

COURT EXAMINER ART. 81 MOTION PRACTICE:

THE COURT'S PERSPECTIVE

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By Frances C. Bowen, Esq.

I. INTRODUCTION

A. Court Examiner is the first line of defense for the court:

- follows case
- advises court of problems
- ensures Guardian's accountability to Incapacitated Person (IP)

B. Order and Judgment Appointing Guardian of the Person and Property notifies Guardian of reporting requirements

- Initial Report:

“ORDERED AND ADJUDGED, that pursuant to Section 81.30 of the Mental Hygiene Law no later than ninety days after the issuance of the commission to the Guardian, the Guardian shall file with the Court an initial report in a form prescribed by the Court, a copy of which should be mailed to *(Insert name and address of Court Examiner of pertinent County), (Insert name of Court Evaluator), (Insert name of Counsel for Incapacitated Person), (If Incapacitated Person resides in a facility, insert name of Chief Executive Officer), (If Incapacitated Person resides in a mental hygiene facility, insert name of Mental Hygiene Legal Service of judicial dept. in which residence is located), and (IF APPLICABLE: Insert name of Incapacitated Person)*”

- Annual Report:

“ORDERED AND ADJUDGED, that the Guardian shall file during the month of May in the office of the Clerk of the Court an annual report in the form required by Section 81.31 of the Mental Hygiene Law, a copy of which should be mailed to *(Insert name and address of Court Examiner of pertinent County), (if Incapacitated Person resides in a facility, insert name of Chief Executive Officer), (If Incapacitated Person resides in a mental hygiene facility, insert name of Mental Hygiene Legal Service of judicial dept. in which residence is located) and (IF APPLICABLE: Insert name of Incapacitated Person)*”

C. Findings should state whether IP should receive copies of the initial and annual reports [MHL Sec. 81.15(b)(7)]:

“That *(NAME OF INCAPACITATED PERSON)* (shall / shall not) receive copies of the initial and annual reports.”

- D. Order and Judgment Appointing Guardian of the Person and Property should list the Court Examiner as a person to be given notice of all further proceedings

II. COMPLIANCE

A. Failure to report - MHL 81.32(c)

- If Guardian fails to file initial or annual report, Court Examiner is statutorily mandated to demand that the Guardian file report within 15 days after service of demand upon him or her. Copy of demand is served upon Guardian by certified mail.
- After expiration of 15 days, if Guardian has not complied with demand and has failed to file report, Court Examiner may make a motion to court, requesting an order:
 - requiring compliance with the demand
 - denying or reducing Guardian's compensation
 - removing Guardian pursuant to MHL Sec. 81.35, absent a showing that the Guardian has acted in good faith
- Guardian will be required to appear on the return date of the motion and the appropriate order will be entered by the court
 - the sanctions available under Art. 81 are more forceful than those that were available under Articles 77 and 78 and are intended to reinforce the serious nature of the Guardian's obligation to report to the court on the affairs of the IP
 - If Guardian fails comply with order and reporting requirements, Court Examiner can make a contempt motion

B. Incomplete report - MHL 81.32(d)

- When an incomplete report has been filed, Court Examiner is statutorily mandated to demand that the Guardian file a revised report, or proof of any item in the report. Copy of demand is served upon Guardian by certified mail.
- Upon failure to comply with demand, Court Examiner may make a motion to court requesting an Order:

- requiring compliance with the demand
- denying or reducing Guardian's compensation
- removing Guardian pursuant to MHL Sec. 81.35, absent a showing that the Guardian has acted in good faith
- Court Examiner may also examine the Guardian and other witnesses under oath and reduce their testimony to writing.
MHL 81.32(e)

III. DEATH OF INCAPACITATED PERSON

In the past, Art. 81 lacked specific directions about what steps the Guardian needs to take upon the death of an incapacitated person. MHL 81.44 (eff. 1/3/09) addresses that gap.

