course of the marriage which constituted the subject of the prior application for Medicaid planning. Based upon the genesis of such funds and the presumed intent of the litigants contributing thereto, the remaining funds should be utilized primarily for the continuing care and maintenance of EMIL Z. as opposed to being transferred to his community spouse.

****6** Notwithstanding the foregoing, this Court is willing to consider a budget for necessary household expenses (utilities, food, insurance, etc.) and for the cost of supporting the infant child of the parties. Upon receipt and review of such budget, the Court shall consider allocating a certain monthly sum to be used for the benefit of Incapacitated Person and his family.

Alternatively, the Co-Guardians may consider whether the creation and funding of a Supplemental Needs Trust for the benefit of EMIL Z. is appropriate and desired. Counsel shall advise Chambers and the Court Examiner in writing as to whether the Co-Guardians wish to establish a Supplemental Needs Trust with guardianship funds, the form of which shall be subject to the prior approval of the Court and on notice to all necessary and interested parties, including the NASSAU COUNTY DEPARTMENT OF SOCIAL SERVICES.

Accordingly, it is

ORDERED, that the Co-Guardians, DAVID J.Z. and NAHAL Z., are hereby authorized and directed to pay from the funds of the Incapacitated Person, the total sum of $431,578.11 to NAHAL Z. as and for reimbursement for expenditures made from individual funds to or for the benefit of EMIL Z., the Incapacitated Person; and it is further

ORDERED, that the Co-Guardians, DAVID J.Z. and NAHAL Z., are hereby authorized and directed to pay from the funds of the Incapacitated Person, the total sum of $45,000.00 to DAVID J.Z. as and for reimbursement of expenditures made from individual funds to or for the benefit of EMIL Z., the Incapacitated Person; and it is further

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ORDERED, that the Co-Guardians shall submit to the Court and the Court Examiner a proposed budget containing expenses anticipated for sustaining the household and supporting the infant child of EMIL Z. and NAHAL Z.; and it is further

ORDERED, that within THIRTY (30) DAYS of the date hereof, the Co-Guardians shall submit their Annual Report and Account for calendar year 2008, if not already accomplished; and it is further

ORDERED, that within SIXTY (60) DAYS of the date hereof, the Court Examiner, GUY R. VITACCO, JR., ESQ., shall submit to the Court his Report as Court Examiner covering the accounting periods through December 31, 2007. As a part of such review, the Court Examiner shall review the sums advanced by and reimbursed to DAVID J. Z., and shall make recommendation as to whether any additional funds are due to him; and it is further

ORDERED, that in all other respects, the motion is denied.

The foregoing constitutes the Decision and Order of the Court.

Slip Copy, 24 Misc.3d 1241(A), 2009 WL 2633740 (N.Y.Sup.), 2009 N.Y. Slip Op. 51841(U)
Unreported Disposition

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Monday, September 21, 2009

Trusts&Estates
Elder Law

PROMISSORY NOTES AND MEDICAID PLANNING

A LAST BASTION OF ASSET TRANSFERS FOLLOWING CHANGES IN FEDERAL LAW.

Jennifer B. Cona

With the passage of the Deficit Reduction Act of 2005, 42 U.S.C. §1396p, (DRA) the federal government sought to severely restrict Medicaid eligibility by radically changing the transfer of asset rules.

More particularly, the law was aimed at eliminating altogether transfer of asset strategies at the so-called 'crisis' phase, that is, last-minute transfers of assets just prior to or immediately after placement in a long-term care facility. However the federal law left open one planning strategy in particular-- planning via a promissory note.

The federal law specifically permits planning via a promissory note by disregarding the asset as countable if the note: 1) is actuarially sound; 2) provides for equal payments with no deferral or balloon payments; and 3) is not cancelled upon the death of the lender. 42 U.S.C. §1396p(c) (1). Following these specific requirements as well as the requirements set forth in the state Administrative Directive (06 OMM/ADM-5), the use of promissory notes became de rigueur for Medicaid/asset protection planning.

As could be anticipated, however, the counties that determine Medicaid eligibility have challenged promissory notes. This has left elder law attorneys and their clients fretting about the status of this federally authorized and heretofore permitted planning strategy, requiring practitioners to be on alert as they pursue this strategy.

To understand the prevalence of promissory note planning, attorneys must first understand the changes in the law wrought by the Deficit Reduction Act (DRA). Most attorneys are familiar with the increased look-back period from three years to five years. However, the most dramatic change in the law is the revised start date for a penalty period associated with a transfer of assets.

