

Hot Topics in Adult Guardianships:
Mental Hygiene Law Article 83 and Case Updates

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JulieAnn Calareso, Esq., one of three shareholders of Burke & Casserly, joined the firm after having clerked as Appellate Court Attorney for the New York State Supreme Court, Appellate Division, Third Department. She focuses her practice on elder law, wills and trusts, estate administration and probate, special needs planning, and corporation and business formation and succession planning.

JulieAnn's commitment to her practice is evidenced by her involvement in the New York State Bar Association's Elder Law section, for which she serves as Vice Chair. She represents the New York State Bar Association on a state wide initiative formed in collaboration with the New York State Office for the Aging, the Office of Court Administration, and other private groups which seeks to evaluate the delivery of legal services to the elderly and disabled, while recommending changes to make our legal system more accessible to that population.

JulieAnn has recently returned to serving on the Board of Directors of the Alzheimer's Association of Northeastern New York's Board of Directors, where she had previously served as a Director and has previously been honored with the Lisa Goldberg Memorial Award for outstanding commitment and service to the Board. She is a former Director of Senior Services of Albany, and is a member of the Capital District Caregivers Coalition, where she works with other dedicated professionals to provide educational and supportive programming for persons providing care to others. She is also a graduate of the Leadership Tech Valley Class of 2011, a joint leadership initiative of the Albany Colonie and Schenectady Chambers of Commerce.

JulieAnn was honored by the Albany-Colonie Regional Chamber of Commerce as the recipient of its 2009 Women of Excellence award in the Emerging Professional category. She now serves on Steering Committee for the Albany-Colonie Regional Chamber of Commerce's Women's Business Council, where she served as Co-Chair of the Woman of Excellence Nominating Committee for 2013 and will serve as Co-Chair of the Adopted Non-Profit Committee for that Council for 2014.

She is a graduate of Albany Law School of Union University where she earned her Juris Doctorate, magna cum laude, having earned membership into the Justinian Honor Society for excellence in legal scholarship. She served as an Associate Editor of the Albany Law Review, and interned at the New York State Office of the Attorney General, Charities Bureau. Her undergraduate degree is from Fordham University, where, in 1994, she earned a Bachelor of Arts in Communications, cum laude, while participating in the Honors Program. Prior to beginning a career of law, JulieAnn worked in television and feature film production in New York and Los Angeles.

In addition to her practice of law and her philanthropic endeavors, JulieAnn is happily married to a fellow lawyer, and enjoys watching her two school-aged children discover life.



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CURRENT HOT TOPICS

of

Article 81 of the Mental Hygiene Law

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A number of issues deserve special attention as a result of statutory language, case law, or judicial practice. This paper outlines the following issues: a guardianship appointment on consent; obtaining jurisdiction over the allegedly incapacitated individual; participation of the allegedly incapacitated individual in the proceedings; the right to a jury trial; and the relationship between the Family Health Care Decision making Act and article 81 of the Mental Hygiene Law.¹

Guardianship on Consent

If a guardian is found to be necessary for an individual's personal needs, safety, or property management, section 81.02 provides that the court may appoint a guardian upon the individual's consent or a judicial determination that the individual is incapacitated.² In disposing of the matter when the individual consents, section 81.15 provides that the court must make certain findings about the individual's agreement, the individual's functional limitations, the need for the appointment, the guardian's powers, and the duration of the guardianship.³

Neither section 81.02, section 81.15, nor any other section of article 81, however, describes what standard should be used to determine whether the individual has capacity to consent to the guardianship.⁴

An appointment to which the individual agrees has many advantages. The individual's consent or acceptance allows the petitioner to maintain a relationship with the individual that may otherwise be strained by the commencement of a guardianship proceeding.⁵ Consent allows the individual "a greater degree of dignity."⁶ Consent also allows everyone to "sidestep the issue of incapacity."⁷ This last element – the issue of incapacity – may nevertheless come to haunt a guardianship based on consent, as the case of *In re Buffalino* illustrates.

The reported decision in *Buffalino* reflects on two proceedings. The first one is the

¹ Practitioners' experiences shared through their presentations at this program will undoubtedly reveal more issues of current concern.

² N.Y. Men. Hyg. Law §81.02.

³ N.Y. Men. Hyg. Law §81.15(a).

⁴ *In re Buffalino*, 960 N.Y.S.2d 627, 628 and n. 2 (N.Y. Sup. Ct. Suff. Co. 2013) (In addition to sections 81.02 and 81.15, other sections of the statute – 81.09, 81.16, and 81.21 – mention the individual's agreement to the appointment of a guardian). On the other hand, the general obligations law describes the capacity necessary to execute a power of attorney. N.Y. Gen. Oblig. L. §5-1501(c) ("Capacity" means ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in a power of attorney, or the authority of any person to act as agent under a power of attorney."). The public health law provides that a person is deemed to be competent to execute a health care proxy unless a court has determined otherwise. N.Y. Pub. Health L. §2981(a).

