

Outline
Court Examiner Update '11-12
January 31, 2012

Advocacy for Persons Who Lack Capacity -
The Role and Function of the Mental Hygiene Legal Service

Carol Pressman, Esq.
Principal Attorney

SECTION I - AN INTRODUCTION TO THE MENTAL HYGIENE LEGAL SERVICE

A. General Jurisdiction

Statutory Basis: MHL §§ 47.01, 47.03

Enabling Regulations, Third Department: 22 N.Y.C.R.R. Part 823

The MHLS (formerly the Mental Health Information Service), is an agency of the New York State, Supreme Court, Appellate Division, which provides protective legal services, advice and assistance to persons receiving care and treatment or alleged to be in need of care and treatment at in-patient and community-based facilities for mentally disabled individuals.

Created in 1964, MHLS operates under a uniform enabling statute codified at MHL article 47 and uniform regulations of the Appellate Divisions.

B. Objectives of MHLS

- to ensure that persons who are mentally ill or developmentally disabled are afforded due process and equal protections under the law;
- to provide legal counsel for its clients in judicial and administrative proceedings concerning admission, retention, transfer, care and treatment;
- to study and review the admission and retention of all patients in psychiatric hospitals and developmental centers;
- to investigate and take legal action relative to cases of abuse and mistreatment, and
- to make appropriate referrals for other needed services.

C. MHLS Jurisdiction in Guardianship Proceedings

Statutory Basis: MHL §§ 81.06; 81.09(b)(1); 81.10(e)
Enabling Regulations: 22 N.Y.C.R.R. §§ 823.2(b); 823.3

The MHLS may appear as court evaluator, counsel or in its agency capacity in article 81 guardianship proceedings. The Service may be appointed as court evaluator or counsel regardless of whether the person alleged to be incapacitated resides in a mental hygiene facility.

- Court Evaluator (MHL § 81.09[b])

If the Court appoints MHLS as the evaluator and upon investigation the Service determines that it represents the interests of the incapacitated person as counsel or that counsel should otherwise be appointed, MHLS shall so report to the court. The Service shall be relieved of its appointment as court evaluator whenever MHLS represents as counsel or assigned to represent the person alleged to be incapacitated
(*see also* 22 N.Y.C.R.R. § 823.3).

- Counsel (MHL § 81.10[e])

The court may appoint as counsel the MHLS in the judicial department where the person alleged to be incapacitated resides.

3. Agency capacity (MHL § 81.06)

The MHLS may act as a petitioner in a guardianship proceeding where a constituent of the Service may be in need of the appointment of a guardian. Typically, the jurisdiction of the Service is invoked pursuant to MHL § 81.06 (a)(6) as an agency concerned with the welfare of the person alleged to be incapacitated.

One of the more typical fact scenarios where MHLS will commence a guardianship proceeding occurs when a constituent of the Service receives a windfall payment of some type and is in need of the establishment of a supplemental needs trust or some other property management devices.

D. Duties of MHLS in Guardianship Proceedings

In addition to the statutory duties of counsel and court evaluator, when MHLS appears in a guardianship proceeding pursuant to a court appointment its enabling regulations require the Service to:

- examine the papers and ascertain that the notices required to be given to the alleged incapacitated person other persons entitled thereto have been served and that there has been compliance with statutory procedures;

- examine records relating to the affairs or medical or psychiatric condition of the alleged incapacitated person;
- interview the alleged incapacitated person, advise him/her of the nature of the proceeding, including the right to counsel and a hearing and ascertain whether the alleged incapacitated person has any objection to the proceeding, the proposed guardian or any other objections;
- interview any psychiatrist, examining psychologist or other such psychiatrist who has knowledge of the alleged incapacitated person's mental and physical condition;
- obtain all available information as to the extent and nature of the alleged incapacitated person's assets;
- obtain all available information concerning the alleged incapacitated person's family background and any other fact that may be necessary or desirable (22 N.Y.C.R.R. § 823.2(b)).

SECTION II- SITUATIONS WHERE JURISDICTION OF MHLS AND COURT EXAMINERS MAY INTERSECT

A. General Jurisdiction -Review of Initial and Annual Reports

Statutory Basis: MHL § 81.30, 81.31

Enabling Regulations: 22 N.Y.C.R.R. § 823.2(b)(4)(5)(6)

Following the appointment of a guardian the jurisdiction and oversight of MHLS continues for those incapacitated persons who are residents of mental hygiene facilities and for others through the service of initial and annual reports.

- MHL § 81.30(f) (initial report)

The guardian shall send a copy of the initial report to the court evaluator and counsel for the incapacitated person at the time of the guardianship proceeding unless the court orders otherwise.

- MHL § 81.30(i) (initial report)

If the incapacitated person resides in a mental hygiene facility, the guardian shall send a copy of the initial report to the MHLS of the judicial department in which the facility is located.