Under the prior law, the penalty period based on a transfer of assets commenced on

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the first day of the month following the date of the asset transfer. As such, a long-term care facility resident could preserve approximately one-half of his or her assets by the so-called 'rule of halves'; one-half of the assets transferred incurred a penalty period of a certain number of months (based upon the amount transferred) beginning the month following the transfer while the other one-half of assets maintained by the resident was used to pay the health care facility during the penalty period assessed on the transferred assets. Under this calculation, both the private pay funds and the penalty period were exhausted at the same time, allowing the resident to secure Medicaid eligibility on that date while preserving one-half of his/ her assets.

Under the DRA, the penalty period based on a transfer of assets does not begin until the facility resident is 'otherwise eligible' for Medicaid benefits but for the asset transfer. 42 U.S.C. 1396p (c)(1)(D)(ii). In other words, a Medicaid applicant must be both residing in a long-term care facility and below the resource limit, currently $13,800, before the penalty period clock will begin to run. This means that the resident must spend-down all of his or her remaining assets (to below the applicable resource limit) before the penalty period will begin on any asset transfers made in the past five years, regardless of when such transfers were actually made. The goal, of course, was to prohibit last-minute transfers of assets.

However, rather than curtailing such 'crisis' asset protection planning altogether, the DRA, by default, made available planning via a promissory note. The DRA calls for the inclusion of funds used to purchase certain notes and loans as 'assets' with respect to transfer of asset penalties unless the note or loan: 1) has a repayment term that is actuarially sound; 2) provides for payments to be made in equal amounts during the term of the loan, with no deferral or balloon payments; and 3) prohibits the cancellation of the balance upon the death of the lender. 42 U.S.C. 1396p(c)(1) (I); 06 OMM/ADM-5, III (3) and IV (6). By taking these enumerated requirements into consideration, the planning technique of asset preservation via a promissory note was born.

How It Works

In general, a promissory note is a contract wherein the maker of the note makes an unconditional promise in writing to pay a sum of money to the payee either at a fixed or determinable future time or on demand of the payee. In the Medicaid planning context, it works as follows: the health care facility resident transfers all of his funds (less the permissible resource allowance) to an individual (typically a family member).

The person receiving the funds signs a note promising to pay back approximately one-half of the monies transferred (the loaned assets), plus interest, to the resident on a monthly basis. The monthly amount to be paid back to the resident is calculated using the long-term care facility's daily rate less the resident's income. Upon payment of the monthly amount to the resident, the resident writes a check for the same amount to the facility. The note repayment amount covers payment to the facility during the penalty period incurred by the transfer of the other one-half of the assets (the gifted assets).

To illustrate: Mr. Smith transfers a total of $420,407.96 to his daughter on Sept.

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30, 2009, as a part-gift/part-loan transaction. The health care facility daily rate is $425 (a typical rate in the New York metro area) and Mr. Smith's monthly income totals $1,854. To determine the monthly loan repayments, Mr. Smith calculates the actual monthly cost at the facility private pay rate for each month (30 or 31 days) less his monthly income. He then calculates the average of the monthly payments during the term of the penalty period (number of months) and factors in an interest rate (typically 5 percent).

Here, the average monthly loan re-payment amount is $10,908.40 per month. This is the amount that Mr. Smith's daughter will pay back to him each month and which he will then turn over to the long-term care facility. The term of the loan will be 20 months beginning in October 2009. As such, $208,907.96 will be the total loan amount and $211,500 will be the total gift made to Mr. Smith's daughter, which amount is free and clear to her. After 20 months, the loan will be re-paid, the gifted money will be protected, and Mr. Smith will be eligible for Medicaid benefits.

In order for the strategy to work, there must be a monthly shortfall in the amount paid to the long-term care facility each month. This is so because the resident must have medical expenses greater than the Medicaid rate in order to be considered 'otherwise eligible' for Medicaid benefits while also having medical expenses he is unable to meet in full. 42 U.S.C. 1396p (c)(1)(D)(ii). Attorneys must be overly instructive in detailing for clients the exact monthly re-payment amount that must be paid to the health care facility each month regardless of the actual monthly invoice from the facility.