⁵ *In re Buffalino*, 960 N.Y.S.2d at 629.

⁶ 960 N.Y.S.2d at 629.

⁷ 960 N.Y.S.2d at 629.

appointment of a guardian on consent. The second one involves dualing motions to expand the guardian’s powers and to discharge the guardian.

In 2009, petitioner Buffalino commenced a guardianship proceeding on behalf of Mr. D.⁸ At that time, Mr. D was approximately 64 years old and a well established business executive. He had been diagnosed with brain cancer and was suffering from severe depression as well as several other illnesses.⁹ He required round-the-clock care and was unable to manage his affairs.¹⁰ Because he was estranged from his brother who was his agent under a power of attorney, and was being divorced by his wife, the appointing court concluded that no resources existed as an alternative to guardianship.¹¹ The court dispensed with a determination of incapacity because it concluded that Mr. D “possessed the requisite capacity to agree” to the guardianship.¹² Thereafter Mr. D. did agree to the appointment and the court appointed as his guardian Ms. Buffalino, a friend and an employee of Mr. D’s financial adviser.¹³ Thus the first proceeding ended.

In January 2012, Ms. Buffalino resigned as Mr. D’s guardian, claiming that he had been verbally abusive to her.¹⁴ The court then appointed a successor guardian, Mr. Isler.¹⁵

The second proceeding began in late September 2012 when Mental Hygiene Legal Service (MHLS), representing Mr. D, moved to have the successor guardian discharged.¹⁶ In early October 2012, the successor guardian moved to have Mr. D. declared incapacitated and to have the guardian’s powers greatly expanded.¹⁷ MHLS then cross-moved to discharge the successor guardian.¹⁸

These applications were the setting for the court’s examination in the second proceeding of an appointment by consent and the scope of that appointment. The court considered two issues: 1) what is the basis of a determination that an individual can consent to a guardianship;

⁸ 960 N.Y.S.2d at 628.

⁹ 960 N.Y.S.2d at 630.

¹⁰ 960 N.Y.S.2d at 630.

¹¹ 960 N.Y.S.2d at 630.

¹² 960 N.Y.S.2d at 628.

¹³ 960 N.Y.S.2d at 628.

¹⁴ 960 N.Y.S.2d at 628.

¹⁵ 960 N.Y.S.2d at 628.

¹⁶ 960 N.Y.S.2d at 628.

¹⁷ 960 N.Y.S.2d at 628.

¹⁸ 960 N.Y.S.2d at 628.

and 2) whether an emergency or change in circumstances permits an expansion of the powers of a guardian to whom the individual has consented without a hearing on the question of capacity.

The court in the second proceeding noted that in the absence of statutory guidance about capacity to consent, it would consider “the individual's ability to meaningfully interact and converse with the court; his or her understanding of the nature of the proceeding; and his or her comprehension of the personal and property management powers being relinquished.”¹⁹ The court observed, however, that such an evaluation was not the equivalent of the in-depth analysis required for a determination of incapacity.²⁰

The court concluded that expanding the guardian's powers in consent cases would involve a *de-facto* determination of incapacity without the requisite due process protections of article 81 – an outcome contrary to the intention and design of the statute.²¹

Consequently, the court converted the successor guardian's application for expanded powers to an application for the appointment of a guardian.²² The court held that the petitioner failed to demonstrate the need for a guardian based on Mr. D's statements that his condition had improved and that he had a plan to provide for his care and sufficient monetary resources to follow it.²³ In light of that finding, the court did not reach the question of Mr. D's capacity,²⁴ nor did it need to because guardianship is to be treated as the last resort.²⁵ The court noted that if Mr. D were subsequently unable to provide for himself under his plan, that inability might be used to demonstrate his need for a guardian.²⁶

The court granted the motion to discharge the guardian, denied the successor guardian's application for a determination as to Mr. D's capacity and declared the cross motion moot.²⁷

Obtaining Jurisdiction of the Allegedly Incapacitated Individual

While section 81.07 sets forth relatively straightforward requirements about service of process, questions about obtaining jurisdiction over an individual alleged to be incapacitated arise quite frequently.

¹⁹ 960 N.Y.S.2d at 629.

²⁰ 960 N.Y.S.2d at 629.

²¹ 960 N.Y.S.2d at 630.

²² 960 N.Y.S.2d at 631.