- MHL § 81.31 (c) (annual report)

If the incapacitated person resides in a mental hygiene facility, the guardian shall send a copy of the annual report to the MHLS of the judicial department in which the facility is located. If the Service was appointed as court evaluator or as counsel for the incapacitated person at the time of the guardianship proceeding, the guardian shall send a duplicate of such report to the MHLS of the judicial department where the venue of the proceeding was located if so ordered by the court.

B. MHLS role in Future Proceedings Involving the Incapacitated Person

In proceedings subsequent to the appointment of a guardian, MHLS enabling regulations at section 823.2(b)(4)(5)(6) provide that the Service shall:

- inform the incapacitated person of the nature of the proceeding and his or her rights in all proceedings for the discharge of a guardian, the enforcement or modification of a guardianship order, or the approval of a guardian's report or accounting (823.2[b][4]).
- In its discretion, the Service may and in an appropriate case, apply to the Court for discharge of the guardian or the enforcement or modification of an order appointing the guardian (823.2[b][5])

C. Informing Court Examiners of the Circumstances of Incapacitated Persons

- The Service also is also authorized to:

Apprise the examiners charged with the review of accounts with regard to any matter within the jurisdiction of such examiner affecting the welfare and property of a party or patient for whom a guardian has been appointed (823.2[b][6]).

SECTION III - CASE STUDIES

~~X~~ **A. Proceeding to Discharge Guardian/MHLS in its Agency Capacity.**

- *Matter of MH*
- *Matter of LC*

B. Proceeding to Appoint a Guardian - MHLS in its Agency Capacity

- *Matter of DH*

C. MHLS Role as Counsel for the Person Alleged to be Incapacitated

- X
- *Matter of DJ B ?*
 - *Matter of Beverly YY*

SECTION IV -PRACTICE FORMS

- Form 1: Order to Show Cause Commencing Application to Remove Guardian due to Incapacity
- Form 2: Petition to Remove Guardian (to accompany Form 1)
- Form 3: Order to Show Cause Commencing Application to Remove Guardian for Breach of Fiduciary Duty
- Form 4: Petition to Remove Guardian (to accompany Form 3)
- Form 5: Order Removing Guardian (to accompany Form 3)

FACT PATTERN

Matter of DMH

DMH is a fifty-seven year old mildly mentally retarded individual who resides with her mother who is also her MHL article 81 guardian. DMH receives day treatment services through a local chapter of the NYSARC, Inc., which is a "mental hygiene facility" licensed by the Office for People With Developmental Disabilities (OPWDD) formerly OMRDD.

DMH and her mother have lived together for many years, but in 2008, DMH was placed on a waiting list for residential services with NYSARC, Inc. DMH's mother and guardian began to experience a rapid decline in her cognitive functioning in 2010 due to dementia. She was unable to manage her own health care needs and could not maintain a safe environment for herself or DMH. In addition to being developmentally disabled, DMH has serious mental and medical conditions of her own including depression, diabetes, obesity, osteoporosis and hearing loss. Despite these multiple mental and physical concerns, DMH's mother/guardian cancelled many of her medical appointments resulting in DMH's attending physicians discharging DMH from their services. These discharges resulted in medication and treatment lapses which put DMH at risk of harm. Referrals for both DMH and her mother/guardian were made to the county Health Department and Department of Social Services (DSS).

DMH was admitted to the hospital with high blood pressure and high blood sugar. Her condition was stabilized and discharge planning commenced. DMH's mother/guardian wanted DMH to be discharged home, but DMH's physician and county officials were of the view that DMH's mother/guardian could not care for DMH because of the mother/guardian's own dementia. The standby guardian (DMH's brother) lives in California and agrees that his mother is not able to care for DMH, but will not take a position counter to that of his mother. In the meantime, DMH was accepted for placement in an OPWDD family care home and the hospital contacted MHLS to ascertain whether MHLS could assist to ensure that DMH was provided with a safe discharge plan. MHLS met with DMH and determined that it was DMH's wish to enter the family care home. MHLS investigated the matter further by reviewing records, speaking with clinicians at the hospital and NYSARC Inc. and with county officials. MHLS also identified a cousin who was very concerned about DMH's welfare and could be a resource in the community. DSS and the county health department were both of the view that DMH and her mother /guardian were endangered adults. DSS was not able to devote immediate resources for the case, however, and was not prepared to commence a judicial proceeding in time to address DMH's immediate needs.

This fact pattern presents dire circumstances confronting two disabled individuals. DMH was in need of:

- (1) Immediate respite placement so she could be safely discharged from the hospital;
- (2) long-term community placement and advocacy;
- (3) discharge of her current guardian due to the guardian's own incapacity and

potentially the appointment of a new guardian.

Her mother/guardian was in need of nursing home placement.

Remedies Invoked on Behalf of DMH

- (1) MHL § 81.23(b)- provisional remedy authorizing DMH's immediate placement in an OPWDD community residence;
- (2) an order removing the current guardian on the grounds that the guardian is incapacitated by reason of dementia; and
- (3) an order appointing a new guardian for DMH.