Social Services Challenges

Procedurally, the county Department of Social Services makes all initial Medicaid eligibility determinations. Such initial determinations may be challenged by filing a Reconsideration Application within 30 days of the initial eligibility notice (90 days in some counties, including New York City and all boroughs). In the event the applicant does not prevail via Reconsideration Application, the applicant may request a Fair Hearing, which must be done within 60 days of the initial notice. Since decisions on Reconsideration Applications are not generally made within 30 or even 60 days, it is a matter of practice to file a Reconsideration Application and request a Fair Hearing at the same time.

Administrative Law Judges (ALJ) preside over Fair Hearings, at which time the department presents its case, generally in narrative form, and appellant may offer a narrative history, put forth oral argument, submit a memoranda of law, call witnesses and cross-examine the department's representative and witnesses, if any. The proceedings are recorded, and the tape sent to the New York State Department of Health in Albany along with the case file. The ALJ makes a recommendation as to the outcome of the case, but the decision is made by the Commissioner of the Department of Health, via a Commissioner's Designee, in Albany.

Several issues and findings have come to light as promissory note cases have made their way through the system. Knowledge of these issues can help a practitioner navigate a case through to conclusion and/or provide instructive assistance for dealing with the hurdles and barriers as they may arise.

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In some instances, the local departments of social services have denied, at the initial approval level, Medicaid eligibility by assessing a penalty period on the loaned assets as if the entire note and loan transfer were a gift instead of assessing a penalty on one-half of the transfer. Use of a detailed 'schedule of gifts' should be employed to lay out for the agency the exact gift amount, loan amount and repayment schedule.

Note repayment terms and interest calculations should be amortized. This has been a source of consternation as the federal law calls for repayments to be in equal amounts during the term of the loan. 42 U.S.C. 1396p(c)(1)(I). As a result, loan repayment amounts must be trimmed to accommodate an amortized interest rate while maintaining an equal monthly repayment amount.

Promissory notes may not be canceled due to death. The federal law proscribes the cancellation of the balance upon the death of the lender. 42 U.S.C. 1396p(c)(i)(I)(iii). However, simply stating in the note that payments will not be cancelled in the event of the death of the lender may not be sufficient. Instead, a clause specifying that payments will continue to be made to the estate of the lender should be included in the note terms.

A typical note may state by its terms that the note can be modified, waived, changed or discharged only by written document signed by all parties. However, such language may be found violative of the DRA in that the note is thereby left open for modification, waiver or discharge.

As a rule, the promissory note strategy can only be employed when an applicant already is in a long-term care facility and is receiving services. Under the federal law, it is almost a condition precedent that a Medicaid applicant (the lender) be placed in a health care facility such that he or she can engage in promissory note planning because the applicant must be 'otherwise eligible' for Medicaid, that is, both below the resource limit and in the facility receiving care, before a penalty period can commence. 42 U.S.C. 1396p (c)(1)(D)(ii). However, after a Suffolk County Department of Social Services Fair Hearing, In the Matter of G.F., FH #5013919Q, the issue of post-nursing home admission execution of notes was brought to the fore.

In Matter of G.F., the Medicaid applicant was denied Medicaid eligibility even though a promissory note had been entered into due, in part, to the fact that the note was signed after the applicant was admitted to the nursing home. As noted above, the execution of a note post-facility admission cannot be grounds for denial of a Medicaid Application.

Conclusion

The federal law was aimed at reducing, if not eliminating, asset transfers for the purpose of securing Medicaid eligibility. It should not come as a surprise, then, that the state and counties would push back against new asset protection planning strategies. As this strategy evolves, practitioners should be mindful of the many pitfalls and carefully advise clients of the uncertainties. Clearly, the new asset protection strategies under the DRA are not for the weak of heart.

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9/21/2009 NYLJ S1, (col. 1)

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Effective: January 3, 2009

Mckinney's Consolidated Laws of New York Annotated Currentness
Mental Hygiene Law (Refs & Annos)
Chapter 27. Of the Consolidated Laws (Refs & Annos)
Title E. General Provisions (Refs & Annos)
Article 81. Proceedings for Appointment of a Guardian for Personal Needs or Property Management (Refs & Annos)
→ **§ 81. 44. Proceedings upon the death of an incapacitated person**

(a) When used in this section:

1. "Statement of death" means a statement, in writing and acknowledged, containing the caption and index number of the guardianship proceeding, and the name and address of the last residence of the deceased incapacitated person, the date and place of death, and the names and last known addresses of all persons entitled to notice of further guardianship proceedings pursuant to paragraph three of subdivision (c) of section 81.16 of this article including the nominated and/or appointed personal representative, if any, of the deceased incapacitated person's estate.