A. Statement of Death - MHL 81.44(a) & (c)

- Statement in writing made by Guardian and acknowledged
- Sets forth:
 - caption and index number of guardianship proceeding
 - name and address of last residence of deceased incapacitated person
 - date and place of death
 - names and last known addresses of all persons entitled to notice of further guardianship proceedings pursuant to MHL 81.16(c)
 - name and address of nominated and/or appointed personal representative, if any, of deceased incapacitated person's estate
- Within 20 days of death of incapacitated person, Guardian must:
 - Serve copy of Statement of Death upon:

- ◆ Court Examiner
- ◆ duly appointed personal representative of decedent's estate, if any
- ◆ if no personal representative has been appointed, then upon the personal representative named in decedent's will or any trust instrument
- ◆ local department of social services
- ◆ chief fiscal officer of county in which Guardian was appointed
- File original Statement of Death with the court which issued letters of guardianship, together with proof of service

B. Statement of Assets and Notice of Claim - MHL 81.44(d)

- Written statement of the Guardian under oath
- Sets forth:
 - caption and index number of guardianship proceeding
 - name and address of incapacitated person at time of death
 - description of the nature and approximate value of guardianship property as of the date of death
 - approximate amount and description of any claims, debts, or liens against the guardianship property (e.g. Medicaid liens, tax liens, administrative costs)
- Within 150 days of death, Guardian must:
 - Serve Statement of Assets and Notice of Claim upon:
 - ◆ personal representative of decedent's estate
 - ◆ where there is no personal representative, upon the public administrator or chief fiscal officer

- Deliver property to:
 - ◆ the duly appointed personal representative, or
 - ◆ the public administrator or chief fiscal officer given notice of the filing of the statement of death, where there is no personal representative
- Guardian may retain certain funds from guardianship property pending settlement of Final Account, equal in value to claim for administrative costs, liens, and debts
 - ◆ Upon motion by Guardian, with notice to Court Examiner and person to whom the guardianship property is deliverable

C. Final Report - MHL 81.44(f)

- Within 150 days of 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 proceed to judicial settlement of the final report
- Extension of time to file report may only be obtained by court order
- The court may appoint a referee to hear the matter and report to the court. MHL 81.33(d)

D. Compliance

- If Guardian fails to comply with notice, turn over and reporting requirements of MHL 81.44(d) or (f), any person entitled to notice of the judicial settlement may file a petition to compel Guardian to account, to suspend and/or remove the Guardian, and to take and state the Guardian's account

At a Term of the Supreme Court of the State of New York held in and for County of _____ at the Courthouse, _____, New York on the ____ day of __, ____.

PRESENT: HON. David H. Guy
Acting Supreme Court Justice

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF

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In the Matter of the Application of (NAME OF PETITIONER), Petitioner Pursuant to Article 81 of the Mental Hygiene Law for the Appointment of a Guardian of the Person and Property of (NAME OF INCAPACITATED PERSON), an Alleged Incapacitated Person.

FINDINGS
Index No.:

RJI No. :

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An Order to Show Cause (NAME OF INCAPACITATED PERSON) an alleged incapacitated person, show cause why a guardian of the Person and Property should not be appointed for (NAME OF INCAPACITATED PERSON) and granting other relief as set forth therein, and (NAME OF COURT EVALUATOR) having been appointed as Court Evaluator and having duly appeared as same and having given his report as required by law, and (NAME OF COUNSEL) having been appointed as Counsel to (NAME OF INCAPACITATED PERSON), the Alleged Incapacitated Person, and having duly appeared as same and (NAME OF PETITIONER) the petitioner herein and (NAME OF PETITIONER'S ATTORNEY), attorney for the petitioner, having appeared, and this matter having regularly come on for a hearing on _____, and upon all the pleadings and proceedings heretofore

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had herein, and due deliberation having been had thereon.

NOW, the court does hereby make the following findings pursuant to Section 81.15 of the Mental Hygiene Law based on clear and convincing evidence introduced at the hearing,

1. That (NAME OF INCAPACITATED PERSON) suffered (explain disabilities).

Based on (his/her) functional limitations and (his/her) inability to adequately understand and appreciate the nature and consequences of such functional limitations (NAME OF INCAPACITATED PERSON) is likely to suffer harm. The appointment of a guardian is necessary to protect (NAME OF INCAPACITATED PERSON) with respect to property management and personal care.

2. (IF APPLICABLE) that (NAME OF INCAPACITATED PERSON) has consented on the record to the appointment of (NAME OF GUARDIAN) as the Guardian of (his/her) Person and Property.

3. (IF APPLICABLE) That the presence of (NAME OF INCAPACITATED PERSON) was dispensed with because

(CHOOSE either a or b):

- a) (he/she) is completely unable to participate in the hearing, pursuant to MHL 81.11(c)(2)

OR

- b) no meaningful participation would result from (his/her) presence

at the hearing, pursuant to MHL 81.11(c)(2).

4. That (NAME OF GUARDIAN) is an appropriate guardian and the petition of (NAME OF PETITIONER) is hereby granted.

5. That pursuant to Sections 81.21 and 81.22 of the Mental Hygiene Law, the Guardian shall have the following powers:

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