In this case, DMH's guardian was removed upon the guardian's consent and DMH was placed, consistent with her wishes, in an OPWDD family care home. DMH's standby guardian returned from California and immediately took steps to safeguard the welfare of both DMH and his mother consistent with their best interests. Because of his demonstrated commitment to DMH he was appointed permanent guardian and continues in that role.

While DMH's mother/guardian is not an MHLS constituent DSS, pursuant to its adult protective services responsibilities, placed DMH's mother/guardian in a nursing facility equipped to meet her needs.

See Forms (1) and (3) in the materials for copies of the pleadings which secured this relief.

FACT PATTERN

Matter of LC

In 2009, an MHL article 81 guardian of the property was appointed for LC, a resident of a nursing home. MHLS was appointed as counsel in that proceeding pursuant to MHL § 81.10. Following the guardian's appointment the primary asset of the incapacitated person (a savings account) was seriously depleted. Over a two year period more than \$100,000 was expended from the account through highly suspect ATM and debit card transactions. The spending typically occurred near race tracks and gaming establishments and also occurred at restaurants and in stores.

During the period the spending accumulated, LC remained confined to a nursing home. In fact, on only one occasion had she left the nursing home during this entire period of time. In addition and following the guardian's appointment, the guardian failed to file her initial report as required by MHL § 81.31. The bank conducted an audit after its fraud investigation unit noted the suspicious activities regarding the ATM transactions near race tracks and gaming centers. With the cooperation and assistance of the court examiner and upon a request by county court, MHLS was asked to commence an application to protect the financial interests of LC.

Remedies Invoked on Behalf of LC

- (1) Removal of guardian pursuant to MHL § 81.35 for failure to file initial and annual reports;
- (2) removal of guardian for breach of fiduciary duty;
- (3) temporary relief prohibiting withdrawals from LC's bank accounts absent further order of the court;
- (4) temporary relief restraining the guardian of the property of LC from withdrawing funds from any accounts of LC.

This case resulted in an order removing the guardian and criminal charges were also filed against the guardian. The guardian accepted a plea bargain that included a sentence of five years probation and restitution. It was also determined that LC was not in need of the appointment of a new guardian after demonstrated improvement in her mental status.

See Forms (2) and (4) in the materials for copies of the pleadings which secured this relief. A redacted court order is also included in the materials (Form 5).

(MHLS as petitioner)

Matter of DH

DH, was a 48 year old woman who was residing in a group home operated by Office for People with Developmental Disabilities (OPWDD) after spending eight months in a county jail. DH was the co-owner, with her brother, of a condo in Westchester which they had inherited from their recently deceased father. She had also inherited approximately \$100,000. DH was diagnosed with mild mental retardation, and had received day services through OPWDD. DH resided in the condo with her father who died in 2009.

After the father's death, DH's brother David moved in and they began to fight. Although the parties dispute the actual injuries, during one fight, DH stabbed her brother after he allegedly threw a lamp at her. She claims she stabbed him in the thumb while he claims that she stabbed him in the stomach. He was hospitalized and released, but filed criminal charges for felony assault and obtained an order of protection preventing her from returning to their residence.

After 8 months in jail, OPWDD's Taconic Developmental Disabilities Services Office (DDSO) agreed to provide residential services for DH. She was discharged from jail pending disposition of the criminal charges which were reduced from 2nd degree to third degree assault, still a felony. Her brother repeatedly advised people that he was unwilling to drop the charges unless she transferred her assets to him. He wanted her to pay for the condo fees and expenses out of her share of the father's estate, and repeatedly sent their uncle to visit her with a Power of Attorney for her to sign so he could access her funds.

TDDSO referred the matter to MHLS. MHLS met with DH and investigated the matter. Upon the consent of DH, MHLS petitioned for the appointment of a guardian.

Remedies Invoked on Behalf of DH

- (1) Temporary restraining order on bank accounts and real estate assets
- (2) Revocation of all prior powers-of-attorneys
- (3) Establishment of supplemental needs trust
- (4) Appointment of guardian of person and property

After his appointment, the 81 guardian placed her liquid resources into a supplemental needs trust, got the criminal charges reduced to a misdemeanor with time served, and convinced the brother to pay the fees on the condo. He is contemplating doing a partition action but is reluctant to do so until the market improves.

(MHLS as court evaluator)

Matter of DB

In this Article 81, Supreme Court appointed MHLS as court evaluator. DB was a 47 year old woman with multiple sclerosis. DB was residing in a Department of Health (DOH) licensed facility. Her brother was her health care agent. He objected to DB's decisions regarding advanced directives, her decision to continue to smoke, her style of haircut, her spending habits and her wishes regarding a possible transfer to another facility. He insisted that she should have an advanced directive that included a do-not-resuscitate (DNR), a do-not-intubate (DNI) and no medical intervention despite her wishes to be full code and despite the fact that the medical staff had determined that DB had capacity to make her own medical decisions, including advanced directives. He essentially petitioned to override all of her decisions.