2. "Personal representative" means a fiduciary as defined by subdivision twenty-one of section 103 of the surrogate's court procedure act to whom letters have been issued and who is authorized to marshal the assets of the decedent's estate.

3. "Public administrator" means a public administrator within or without the city of New York, as established by articles eleven and twelve of the surrogate's court procedure act, or the chief fiscal officer of a county eligible to be appointed an administrator, pursuant to section twelve hundred nineteen of the surrogate's court procedure act. The role of the public administrator under this section is that of a stake holder or escrowee only, and the public administrator shall not, by virtue of this section, have a substantive role in administering the estate.

4. "Statement of assets and notice of claim" means a written statement under oath containing the caption and index number of the guardianship proceeding, the name and address of the incapacitated person at the time of death, a description of the nature and approximate value of guardianship property at the time of the incapacitated person's death; with the approximate amount of any claims, debts or liens against the guardianship property, including but not limited to medicaid liens, tax liens and administrative costs, with an itemization and approximate amount of such costs and claims or liens.

(b) Unless otherwise directed by the court, all papers required to be served by this section shall

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be served by regular mail and by certified mail return receipt requested.

(c) Within twenty days of the death of an incapacitated person, the guardian shall:

1. serve a copy of the statement of death upon the court examiner, the duly appointed personal representative of the decedent's estate, or, if no person [FN1] representative has been appointed, then upon the personal representative named in the decedent's will or any trust instrument, if known, and upon the public administrator of the chief fiscal officer of the county in which the guardian was appointed, and

2. file the original statement of death together with proof of service upon the personal representative and/or public administrator or chief fiscal officer, as the case may be, with the court which issued letters of guardianship.

(d) Within one hundred fifty days of the death of the incapacitated person, the guardian shall serve upon the personal representative of the decedent's estate or where there is no personal representative, upon the public administrator or chief fiscal officer, a statement of assets and notice of claim, and, except for property retained to secure any known claim, lien or administrative costs of the guardianship pursuant to subdivision (e) of this section, shall deliver all guardianship property to:

1. the duly appointed personal representative of the deceased incapacitated person's estate, or

2. the public administrator or chief fiscal officer given notice of the filing of the statement of death, where there is no personal representative.

3. any dispute as to the size of the property retained shall be determined by the surrogate court having jurisdiction of the estate.

(e) Unless otherwise ordered by the court upon motion by the guardian on notice to the person or entity to whom guardianship property is deliverable, and the court examiner, the guardian may retain, pending the settlement of the guardian's final account, guardianship property equal in value to the claim for administrative costs, liens and debts.

(f) Within one hundred fifty days of the incapacitated person's death, the guardian shall file his or her final report with the clerk of the court of the county in which annual reports are filed, and thereupon proceed to judicially settle the final report upon such notice as required by subdivision (c) of section 81.33 of this article, including notice to the person or entity to whom the guardianship property was delivered. There shall be no extension of the time to file a final report except by order of the court.

(g) Upon failure of the guardian to comply with subdivisions (d) or (f) of this section, any person entitled to notice of this proceeding may file a petition to compel the guardian to account, to sus-

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pend and/or remove the guardian, and to take and state the guardian's account.

CREDIT(S)

(Added L.2008, c. 175, § 2, eff. Jan. 3, 2009.)

[FN1] So in original ("person" should be "personal").

HISTORICAL AND STATUTORY NOTES

2009 Electronic Update

Former Sections

Former § 81. 44 was renumbered Mental Hygiene Law § 81.43 by L.2004, c. 438, § 27, eff. Dec. 13, 2004.

PRACTICE COMMENTARIES

2009 Electronic Update

by Rose Mary Bailly

2008

Although it is generally accepted that the death of an incapacitated person terminates the guardian's authority, article 81 lacked specific directions about what steps the guardian needs to take under those circumstances and this lack of direction has result in conflicting views about what needs to be done.*See e.g., Matter of Peer (Digney),* 50 A.D.3d, 1511; 856 N.Y.S. 385 (4th Dept. 2008). *See generally,* Colleen F. Carew and John J. Reddy Jr., *The Article 81 Guardian and the Personal Representative,* N.Y.L.J. (Aug. 20, 2008).*See also* Chapter 175 of the Laws of 2008 Sponsor's Memorandum.