²³ 960 N.Y.S.2d at 630-631.

²⁴ 960 N.Y.S.2d at 630.

²⁵ 960 N.Y.S.2d at 631.

²⁶ 960 N.Y.S.2d at 630.

²⁷ 960 N.Y.S.2d at 631.

A. *Hand Delivery*

Section 81.07(e) provides that the order to show cause and the petition be personally delivered to the individual.²⁸ This language anticipates delivery by hand, not to be confused with personal delivery under section 308 of the Civil Practice Law and Rules.²⁹ This narrowly drawn requirement is consistent with the mandate that the order to show cause include language warning the individual of the rights afforded a respondent to an article 81 proceeding and the consequences of the proceeding.³⁰

The hand delivery requirement was a response to concerns that under the former committee and conservator statutes the individual was often unaware of the proceeding. Section 81.07 contemplates, however, an exception to the rule where delivery by hand is impractical. This exception has created concerns.

B. *Exception to Hand Delivery*

The statutory exception to the general requirement of hand delivery is narrowly written. According to section 81.07, the individual must refuse to accept service.³¹ When the petitioner is able to satisfy the court that service of process has been refused, the court has the discretion to order another form of service.³² “Refusal” has been interpreted to require the individual’s deliberately affirmative action or reaction.³³ *Matter of Hammons (McCarthy)* adopted this interpretation as a matter of first impression and concluded that substituted service was not available to the petitioner when the respondent lived in an apartment but could not be found because he often wandered in search of stray cats.³⁴ The court noted, however, that the result in the case was unsatisfactory and urged legislative review of the provision.³⁵

²⁸ N.Y. Men. Hyg. Law §81.07(e)(2)(I).

²⁹ See Comments of the New York State Law Revision Commission to Section 81.07 of the Mental Hygiene Law, McKinney’s Consolidated Law of New York, Civil Practice Law and Rules, Book 34A, pages 84-85.

³⁰ N.Y. Men. Hyg. Law §81.07(a).

³¹ N.Y. Men. Hyg. Law §81.07(e)(2)(I).

³² N.Y. Men. Hyg. Law §81.07(e)(2)(I).

³³ *Matter of Hammons (McCarthy)*, 168 Misc.2d 874, 645 N.Y.S.2d 392 (Sup. Ct. Queens Co. 1996)(citing the following cases where the individual’s refusal to accept service “evidences a deliberate attempt to resist service”: *Bossuk v. Steinberg*, 58 N.Y.2d 916, 918, 460 N.Y.S.2d 509, 447 N.E.2d 56 (1983); *Ellenbogen & Goldstein, P.C. v. Brandes*, 215 A.D.2d 226, 626 N.Y.S.2d 160 (1st Dept. 1993); *Spector v. Berman*, 119 A.D.2d 565, 566, 500 N.Y.S.2d 735 (2nd Dept. 1986).). See *Matter of Barrios-Paoli*, 173 Misc.2d 736, 662 N.Y.S.2d 388 N.Y.Sup. Ct. Queens Co. 1997)(respondent refused to buzz in the process server and court granted alternative form of service).

³⁴ 168 Misc.2d at 875, 645 N.Y.S.2d at 393

A subsequent case, *Matter of Barrios-Paoli*, presented the same court with facts that met the requirements of its interpretation of section 81.07.³⁶ *Barrios-Paoli* involved an application by Adult Protective Services (APS) for a guardian for a 93 year-old man suffering from dementia.³⁷ Although the man lived with his wife, APS alleged that she was overwhelmed by his needs.³⁸ The process server claimed that he attempted service of process on three occasions. On the first try, when the process server identify himself as having “papers from social services,” the respondent refused to “buzz” open the door to the apartment building where he lived.³⁹ On the next two occasions no one answered the bell.⁴⁰ The court held that petitioner had demonstrated that no other men lived with the respondent and thus had satisfied the requirement of the respondent’s refusal.⁴¹ The court ordered that the petition and order to show cause be mailed to the respondent at his home address.⁴²

Three questions have arisen regarding this exception for refusal to accept service. The first is whether the exception should be treated so narrowly. The second is what type of alternative service is appropriate assuming that the court is willing to order an alternative form of service. The third is what are the consequences of a petitioner’s failure to comply with the terms of a court ordered alternative service.

It has been suggested that the exception to hand delivery be broadened to include cases where the individual is simply not at home or not answering the door. This expansion of the exception could incorporate the alternative forms of service available under section 308.⁴³ It

³⁵ 168 Misc.2d at 878, 645 N.Y.S.2d at 395.

³⁶ 173 Misc.2d 736, 662 N.Y.S.2d 388 (N.Y.Sup. Ct. Queens Co. 1997).