After reviewing facility records and interviewing staff at the facility, the petitioner, and DB, MHLS prepared a report indicating that 1) the AIP did not require a guardian, 2) that the AIP did not want her brother to be her guardian but that he could continue as her hep, and 3) the proposed guardian was unsuitable.

Although at multiple meetings with MHLS, the AIP stated emphatically that she objected to the appointment of her brother, her court appointed counsel advised the court that the AIP had consented to the appointment of her brother as her guardian at every meeting between them. Despite the discrepancy between the AIPs responses to the court evaluator and counsel, counsel refused to allow any witnesses during her meetings with the AIP.

Based on that alleged consent, petitioner's attorney and the AIP's counsel took the position that the court should disregard the court evaluator's report in its entirety. Petitioner's attorney then prepared an order "on consent." The two attorneys also took the position that a hearing was unnecessary due to the AIPs alleged consent. At the request of the court evaluator, the director of the facility hired counsel to oppose the petition, and upon notice of that additional opposition, the petitioner withdrew his petition.

(MHLS as counsel)

Matter of Beverly YY

This Article 81 was commenced in 2001, when Beverly YY's brother-in-law and niece petitioned for appointment as co-guardians of the property and for the appointment of the County DSS as guardian of the person for Beverly. Beverly was a 65 year old mentally ill woman with several recent mental health unit admissions. The brother-in-law lived locally and the niece lived in Texas. Beverly owned and resided in a home which had been left to her by her mother, and had about \$100,000.00 in liquid assets. MHLS was counsel, and after meeting with Beverly, consented to the application at the initial hearing.

In 2003, the co-guardians of the property had depleted all of Beverly's liquid resources on personal aides/home care and general home maintenance, and had placed the house into a trust for the niece. The co-guardians of the property also advised the court that the niece would not pay to maintain her aunt in the home. They advised the court that the IP should get Medicaid and be moved to a nursing home, and told the court that they were resigning as co-guardians of the property. The court advised them they had to petition for removal.

Upon petition, the court and parties told the niece she had to deed the house back to her aunt but she refused to do so. She also advised the court she would remain as sole guardian of the property. The court ordered her to deed the house back to her aunt and removed the co-guardians of the property.

The court appointed an attorney off the part 36 list as replacement guardian of the property. The attorney obtained a reverse mortgage and worked with DSS to keep the IP in her home. In 2007, the niece petitioned for the removal of the new guardian of the property on the ground that as the new attorney for the hospital the IP was in during 2000, there was a conflict of interest. MHLS met with the IP who wanted the attorney to remain as her guardian. The niece then withdrew her petition.

In 2008, the IP's dementia made it impossible to maintain her in the home. After her move to a nursing home, a pipe broke in the home causing major damage.

In 2009, the guardian petitioned for fees and the authority to sell the house. He advised the court of the damage, and that he was waiting for estimates to determine whether it paid to take the insurance money and repair the house or sell it "as is". The niece cross-petitioned for the removal and replacement of the guardian of the property alleging that he had neglected the property, breached his fiduciary duty to the IP and that he had a conflict of interest. She also petitioned to remove DSS on the grounds that her aunt had fallen twice in the nursing home, and to be appointed as the guardian of the person.

The court denied the niece's request and determined that there was insufficient evidence

to require a hearing. The court authorized the sale of the residence and payment of fees to the guardian of the property. The niece appealed to the Appellate Division but failed to ask for a stay of the sale of the residence. During the pendency of the appeal, the guardian of the property fixed up the residence and sold it at almost full appraised value despite the depressed real estate market. The Appellate Division affirmed the lower court's decision but refused to entertain a mootness argument regarding the value of the property. The niece then petitioned for leave to appeal to the Court of Appeals, which was denied.

Between 2000 and 2010, the niece filed multiple complaints (and on at least one occasion attempted to file criminal charges) against MHLS, DSS, staff at the mental health unit and the replacement guardian of the property. There were a total of seven petitions/motions/applications.

Case reported at 79 AD3d 1442 (3rd Dept 2010).

SECTION IV -PRACTICE FORMS

- Form 1: Order to Show Cause Commencing Application to Remove Guardian due to Incapacity
- Form 2: Petition to Remove Guardian (to accompany Form 1)
- Form 3: Order to Show Cause Commencing Application to Remove Guardian for Breach of Fiduciary Duty
- Form 4: Petition to Remove Guardian (to accompany Form 3)
- Form 5: Order Removing Guardian (to accompany Form 3)

In the Matter of the Guardianship of

DMH

an Alleged Incapacitated Person.

ORDER TO SHOW CAUSE

Index No. XXXX-XX

Upon reading and filing the annexed affirmation of the Director, as Mental Hygiene Legal Service, and upon all prior papers and proceedings had herein:

Let guardian of the person of DMH, a person determined to be incapacitated by Order and Judgment of this Court dated _____, show cause on the _____ day of _____, 2011, at the _____ County Courthouse, _____, New York, why an Order should not be issued that would modify this Court's Order and Judgment of _____, 2011 to: (1) remove _____ as guardian of the person of DMH pursuant to Mental Hygiene Law § 81.35; and (2) appoint _____ as guardian of the person of DMH together with such other and further relief as this Court may deem just and proper.