Chapter 175 of the laws of 2008 addresses that gap. New section 81. 44 provides direction to the guardian of the steps to take immediately and the ultimate steps.

The guardian has 20 days after the death to notify the court examiner, the duly appointed personal representative of the decedent's estate, or, none has been appointed, the personal representative named in the decedent's will or any trust instrument, and the public administrator of the chief fiscal officer of the county in which the guardian was appointed, and file the original statement of death together with proof of service with the court which appointed the guardian.

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The guardian has 150 days after the death to file the final report with the guardianship court and move to settle the final account. The guardian must also serve a statement of assets and notice of claim and deliver all guardianship property, except for property retained to secure any known claim, lien or administrative costs, to the duly appointed personal representative of the deceased incapacitated person's estate, or, if there is no personal representative, he public official given notice of death.

The Surrogate's Court with jurisdiction over the estate has jurisdiction of over any dispute regarding the amount of the property retained.

If the guardian fails to comply with these requirements, any person entitled to notice under this section can commence a proceeding to compel the guardian to account, or to suspend and/or remove the guardian.

As the Sponsor's Memorandum notes:

This proposal is designed to facilitate the transition between a guardianship for an incapacitated person and an estate after the death of such incapacitated person. It clad ties the rights of the personal representative of the estate to marshal guardianship funds and codifies the right of the guardian to retain a reserve to cover reasonably anticipated administrative expenses of the guardianship. It also requires the personal representative of the estate to be noticed on the guardian's application to be discharged and for approval of the guardian's final accounting. Lastly it authorizes the guardian to pay the funeral bill and, if no personal representative has been appointed to marshal assets. to pay estimated taxes. This should give guidance to guardians and others as to the procedures which should be followed upon the death of an incapacitated person and eliminate jurisdictional confusion between the personal representative of the estate and the guardian of the incapacitated person's property.

McKinney's Mental Hygiene Law § 81. 44, NY MENT HYG § 81. 44

Current through L.2009, chapters 1 to 14 and 16 to 347.

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New York Sponsors Memorandum, 2008 A.B. 8977
2008

New York Assembly

231st Legislature, 2008 Regular Session .

SPONSORS MEMO:

NEW YORK STATE ASSEMBLY

MEMORANDUM IN SUPPORT OF LEGISLATION

submitted in accordance with Assembly Rule III, Sec 1(e)

BILL NUMBER: A8977

SPONSOR: RiveraP

TITLE OF BILL:

An act to amend the mental hygiene law, in relation to proceedings upon the death of an incapacitated person

PURPOSE OR GENERAL IDEA OF BILL:

To set forth specific proceedings which must occur upon the death of an incapacitated person to facilitate the transition from a guardianship to an estate.

SUMMARY OF SPECIFIC PROVISIONS:

Section One: Amends subdivision (a) of Section 81.34 of the Mental Hygiene Law to mandate that the guardian of an incapacitated person notify the personal representative of the estate as well as the court that the guardian has paid all taxes and fully discharged his or her duties to the incapacitated person. Further it authorizes the guardian to pay the funeral expenses of the incapacitated person and, in the event a personal representative has not been appointed, to pay the estimated estate and income tax charges.

Section Two: Adds a new Section 81.44 to the Mental Hygiene Law to specify those proceedings and things which must be done by the guardian of an incapacitated person upon the death of such person to transition the guardianship to an estate. Included in these provisions is the requirement that the guardian prepares and distributes within twenty days of the death of an incapacitated person a statement of assets itemizing the value of the guardianship property at the time of the inca-

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pacitated person's death and the amount of any claims or liens against the guardianship property. Thereafter and within one hundred and fifty days of an incapacitated person's death a statement of assets and notice of claim must be prepared together with a final report to be filed with the court.

Section Three: Provides that this legislation will take effect on the one hundred and eightieth day after it shall have become law.

JUSTIFICATION:

This proposal is designed to facilitate the transition between a guardianship for an incapacitated person and an estate after the death of such incapacitated person. It clad ties the rights of the personal representative of the estate to marshal guardianship funds and codifies the right of the guardian to retain a reserve to cover reasonably anticipated administrative expenses of the guardianship. It also requires the personal representative of the estate to be noticed on the guardian's application to be discharged and for approval of the guardian's final accounting. Lastly it authorizes the guardian to pay the funeral bill and, if no personal representative has been appointed to marshal assets, to pay estimated taxes. This should give guidance to guardians and others as to the procedures which should be followed upon the death of an incapacitated person and eliminate jurisdictional confusion between the personal representative of the estate and the guardian of the incapacitated person's property.