³⁷ 173 Misc.2d at 737, 662 N.Y.S.2d at 389.

³⁸ 173 Misc.2d at 737, 662 N.Y.S.2d at 389.

³⁹ 173 Misc.2d at 737, 662 N.Y.S.2d at 389.

⁴⁰ 173 Misc.2d at 737, 662 N.Y.S.2d at 389.

⁴¹ 173 Misc.2d at 739, 662 N.Y.S.2d at 390.

⁴² 173 Misc.2d at 739, 662 N.Y.S.2d at 390.

⁴³ Section 308 of the CPLR provides for service of process on a natural person as follows:
 “1. by delivering the summons within the state to the person to be served; or 2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" . . . 3. by delivering the summons within the state to the agent for service of the person to be served as designated under rule 318, . . . 4. where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" . . . 5. in such manner as the court, upon motion without notice, directs, if service is impracticable

might also be appropriate to give the forms of service an order of priority as the statute governing service of a writ of habeas corpus does.⁴⁴ It has also been suggested that the privacy interests of the individual be protected in the use of alternative service by providing that only the order to show cause can be “nailed.”

Arguably these changes could be adopted so long as a court evaluator or counsel is appointed and the adequacy of service is reviewed.⁴⁵

In re Theodore T. resolves the third question regarding the consequences of a petitioner’s failure to comply with the terms of a court ordered alternative service. The petition will be dismissed.⁴⁶

In *Theodore T.*, the order to show cause for the appointment of a temporary guardian directed the petitioner to serve the allegedly incapacitated brother of petitioner personally or “by leaving [the papers] with someone at his residence and mailing the order.”⁴⁷ The case did not discuss what evidence satisfied the trial court that an alternative form of service was appropriate.

Having overcome the refusal requirement of section 81.07, petitioner’s proceeding nevertheless failed when he caused the order to show cause and petition to be sent to his brother by Federal Express. The trial court granted the motion of the allegedly incapacitated brother to dismiss the petition on the grounds that petitioner had failed to follow the terms of service in the order to show cause and thus the trial court lacked jurisdiction.⁴⁸ The petitioner appealed. The Second Department agreed, holding that the service was not in strict compliance with the terms of the order to show cause and thus the court lacked jurisdiction to proceed with the guardianship petition.⁴⁹

Even if the court permits the use of alternative service, it remains uncertain how a court can process an article 81 proceeding if the individual cannot be found as was the case in *Hammons*. However, in cases where the difficulty of locating the individual arises because a third party is detaining him or her, a writ of habeas corpus may be used to secure the individual’s presence in court which in turn permits service on the individual.

under paragraphs one, two and four of this section”.

⁴⁴ See note 57.

⁴⁵ The court evaluator is already required to explain the papers to the alleged incapacitated person. N.Y. Men. Hyg. L. §81.09(c)(2).

⁴⁶ 78 A.D.3d 955, 912 N.Y.S.2d 72 (2nd Dept. 2010).

⁴⁷ 78 A.D.3d at 956, 912 N.Y.S.2d at 74 (emphasis added).

⁴⁸ 78 A.D.3d at 956-957, 912 N.Y.S.2d at 74. See Mental Hygiene Law § 81.42(a) (“A motion to dismiss based on the alleged failure to comply with any of the provisions of this article, other than subparagraph (i) of paragraph one of subdivision (d) of section 81.07 of this article, must be determined without regard to technical mistakes, deficiencies, and omissions that do not result in actual prejudice that affects the integrity of the proceeding.”) (emphasis added). (Note: Section 81.42(a) should be citing subdivision (e) of section 81.07 because 81.07 was amended in 2004 but the amendment was not reflected in section 81.42.).

⁴⁹ 78 A.D.3d at 956, 912 N.Y.S.2d at 74.

C. *Use of Habeas Corpus to Facilitate Service*

A writ of habeas corpus is a civil proceeding under Article 70 of the Civil Practice Law and Rules (CPLR).⁵⁰ The purpose of the writ is to “to inquire into the cause of [a] detention and for deliverance.”⁵¹ The CPLR does not, however, prescribe its use as a remedy.⁵² It is invoked in both civil and criminal matters. For example, on the criminal side, the writ can be used to challenge the jurisdiction of a criminal court which sentenced a defendant, the denial of bail or imposition of excessive bail, and, in some cases, detention as a result of revocation of parole.⁵³ On the civil side, it often makes an appearance as a challenge to custody or visitation, or confinement in a mental hygiene facility.⁵⁴ In short, a writ of habeas corpus is a flexible remedy.