This Court having found that the Mental Hygiene Legal Service has demonstrated (1) a likelihood of success on the merits; (2) that DMH may be irreparably harmed if she is returned to her current residential setting; and (3) that the equities favor granting temporary relief pursuant to MHL § 81.23(b).

ORDERED, that pending a hearing to a final adjudication of this matter, this Court, pursuant to Mental Hygiene Law § 81.23(b), authorizes the placement of DMH in a residential setting which is operated or licensed by the New York State Office for People with Developmental Disabilities; and it is further

ORDERED, that personal service of this order, together with the supporting papers upon which it is based, shall be made on DMH on or before _____, 2011; and it is further

ORDERED, that service of overnight delivery of this order, together with the supporting papers upon which it is based, shall be made on:

Proposed guardian
1234 Main Street
Anytown, New York 12345

ORDERED, service by mail of this order shall be made upon the following individuals:

_____, Esq.
Court Examiner
5678 Main Street
Anytown, New York 67890

ENTER

Dated: _____, 2011
Anytown, New York

Justice of the Supreme Court

STATE OF NEW YORK
SUPREME COURT COUNTY OF _____

In the Matter of the Application of
MH

AFFIRMATION

Petitioner,

Index No.:1234-56

RJI No.: 12-3-4567-8901

For the Appointment of a Guardian of the
person of DMH

an Alleged Incapacitated Person.

Sheila E. Shea, an attorney duly licensed to practice law in the State of New York hereby affirms the following under penalty of perjury:

1. I am the Director of the Mental Hygiene Legal Service (MHLS) for the Third Judicial Department. My business address is 40 Steuben Street, Suite 501, Albany, New York 12207.

2. I submit this affirmation seeking immediate and permanent relief. Pursuant to MHL § 81.23(b), immediate relief is sought to permit DMH to be discharged from the _____ Hospital and placed in a safe environment while the instant application is being considered by the Court. Upon the grounds alleged herein, removal of DMH'S guardian and modification of the article 81 guardianship order is also sought pursuant to MHL § 81.35.

3. As provided for by MHL § 81.35 an application to remove a guardian may be commenced by "Notice of Motion." An Order to Show Cause is selected as the procedural vehicle to commence the instant motion both to shorten the return time due to exigent circumstances and because temporary relief is also sought pursuant to MHL § 81.23(b).

4. The facts as alleged below are pled upon information and belief, based upon a review of records maintained for DMH by a chapter of NYSARC, Inc., the _____ Hospital, the _____ County Department of Social Services, and personal interviews with DMH and persons providing services to her both at the NYSARC, Inc., and the _____ Hospital.

STANDING OF MHLS TO COMMENCE THE INSTANT MOTION

5. DMH is a mentally disabled individual.

6. While DMH does not currently reside in a mental hygiene facility she is on a wait list for such residential services.

7. As such, DMH is alleged to be in need of care and treatment in a “facility” as defined by Mental Hygiene Law (MHL) § 1.03(6) and is a constituent of MHLS (*see* MHL §§ 47.01 & 47.03).

8. MHLS is an agency “concerned with the welfare” of DMH and has standing under MHL § 81.06(a)(6) to bring this motion.

9. MHLS’ enabling regulations also provide that the MHLS Director “may, in an appropriate case and in his or her discretion, apply to the court for the discharge of the guardian or the enforcement or modification of an order appointing the guardian” (*see* 22 NYCRR § 823.2[b][5]).

FACTS

10. DMH is fifty-seven (57) years of age and a mildly mentally retarded woman who resides with her mother, MH, at _____, New York.

11. Pursuant to an Order and Judgment dated _____, this Court appointed MH guardian of the person of DMH pursuant to MHL article 81 (*see* Order and Judgment of Supreme

Court, _____ County, dated _____ attached hereto as Exhibit "A").

12. Pursuant to its Order and Judgment, this Court appointed _____ standby guardian of the person of DMH, also pursuant to MHL article 81 (Exhibit "A").

13. Although DMH resides with her mother/guardian, she receives Home and Community Based Services (HCBS) from the _____, a chapter of the NYSARC, Inc. These HCBS services include medicaid service coordination, hourly respite services, prevocational services and prevocational day habilitation.

14. Upon information and belief, it has been the desire of both mother and daughter to have DMH reside with MH until MH is no longer able to care for DMH.

15. Upon information and belief, over time _____ has experienced a diminished ability to act as DMH'S care giver and guardian.

16. Upon information and belief, _____ agreed to apply for residential services for DMH and did so in 2008.

17. Upon information and belief, DMH was placed on the New York "Cares List," the Office for People with Developmental Disabilities (OPWDD) wait list for residential services.