PRIOR LEGISLATIVE HISTORY:

New Bill.

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS:

None.

EFFECTIVE DATE:

One Hundred Eighty days after it shall have become law.

NY Spons. Memo., 2008 A.B. 8977
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SUPREME COURT (COUNTY COURT) OF THE STATE OF NEW YORK
COUNTY OF _____

----------X

In the Matter of the Guardianship of

Xxxxx Yyyyyyyy

An Incapacitated Person

----------X

Index No.: _____

STATEMENT OF DEATH OF INCAPACITATED PERSON

TO THE SUPREME COURT (COUNTY COURT) OF THE STATE OF NEW YORK, COUNTY OF _____

1. Name of Guardian: _____

2. Name of Incapacitated Person: _____

3. Last address or residence of Incapacitated Person: _____
   _____

4. Date of Death of Incapacitated Person: _____

5. Place of Death of Incapacitated Person: _____
   _____

6. Name of Nominated or Appointed Personal Representative of Incapacitated Person's estate, if any (e.g. executor): _____
   Address: _____

7. Names and addresses of persons entitled to notice of further guardianship proceedings as ordered by the court pursuant to MHL 81.16(c)(3) (Add additional pages, if necessary):

   A. Name: _____
   Address: _____
   Relationship to Incapacitated Person: _____

   B. Name: _____
   Address: _____
   Relationship to Incapacitated Person: _____

   C. Name: _____
   Address: _____
   Relationship to Incapacitated Person: _____

D. Name:_____
Address: _____
Relationship to Incapacitated Person: _____

E. Name:_____
Address: _____
Relationship to Incapacitated Person: _____

Dated:_____, New York

_____, 20____

_____
Signature of Guardian

State of New York)
) ss.:
County of _____)

On the ..... day of ..... in the year 20..... before me, the undersigned, personally appeared ....., personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

_____
Notary Public, State of New York

To:
_____, Court Examiner, and

_____, Court-Appointed Personal Representative, or

If no Court-Appointed personal representative:
_____, Personal Representative Named in Incapacitated Person's will or trust, **and**
_____, Public Administrator or Chief County Fiscal Officer.

SUPREME COURT (COUNTY COURT) OF THE STATE OF NEW YORK
COUNTY OF _____

----------X

In the Matter of the Guardianship of

Xxxxx Yyyyyyyy

An Incapacitated Person

----------X

Index No.: _____

STATEMENT OF ASSETS AND NOTICE OF CLAIM

TO THE SUPREME COURT (COUNTY COURT) OF THE STATE OF NEW YORK, COUNTY OF _____

1. Name of Guardian: _____
2. Name of Incapacitated Person: _____
3. Last address or residence of Incapacitated Person: _____
   _____
4. Date of Death of Incapacitated Person: _____

Please list the ***approximate value*** as of the date of death of the assets marshaled by the guardian and under the control of the guardian, please be specific, please itemize and use additional pages as necessary:

5. Describe the location and value of guardianship bank accounts:

   A. Bank : _____
   Approximate Current Value: _____

   B. Bank:: _____
   Approximate Current Value: _____

6. List the type, location and value of any securities, stocks, bonds, mutual funds, certificates of deposit, interests in business, money owed to the Incapacitated Person, etc.

   _____
   _____
   _____
   _____
   _____
   _____

7. List any valuable personal property of the guardianship, e.g., automobiles, valuable jewelry, art work, antiques, valuable home furnishings:

   _____
   _____
   _____

8. List amount of any Medicaid claims against the guardianship: _____

_____

_____

9. List any tax liens or taxes due (income, estate, property)_____

_____

_____

_____

10. List any other outstanding debts, claims, or liens against the guardianship assets (include unpaid bills from household expenses, credit card debt, funeral expenses, care providers, mortgages, coop / condo maintenance, loans, home equity loans: _

_____

_____

_____

_____

11. List the approximate amount of administrative costs anticipated necessary to end the guardianship (e.g. attorney fees, accountant fees, court examiner fees, guardian compensation, bond premiums):

_____

_____

Dated:_____, New York

_____, 20____

_____
Signature of Guardian

Sworn to before me this
_____day of _____, 20____

_____
Notary Public, State of New York

To:

_____,
Court-Appointed Personal Representative, or

If no Court-Appointed personal representative:

_____,
Personal Representative Named in Incapacitated Person's will or trust, **and**

_____,
Public Administrator or Chief County Fiscal Officer.

Judiciary Law
Rules of Professional Conduct
Rule 1.5. Fees and Division of Fees

(a) A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. The factors to be considered in determining whether a fee is excessive may include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule. This provision shall not apply when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client. Any changes in the scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing stating the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or, if not prohibited by statute or court rule, after the contingent fee is calculated. The writing must clearly notify the client of any expenses for which the client will be liable regardless of whether the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a writing stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge or collect:

(1) a contingent fee for representing a defendant in a criminal matter;

(2) a fee prohibited by law or rule of court;

(3) a fee based on fraudulent billing;

(4) a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated; or

(5) any fee in a domestic relations matter if:

(i) the payment or amount of the fee is contingent upon the securing of a divorce or of obtaining child custody or visitation or is in any way determined by reference to the amount of maintenance, support, equitable distribution, or property settlement;

(ii) a written retainer agreement has not been signed by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement; or

(iii) the written retainer agreement includes a security interest, confession of judgment or other lien without prior notice being provided to the client in a signed retainer agreement and approval from a tribunal after notice to the adversary. A lawyer shall not foreclose on a mortgage placed on the marital residence while the spouse who consents to the mortgage remains the titleholder and the residence remains the spouse's primary residence.

(e) In domestic relations matters, a lawyer shall provide a prospective client with a statement of client's rights and responsibilities at the initial conference and prior to the signing of a written retainer agreement.

(f) Where applicable, a lawyer shall resolve fee disputes by arbitration at the election of the client pursuant to a fee arbitration program established by the Chief Administrator of the Courts and approved by the Administrative Board of the Courts.

(g) A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:

(1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;

(2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and

(3) the total fee is not excessive.

(h) Rule 1.5(g) does not prohibit payment to a lawyer formerly associated in a law firm pursuant to a separation or retirement agreement.

Rules of Prof. Con., Rule 1.5 McK. Consol. Laws, Book 29 App., NY ST RPC Rule 1.5

Judiciary Law
Rules of Professional Conduct

Rule 1.14. Client With Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.

(b) When the lawyer reasonably believes that the 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.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Rules of Professional Conduct
Rule 1.15. Preserving Identity of Funds and Property of Others; Fiduciary Responsibility; Commingling and Misappropriation of Client Funds or Property; Maintenance of Bank Accounts; Record Keeping; Examination of Records

(a) Prohibition Against Commingling and Misappropriation of Client Funds or Property.

A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

(b) Separate Accounts.

(1) A lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law shall maintain such funds in a banking institution within New York State that agrees to provide dishonored check reports in accordance with the provisions of 22 N.Y.C.R.R. Part 1300. "Banking institution" means a state or national bank, trust company, savings bank, savings and loan association or credit union. Such funds shall be maintained, in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member, or in the name of the lawyer or firm of lawyers by whom the lawyer is employed, in a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm, and separate from any accounts that the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity; into such special account or accounts all funds held in escrow or otherwise entrusted to the lawyer or firm shall be deposited; provided, however, that such funds may be maintained in a banking institution located outside New York State if such banking institution complies with 22 N.Y.C.R.R. Part 1300 and the lawyer has obtained the prior written approval of the person to whom such funds belong specifying the name and address of the office or branch of the banking institution where such funds are to be maintained.

(2) A lawyer or the lawyer's firm shall identify the special bank account or accounts required by Rule 1.15(b)(1) as an "Attorney Special Account," "Attorney Trust Account," or "Attorney Escrow Account," and shall obtain checks and deposit slips that bear such title. Such title may be accompanied by such other descriptive language as the lawyer may deem appropriate, provided that such additional language distinguishes such special account or accounts from other bank accounts that are maintained by the lawyer or the lawyer's firm.

(3) Funds reasonably sufficient to maintain the account or to pay account charges may be deposited therein.

(4) Funds belonging in part to a client or third person and in part currently or potentially to the lawyer or law firm shall be kept in such special account or accounts, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(c) Notification of Receipt of Property; Safekeeping; Rendering Accounts; Payment or Delivery of Property.

A lawyer shall:

(1) promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest;

(2) identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them; and

(4) promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive.

(d) Required Bookkeeping Records.