The proceeding can be commenced by the ‘detained’ individual or someone acting on the individual’s behalf.⁵⁵ Service is made on the person who is detaining the individual.⁵⁶ The statute lists the forms of service in the order of their priority.⁵⁷

The writ usually requires that the detainee be brought before the court.⁵⁸ There is an exception if the detainee is “too sick or infirm to make the required trip.”⁵⁹ If the individual is

⁵⁰ Vincent Alexander, Practice Commentaries, McKinney’s Consolidated Law of New York, Civil Practice Law and Rules, Book 7B, page 7.

⁵¹ N.Y. Civ. Prac. L. & Rules §7002(a).

⁵² Vincent Alexander, Practice Commentaries, McKinney’s Consolidated Law of New York, Civil Practice Law and Rules, Book 7B, page 8.

⁵³ Vincent Alexander, Practice Commentaries, McKinney’s Consolidated Law of New York, Civil Practice Law and Rules, Book 7B, pages 8-9.

⁵⁴ Vincent Alexander, Practice Commentaries, McKinney’s Consolidated Law of New York, Civil Practice Law and Rules, Book 7B, page 9.

⁵⁵ N.Y. Civ. Prac. L. & Rules §7002(a).

⁵⁶ N.Y. Civ. Prac. L. & Rules §7002(a).

⁵⁷ N.Y. Civ. Prac. L. & Rules §7005(“Service shall be made by delivering the writ and a copy of the petition to the person to whom it is directed. If he cannot with due diligence be found, the writ may be served by leaving it and a copy of the petition with any person who has custody of the person detained at the time. Where the person to whom the writ is directed conceals himself or refuses admittance, the writ may be served by affixing it and a copy of the petition in a conspicuous place on the outside either of his dwelling or of the place where the person is detained and mailing a copy of the writ and the petition to him at such dwelling or place, unless the court which issues the writ determines, for good cause shown, that such mailing shall be dispensed with, or directs service in some other manner which it finds reasonably calculated to give notice to such person of the proceeding. If the person detained is in the custody of a person other than the one to whom the writ is directed, a copy of the writ may be served upon the person having such custody with the same effect as if the writ had been directed to him.”).

⁵⁸ N.Y. Civ. Prac. L. & Rules §7006(a).

alleged to be sick, however, it is “unsatisfactory, if not unsafe,” for a court not to have direct contact with the individual before deciding whether he or she is being held against his or her will.⁶⁰ The court can establish contact by personally visiting the individual or appointing a special guardian to do so.⁶¹

If a petition for a writ can make the necessary allegations that the individual is being wrongly detained by a third party, the requirement of bringing the detainee before the court allows the petitioner to hand deliver the article 81 process at that time. Several reported cases involve the issuance of writs of habeas corpus in conjunction with an article 81 proceeding.⁶² Two are particularly worthy of note.

In *Nixon (Corey)*,⁶³ petitioner alleged in an article 81 petition that he was unable to locate his grandmother who had been hospitalized for injuries sustained in an automobile accident and was thereafter allegedly removed from the hospital by her son. Petitioner further alleged that he believed his grandmother was in danger because she was unlikely to take her medication and unlikely to receive needed care from her son. The court recognized that it could not order substituted service on the grandmother. It noted that the requirement of section 81.07 regarding hand delivery was an “essential obstacle” to the commencement of the guardianship proceeding because of the inability to locate and serve the grandmother. The court concluded that petitioner’s allegations warranted combining a writ of habeas corpus with an article 81 proceeding to bring the grandmother into court whereupon she could be served with the article 81 order to show cause and petition.

The court did, however, order substituted service upon the son’s attorneys who were presenting him in a real property action which he and the grandmother had commenced against the grandson.

In *Brevorka ex rel. Wittle v. Schuse*,⁶⁴ the Fourth Department concluded that a writ of habeas corpus and an article 81 proceeding were not mutually exclusive. Petitioner alleged that the respondents had taken an 89 year old woman from her apartment without her consent, were holding her against her will, and were concealing her “whereabouts from her friends and family.”⁶⁵ Respondents move to dismiss the habeas corpus petition on the grounds that the proper remedy was an article 81 proceeding.⁶⁶ The supreme court denied the motion and ordered the

⁵⁹ N.Y. Civ. Prac. L. & Rules §7006(a).

⁶⁰ *State v. Connor*, 87 A.D.2d 511, 512, 447 N.Y.S.2d 485, 487 1st Dept. 1982).

⁶¹ 87 A.D.2d at 512, 447 N.Y.S.2d at 487.

⁶² See, e.g., *People (ex rel Hilary A. Best) v. Driscoll*, 2007 N.Y. Misc. LEXIS 3398 (2007); *Brevorka ex rel. Wittle v. Schuse*, 227 A.D.2d 969, 643 N.Y.S.2d 861 (1996); *Matter of Nixon (Corey)*, N.Y.L.J., 6/4/96, p. 30, col. 6.