18. Upon information and belief, MH is in ill health and is currently able to exercise the duties of guardian. Nor can she provide a safe environment for herself or DMH to live in (*see* letter of _____ County Department of Health attached hereto as Exhibit "B"; letter of _____, M.D. attached hereto as Exhibit "C").

19. Exhibit B & C demonstrate that MH is suffering from multiple medical conditions, including dementia, and does not properly manage her own health care and is not able to maintain a safe environment for herself or her daughter Marie.

20. Upon information and belief, MH is also incontinent of bladder and bowel and despite this fact has refused personal care from home health aides.

21. Further, MH has severe neuropathies which result in her having no feeling in her feet (Exhibit "B"). Despite this fact, MH continues to drive both alone and with DMH in the vehicle putting them both at risk.

22. Upon information and belief, DMH has serious mental and physical health concerns of her own, including mild mental retardation, depression, diabetes mellitus (type 2), sleep apnea, obesity, hyperlipidemia, left estropia, myopia, presbyopia, degenerative changes of the lumbar or sacral spine, and moderate to severe high frequency sensorineural impairment in both ears.

23. Despite these multiple mental and physical health concerns, MH has cancelled many of DMH'S medical appointments and this has resulted in DMH being discharged by her primary care physician and psychiatrist. Upon information and belief, these charges have resulted in medication and treatment lapses which have put DMH at risk of harm.

24. Upon information and belief, despite her guardianship duties relative to DMH, MH has not followed-through with recommended medical appointments for DMH, including colonoscopy, yearly mammograms and eye and podiatrist appointments that are necessary due to M's diabetes.

25. The health care providers for both _____ and DMH determined that they are in danger based on this state of affairs. These concerns as well as concerns over the safety of DMH'S home environment led Doctor _____ to make referrals to _____ County Adult Protective Services and the _____ County Health Department (Exhibit "C"). However, since MARY JONES

refuses to comply with the doctor's recommendations with respect to the JONES' home environment and other concerns, the doctor discharged DMH as his patient as of April 4, 2010. As a result of this discharge, the Health Department cancelled skilled nursing and home health aide services (*see also* Exhibit "B").

26. DMH was admitted to the hospital due to high blood pressure and high blood sugar. Upon information and belief, DMH' medical condition has been stabilized so that she is healthy enough for discharge from the hospital. However, DMH'S treating physician is reluctant to discharge DMH back to her mother/guardian's care due to MH's dementia.

27. Specifically, after speaking with _____ on the phone, the treating physician felt that ___ was unable to understand the particulars of DMH'S medication regimen (*i.e.* frequency and dosage), and JANE's plan of care generally (Exhibit D). Upon information and belief, JANE's treating physician feels that discharging DMH back to her home under _____ care is not a safe discharge plan (Exhibit "D").

28. Upon information and belief, _____ wants to have DMH discharged back to her home under _____'s care.

29. Upon information and belief DMH' standby guardian supports D's placement in an OPWDD operated or licensed residential setting, but is unwilling to take any position that is counter to his mother's wishes. The standby guardian also resides in California and is not able to actively attend to this situation.

30. Upon information and belief, DMH' cousin is very concerned about DMH' situation. JANE's cousin supports the concept of DMH'S placement in an OPWDD operated or

licensed residential setting. Upon information and belief, ___ is willing and able to serve as guardian of DMH'S person should ___ be removed as guardian.

31. MHLS met with DMH at the hospital. DMH informed MHLS that she had met with an OPWDD licensed family care provider that morning and that she would like to live with the family care provider. DMH also informed me that she would like ___ to be appointed as her guardian.

32. It is respectfully requested that this Court issue an order after a hearing modifying this Court's Order and Judgment of _____ to: 1) remove MH as guardian of DMH'S person pursuant to Mental Hygiene Law § 81.35; 2) remove ___ as standby guardian of DMH'S person pursuant to Mental Hygiene Law § 81.35; and 3) appoint ___ as guardian of DMH'S person, together with such other and further relief this Court may deem just and proper.

APPLICATION FOR IMMEDIATE AND TEMPORARY RELIEF

33. In addition, it is respectfully requested that pending a hearing and a final adjudication of this matter, this Court, pursuant to Mental Hygiene Law § 81.23(b), issue an order authorizing DMH'S placement in an OPWDD operated or licensed residential setting.

34. MHL § 81.23(b) provides for the issuance of an injunction and temporary restraining order after the appointment of a guardian when any person does or suffers to be done any act or omission "endangering the health, safety or welfare of the incapacitated person. . ."

35. In this application it is alleged that acts of omission, due to the dementia and physical decline of the guardian, place DMH at extreme risk of harm.

36. This office has written to the guardian and standby guardian to provide them with notice that the instant application is being commenced and that temporary and immediate relief is

being sought (*see* correspondence annexed as Exhibit "E").

37. We further request that the Court grant immediate relief in the order to show cause commencing this application so that DMH may be discharged from the hospital and placed in an OPWDD licensed or operated community bed during the pendency of this application. Such placement would be upon the consent of DMH and consistent with her best interests.