(1) A lawyer shall maintain for seven years after the events that they record:

(i) the records of all deposits in and withdrawals from the accounts specified in Rule 1.15(b) and of any other bank account that concerns or affects the lawyer's practice of law; these records shall specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement;

(ii) a record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed;

(iii) copies of all retainer and compensation agreements with clients;

(iv) copies of all statements to clients or other persons showing the disbursement of funds to them or on their behalf;

(v) copies of all bills rendered to clients;

(vi) copies of all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed;

(vii) copies of all retainer and closing statements filed with the Office of Court Administration; and

(viii) all checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips.

(2) Lawyers shall make accurate entries of all financial transactions in their records of receipts and disbursements, in their special accounts, in their ledger books or similar records, and in any other books of account kept by them in the regular course of their practice, which entries shall be made at or near the time of the act, condition or event recorded.

(3) For purposes of Rule 1.15(d), a lawyer may satisfy the requirements of maintaining "copies" by maintaining any of the following items: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

(e) Authorized Signatories.

All special account withdrawals shall be made only to a named payee and not to cash. Such withdrawals shall be made by check or, with the prior written approval of the party entitled to the proceeds, by bank transfer. Only a lawyer admitted to practice law in New York State shall be an authorized signatory of a special account.

(f) Missing Clients.

Whenever any sum of money is payable to a client and the lawyer is unable to locate the client, the lawyer shall apply to the court in which the action was brought if in the unified court system, or, if no action was commenced in the unified court system, to the Supreme Court in the county in which the lawyer maintains an office for the practice of law, for an order directing payment to the lawyer of any fees and disbursements that are owed by the client and the balance, if any, to the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(g) Designation of Successor Signatories.

(1) Upon the death of a lawyer who was the sole signatory on an attorney trust, escrow or special account, an application may be made to the Supreme Court for an order designating a successor signatory for such trust, escrow or special account, who shall be a member of the bar in good standing and admitted to the practice of law in New York State.

(2) An application to designate a successor signatory shall be made to the Supreme Court in the judicial district in which the deceased lawyer maintained an office for the practice of law. The application may be made by the legal representative of the deceased lawyer's estate; a lawyer who was affiliated with the deceased lawyer in the practice of law; any person who has a beneficial interest in such trust, escrow or special account; an officer of a city or county bar association; or counsel for an attorney disciplinary committee. No lawyer may charge a legal fee for assisting with an application to designate a successor signatory pursuant to this Rule.

(3) The Supreme Court may designate a successor signatory and may direct the safeguarding of funds from such trust, escrow or special account, and the disbursement of such funds to persons who are entitled thereto, and may order that funds in such account be deposited with the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(h) Dissolution of a Firm.

Upon the dissolution of any firm of lawyers, the former partners or members shall make appropriate arrangements for the maintenance, by one of them or by a successor firm, of the records specified in Rule 1.15(d).

(i) Availability of Bookkeeping Records: Records Subject to Production in Disciplinary Investigations and Proceedings.

The financial records required by this Rule shall be located, or made available, at the principal New York State office of the lawyers subject hereto, and any such records shall be produced in response to a notice or subpoena duces tecum issued in connection with a complaint before or any investigation by the appropriate grievance or departmental disciplinary committee, or shall be produced at the direction of the appropriate Appellate Division before any person designated by it. All books and records produced pursuant to this Rule shall be kept confidential, except for the purpose of the particular proceeding, and their contents shall not be disclosed by anyone in violation of the attorney-client privilege.

(j) Disciplinary Action.

A lawyer who does not maintain and keep the accounts and records as specified and required by this Rule, or who does not produce any such records pursuant to this Rule, shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings.

Rules of Prof. Con., Rule 8.3 McK.Consol.Laws, Book 29 App.

Mckinney's Consolidated Laws of New York Annotated

Judiciary Law

Rules of Professional Conduct [Eff. April 1, 2009. See Code of Professional Responsibility, Ante.]

Rule 8.3. Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(b) A lawyer who possesses knowledge or evidence concerning another lawyer or a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct.

(c) This Rule does not require disclosure of:

(1) information otherwise protected by Rule 1.6; or

(2) information gained by a lawyer or judge while participating in a bona fide lawyer assistance program.
Rules of Prof. Con., Rule 8.3 McK. Consol. Laws, Book 29 App., NY ST RPC Rule 8.3

Current April 1, 2009.