⁶³ N.Y.L.J., 6/4/96, p. 30, col. 6.

⁶⁴ 227 A.D.2d 969, 643 N.Y.S.2d 861 (4th Dept. 1996).

⁶⁵ 227 A.D.2d 969, 643 N.Y.S.2d 861.

individual to undergo a psychiatric examination and to continue to pay rent on her apartment.⁶⁷

The appellate division affirmed, holding that the availability of another statutory remedy does not preclude the issuance of a writ of habeas corpus.⁶⁸ The court further held that the trial court did not abuse its discretion in ordering a psychiatric evaluation and the continued payment of rent.⁶⁹ The evaluation would be useful in determining if the woman was indeed being held against her will and the rental payments would ensure her ability to return to her apartment if she were being unlawfully detained.⁷⁰

Thus, filing a petition for a writ of habeas corpus along with a petition for the appointment of an article 81 guardianship may be a useful tactic in cases where petitioner fears that third parties have isolated the allegedly incapacitated individual from his or her family and friends. Attorneys should be cautious, however, that in using this tactic they do not become unwitting victims of a dysfunctional family.⁷¹

Writs of habeas corpus cannot be used when the individual is detained outside of New York.⁷² The individual's out-of-state location, however, will not necessarily defeat an article 81 proceeding for lack of personal jurisdiction.

D. Out-of-State Service on the Allegedly Incapacitated Individual

Section 81.04 provides that the court has jurisdiction over a resident of the state; a nonresident of the state present in the state; and a nonresident of the state who has a guardian or other judicially appointed decisionmaker in the foreign state.

Although the language of the statute does not address the case of a former resident who is now living in another jurisdiction, it still may be possible for the court to obtain jurisdiction over that individual for purposes of commencing an article 81 proceeding. Several cases have considered the matter.⁷³

⁶⁶ 227 A.D.2d 969, 643 N.Y.S.2d 861.

⁶⁷ 227 A.D.2d 969, 643 N.Y.S.2d 861.

⁶⁸ 227 A.D.2d 969, 643 N.Y.S.2d 861.

⁶⁹ 227 A.D.2d at 969-970, 643 N.Y.S.2d at 861.

⁷⁰ 227 A.D.2d at 969-970, 643 N.Y.S.2d at 861.

⁷¹ See, e.g., *In re Samuel S.*, 96 A.D.3d 954, 947 N.Y.S.2d 144 (2nd Dept 2012), *aff'g and modifying*, 33 Misc.3d 1203(A), 938 N.Y.S.2d 230 (Table) (N.Y. Sup. Ct. Kings Co. 2011). (brother commenced an article 81 guardianship for his brother and also commenced a petition for a writ of habeas corpus alleging that his sister was isolating their brother for whom she was caring pursuant to a health care proxy and power of attorney; the sister crossed petitioned to be appointed as guardian. The trial court combined all proceedings and ruled in favor of the sister. That ruling was affirmed on appeal.).

⁷² N.Y. Civ. Prac. L. & Rules §7002(a).

⁷³ Compare, e.g., *Winter*, Slip Op. (N.Y. Sup. Ct. Albany Co. Mar. 3, 2009)(Appendix A); *Matter of Mary S.*, 234 A.D.2d 300, 651 N.Y.S.2d 81(out-of-state woman had sufficient ties to the state for the court to

Matter of Winter is perhaps the most useful to review because it offers a detailed examination of the factual basis for the court's decision. The case involved siblings feuding over their mother's care.⁷⁴ In January 2009, petitioner daughter commenced an article 81 guardianship for the 92 year old mother. At the time the proceeding was begun the mother had been living with her son in Connecticut for about a month. The daughter claimed that the son had isolated his mother, was keeping her against her will, and was using her property for his benefit.

The mother had been a resident of Albany County for 22 years. In December 2008, she was hospitalized in Albany Medical Center Hospital for seven days where she received a diagnosis of, and treatment for, dementia. Shortly after her discharge the woman went to stay with her son in Connecticut. There she was served with the article 81 papers. The order to show cause ordered personal service on the mother in accordance with CPLR 308.

Appearing by her attorney, respondent claimed that the court lacked jurisdiction over her because she did not reside in New York, she was not served in New York, and service did not conform to the specifications of the order to show cause.

The court opined that its decision would turn on whether clear and convincing evidence established that the mother intended to change her domicile so as to deprive the court of jurisdiction.