38. Upon information and belief, the following parties should be served with the Order to Show Cause and papers upon which it is based:

DMH
address
address

MH
address
address

STANDBY GUARDIAN
address
address

PROPOSED GUARDIAN
address
address

39. Upon information and belief, the following parties should be given notice of this proceeding:

COURT EXAMINER
address

COMMISSIONER
NYS OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES
address
address

COMMISSIONER

COUNTY DEPARTMENT OF SOCIAL SERVICES
address
address

WHEREFORE, it is respectfully requested that this Court:

- a. Sign the annexed Order to Show Cause;
- b. Issue an order after a hearing modifying this Court's Order and Judgment of October 3, 2002 to: (1) remove _____ as guardian of DMH'S person pursuant to Mental Hygiene Law § 81.35; (2) remove _____ as standby guardian of the person pursuant to Mental Hygiene Law § 81.35; and (3) appoint _____ as guardian of the person of DMH;
- c. Issue an order pursuant to Mental Hygiene Law § 81.23(b), authorizing the immediate placement of DMH in an OPWDD licensed or operated residential setting pending a hearing and final resolution of this matter; and
- d. Grant such other and further relief as it may deem just and proper.

Dated: December 2, 2011
_____, New York

Sheila E. Shea

FORM 3

At a Trial Term of the Supreme Court of the
State of New York, held in and for the County of
_____ at _____, New York on the
_____ day of _____, 2011

Present: Hon.

STATE OF NEW YORK
SUPREME COURT COUNTY OF _____

In the Matter of the Application of
Mental Hygiene Legal Service on behalf of
LC,

ORDER TO SHOW CAUSE

Petitioner,

Index No.: 1234-56
RJI No.: 12-3-4567-8901

For the Modification and Revocation of an
Article 81 Guardianship.

Upon the Petition/Affirmation of Mental Hygiene Legal Service dated the ___ day of
_____, 2011, the affidavit of _____ sworn to the ___ day of _____, 2011, and
upon all prior papers and proceedings had herein, let _____ show cause on the
_____ day of _____, 2011 or as soon as thereafter as counsel can be heard, why
_____ should not be removed as guardian of the property of LC, as required by
Mental Hygiene Law §§ 81.35 and 81.36 and to protect and preserve the interests of LC,
including the financial interests of LC in a checking and savings account named at _____
Bank for such other and further relief as to this Court seems just and proper; and it is further
ORDERED, that _____ Bank, with offices located at _____, New
York, is hereby prohibited and restrained from releasing or dispersing any funds from Account

No. xxxxxxxxxx in the name of LC; or any other account of LC pending further order of this Court; and it is further

ORDERED, that _____ is hereby prohibited and restrained from attempting to access any funds from Account No. xxxxxxxxxx maintained at _____ Bank otherwise expending any monies owned by or received for the benefit of LC found in any other location, without further order of this Court.

IT IS. NOW

ORDERED, that service of this order by regular mail upon _____, Fraud Investigator, _____ Bank, _____ New York, Examiner of Guardian's Accounts; _____ Administrator Nursing Home; LC, _____, on or before _____, 2011, shall be deemed good and sufficient service.

Dated: November 28, 2011

ENTER

Hon.

STATE OF NEW YORK
SUPREME COURT COUNTY OF _____

In the Matter of the Application of the
Mental Hygiene Legal Service on behalf of

LC

Petitioner,

PETITION

Index No.

For the Modification and Revocation of an
Article 81 Guardianship.

_____, an attorney duly licensed to practice law in the State of New York,

affirms under the penalty of perjury:

1. I am a _____ Attorney on the staff of the Mental Hygiene Legal Service for the Third Judicial Department, Sheila E. Shea, Esq., Director.

2. That Mental Hygiene Legal Service was appointed to represent LC pursuant to Mental Hygiene Law § 81.10 by order of this Court dated _____.

3. Thereafter, on _____, _____ was appointed guardian of the person and property of LC pursuant to Mental Hygiene Law article 81 (Exhibit 1).

4. According to the findings set forth in the _____ order _____ had a savings account in the amount of \$ _____ at _____ Bank (Account No. _____).

5. Upon information and belief, on or about _____, _____ presented her order of appointment and commission to _____ Bank and requested that the account reflect her appointment as guardian.

6. Upon information and belief, at the close of business on _____, 2011, the savings account had a balance in excess of \$105,000.

7. Upon information and belief, as of _____, 2011, there was only \$7,500 in LC's guardianship savings account (Exhibit 2).

8. Upon information and belief, between the period of _____, 2009 and _____, 2011, there were multiple ATM withdrawals totaling _____ from LC's checking account (Exhibit 3).

9. Upon information and belief, there were also debit card transactions totaling _____, from hotels and amusement parks (Exhibit 4).

10. Upon information and belief, there have been scores of ATM purchases at restaurants, credit card companies, bus companies and gaming establishments (Exhibit 5).