Noting that a person can have more than one residence at a time, the court quoted *In re Webber's Will*:

The law of domicile is definite. Every person must have a domicile and can have only one at any one time. A person acquires a domicile of origin at birth. Such domicile of origin is that of his or her parents at the time of birth and it continues until there has been an effective change. To acquire a domicile of choice there must be an intent to abandon the prior domicile, whether of origin or choice, and an intent to acquire a new one. Actual residence in a particular locality and intent to remain there must concur.⁷⁵

The court then turned to an examination of the mother's actions viewed through the allegations in the proceeding.

The daughter alleged that her mother's move was temporary in order to provide some respite to the daughter caregiver and to allow the mother to receive some outpatient evaluations. The daughter pointed to two statements made by her mother. The first was her mother's letter to her landlord terminating her apartment lease at the end of January 2009. In it she stated that she intend to move to an assisted living facility in the area. The second was the mother's statements about intending to return home which she made to her other son when he visited her in Connecticut. The daughter also relied on information about previously scheduled physician's

exercise jurisdiction); *Matter of Margaret Louise Beasley*, 234 A.D.2d 32; 650 N.Y.S.2d 170 (no showing of intent to change domicile) with *Matter of Oustinow*, N.Y.L.J., 4/8/03 (Sup. Ct. NY Co.)(no jurisdiction over religious leader who had relocated to Canada, maintained Canadian citizenship, and had executed the Canadian equivalent of a power of attorney).

⁷⁴ *Winter*, (Appendix A).

⁷⁵ *Winter*, (Appendix A)(citing 187 Misc. at 675, 64 N.Y.S.2d at 283).

appointments in New York in January and February 2009, and her mother's storage of many personal items in New York, her execution of advanced directives in New York, her attendance at church in New York, and her maintenance of a New York driver's license.

The son with whom the mother was living alleged that the move was permanent and pointed to a change of address card allegedly completed by the mother and a check as evidencing his mother's new Connecticut checking account. The mother submitted an affidavit detailing the personal items which she had taken to her son's home.

The daughter alleged that her mother lacked the capacity to form an intent to change her domicile; the son and mother claimed the contrary.

The court concluded that the mother had failed to establish an intent to change domicile. It relied on her statements to her other son about intending to return home, her correspondence about her move to the assisted living facility, and her failure to bring up the subject of the change of address card. Consequently, the court held that service on the mother in Connecticut was sufficient.

Participation of the Allegedly Incapacitated Individual in the Proceedings

Much of the language of article 81 emphasizes the importance of the allegedly incapacitated individual's participation in the proceeding.⁷⁶ Section 81.11, in particular, emphasizes that the only reasons for excluding the individual from the hearing are if the individual is located outside the state or "all the information before the court clearly establishes that (i) the person alleged to be incapacitated is completely unable to participate in the hearing or (ii) no meaningful participation will result from the person's presence at the hearing."⁷⁷

However, several recent decisions have held that the individual cannot be compelled to participate.⁷⁸

A. The Court Evaluator's Interview of the Individual

Among the duties of the court evaluator is the requirement to meet, interview, and consult with the allegedly incapacitated individual.⁷⁹ While the language of the statute appears to presume that a meeting will take place between the court evaluator and the allegedly incapacitated individual, an issue has arisen as to whether the allegedly incapacitated individual

⁷⁶ See, e.g., N.Y. Men. Hyg. L. §§81.07(order to show cause listing right to object to request for medical records, right to a jury trial and right to counsel); 81.09(c)(1)(listing the opportunity to meet with the court evaluator); 81.11(listing right to call and cross-examine witnesses and be present at the hearing).

⁷⁷ N.Y. Men. Hyg. L. §81.11(c)(2).

⁷⁸ *In re Heckl*, 840 N.Y.S.2d 516 (4th 2007); *In re Allers*, 37 Misc.3d 418, 948 N.Y.S.2d 902 (N.Y. Sup. Ct. Dutchess Co. 2012); *In re United Health Services Hospitals, Inc. (AG)*, 6 Misc.3d 447, 785 N.Y.S.2d 313 (Sup. Ct. Broome Co. 2004). See also *In re Doar*, 20 Misc.3d 1110(A), 867 N.Y.S.2d 373 (N.Y. Sup. Ct. N.Y. Co. 2008).