11. Upon information and belief, LC resides at the Nursing Home located at _____, New York. Upon further information and belief, LC has only left the Nursing Home one time since _____, 2010.

12. Upon information and belief, the guardian has not prepared/filed an Initial Report or an Annual Report as required by Mental Hygiene Law §§ 81.30 and 81.31, despite being requested to by the Examiner of Guardian's Accounts.

13. That based upon the fact that the guardian has failed to file the proper reports evidencing the manner in which she has applied the funds maintained in the bank account, and that there appear to be multiple ATM withdrawals that are questionable on their face, it is hereby requested that the guardian be directed to appear before the Court and present an accounting of activities since her appointment as guardian in _____, 2009.

14. It is also requested that a temporary restraining order be issued restraining the Bank from releasing or dispersing any funds from Account No. _____, in the name of LC and

____ (guardian) absent an order from this Court.

15. It is also requested that a temporary restraining order be issued restraining _____ from attempting to access any funds from Account No. _____ maintained at _____ Bank otherwise expending any funds owned by or received for the benefit of LC found in any other location, without an order from this Court.

WHEREFORE, it is respectfully requested that this Court issue an order:

(1) Directing _____, Guardian of the Person and Property of LC to appear before this Court and present an accounting of how such funds have been expended by her as Guardian of LC; and

(2) Issue a Temporary Restraining Order to _____ Bank prohibiting from releasing any funds from Account No. ____ or any other accounts in the name of LC or _____ guardian, pending further order of the Court; and

(3) Issue a Temporary Restraining Order prohibiting _____ as Guardian of the property of LC, restraining her from attempting to access any funds from Account No. ____ maintained at _____ Bank or otherwise expending any funds owned by or received for the benefit of LC found in any other location, without an order from this Court.

Dated: _____, 2011
_____, New York

_____, Esq.

STATE OF NEW YORK
COUNTY COURT COUNTY OF _____

In the Matter of the Application of Mental
Hygiene Legal Service on behalf of
LC,

Petitioner,

For a Modification and Revocation of an
Article 81 Guardianship.

Order Removing Guardian

Hon. _____
Index No.
RJI No.

By order to show cause of County Court, _____ County (_____, J) dated _____, 2012,
petitioner, Mental Hygiene Legal Service on behalf of LC, petitioned for the removal of _____ as
guardian of the person and property of LC pursuant to Mental Hygiene Law § 81.35, due to her
failure to file an initial or annual report of her actions as Guardian for LC, as required by Mental
Hygiene Law §§ 81.35 and 81.36 and to protect and preserve the assets of LC;

AND This matter being returnable on _____, 2012, at which time a conference and an
initial hearing was held at the County Court, _____ County, New York. Mental Hygiene Legal
Service was present as was LC and _____, LC's social worker from _____ Nursing Home;

AND at that time, _____ having moved to resign her position as Guardian for the person
and property of LC and the Court having accepted her resignation, and ordering that a further
hearing be held, and ordering that, on that date, _____ submit her final guardianship accounting;

AND the Court further determining that, on that date, a hearing would be conducted
whether LC required any further appointment of a Guardian for her personal property;

AND that on _____, 2012, a hearing was held before this court and present were Mental
Hygiene Legal Service, LC, _____, Examiner of Guardian's Accounts. At that time, _____

presented her final accounting to the Court and the same was concurrently examined by _____, Esq., in her capacity as Examiner of Guardian's Accounts for the County of _____;

AND Attorney _____ indicating to the Court that, upon her initial inspection, the proffered accounting was not acceptable as a full and thorough accounting;

AND the Court then ordering that _____, after filing her offered accounting with the County Clerk continue to work with Attorney _____ in submitting a more acceptable accounting;

AND the Court then taking testimony on the issue of whether LC continues to require a guardian for her personal and/or property;

AND LC's social worker from _____ Nursing Home, _____, New York having testified in support of the position that LC no longer requires the appointment of a Guardian due to recent improvements in her mental and physical condition;

NOW, after deliberating upon the order to show cause and the evidence adduced at the hearing, it is hereby

ORDERED that _____ be removed but not discharged as Guardian of the person and property of LC, and that she is ordered to submit a further guardianship account or accounts to the approval of _____, Esq., as Examiner of Guardian's Accounts for _____, County, and to the approval of this Court before being fully discharged as Guardian; and it is further

ORDERED that the prior guardianship of the person and property of LC is hereby terminated; and it is further

ORDERED that LC is entitled to access all monies from Account No. _____ maintained at _____ Bank; and it is further

ORDERED that the Examiner of Guardian's Accounts should submit an affidavit for

legal services to the Court upon notice of Mental Hygiene Legal Service; and it is further

ORDERED that a copy of the final accounting of _____ be provided to Mental Hygiene Legal Service, the Examiner of Guardian's Accounts, and to the Court; and it is further

ORDERED that the papers in this proceeding shall be sealed by the clerk and released only to the parties, the parties' counsel, the Examiner of Guardian's Accounts, or by further Court order.

Dated: _____, 2012
_____, New York

Hon.