⁷⁹ N.Y. Men. Hyg. L. §81.09(c)(1).

can refuse to meet with, and be interviewed by, the court evaluator. At least one appellate court has opined that while the individual cannot assert a privilege against self-incrimination, the individual can indeed refuse to meet with the court evaluator.⁸⁰

The children of the allegedly incapacitated woman in *Heckl* commenced a guardianship proceeding and in due course the court appointed a court evaluator.⁸¹ The woman moved to vacate that appointment on the grounds she already had counsel, that the appointment with its concomitant requirement that she be interviewed infringed on her liberty interest, and that she could not be compelled to speak to the court evaluator.⁸²

The trial court held that she could not assert the right against self-incrimination and that she was to meet with the court evaluator.⁸³ When she refused to do so, her children sought to have her held in contempt with an appropriate fine or imprisonment.⁸⁴

The Fourth Department concluded that the trial court could not vacate the appointment of the court evaluator because the statutory scheme does not contemplate that the appointment be suspended or vacated when the allegedly incapacitated individual has retained counsel; it is only contemplated when the court has appointed counsel.⁸⁵

Acknowledging that her liberty interests were at stake given the powers that could be granted to the guardian, the court, nevertheless, decided that her right against self-incrimination was not applicable to the court evaluator's interview.⁸⁶ The court stated that "the right against self-incrimination applies to protect a person from "inculpatory" statements, i.e., statements that the person "may reasonably apprehend could be used in a criminal prosecution."⁸⁷ Because statements made to a court evaluator are, under the legislative scheme, to be used for purposes of protection and care rather than punishment, they are not "subject to the constitutional protection against self-incrimination."⁸⁸

The court held, however, that it could not compel the woman to meet with the court evaluator, there being no statutory duty imposed on her to do so.⁸⁹ The court viewed the

⁸⁰ *In re Heckl*, 44 A.D.3d 110, 840 N.Y.S.2d 516 (4th Dept. 2007).

⁸¹ 44 A.D.3d at 112, 840 N.Y.S.2d at 518.

⁸² 44 A.D.3d at 112, 840 N.Y.S.2d at 518.

⁸³ 44 A.D.3d at 112, 840 N.Y.S.2d at 518.

⁸⁴ 44 A.D.3d at 112, 840 N.Y.S.2d at 518.

⁸⁵ 44 A.D.3d at 114, 840 N.Y.S.2d at 520.

⁸⁶ 44 A.D.3d at 114, 840 N.Y.S.2d at 520.

⁸⁷ 44 A.D.3d at 115, 840 N.Y.S.2d at 520.

⁸⁸ 44 A.D.3d at 115, 840 N.Y.S.2d at 520.

⁸⁹ 44 A.D.3d at 115-116, 840 N.Y.S.2d at 520-521.

woman's refusal to participate in a meeting as her decision not to "avail herself of the statutory protection of providing the court with the independent report of the court evaluator regarding her 'personal wishes, preferences and desires.'"⁹⁰

As for the contempt motion, the court held that the children had failed to satisfy the burden of proof for establishing the contempt but could not "ignore the incongruity of their request to punish their mother "by fine or imprisonment or both" in the very same proceeding in which they allege that she is physically and mentally incapable of caring for herself."⁹¹

B. Compelling the Testimony of the Allegedly Incapacitated Individual at the Hearing

The Comments of the Law Revision Commission express the significance of the hearing on the appointment of a guardian:

In order to permit the court to observe the allegedly incapacitated person first hand and draw conclusions regarding the needs of that person, [Section 81.11] requires the person's presence at the hearing at the courthouse or where the person resides. If the person cannot come or be brought to the courthouse, the hearing must be conducted where the person resides. In rare and exceptional circumstances, the requirement that the hearing be conducted where the person resides may be dispensed with.

Requiring the presence of the person at the hearing satisfies many important goals. It allows the judge to make first hand observations and draw first hand impressions of the allegedly incapacitated person. Judges have substantial expertise in evaluating the persons who testify in court not only by their testimony but also by their appearance and demeanor. That expertise and experience prove very valuable in observing a person alleged to be incapacitated particularly because disparities often exist between what is written on paper and what is deduced from observing the person first hand. Information on paper tends to underrate capacity (Surrogate decision making Panel--The Final Evaluation Report, on file at the Office of the Commission on Quality of Care).

The allegedly incapacitated person's presence also permits the person to be part of the decisionmaking process, thereby recognizing, respecting and preserving the person's dignity. Additionally, the person's presence may allow the person to accept the appointment of a guardian more easily than someone who has been excluded from the process even by the best of intentions. For example, a person for whom a guardian is sought may be resisting placement or continued residence in a nursing home. The hearing provides that person with an opportunity to voice objections and be heard by someone in authority, i.e., the judge, and to hear the consideration that has been given to other alternatives. Having had an opportunity to be part of the process, the person may be more likely to accept the placement. Indeed, the decision to remain in the nursing home may

⁹⁰ 44 A.D.3d at 116, 840 N.Y.S.2d at 521.

⁹¹ 44 A.D.3d at 116, 840 N.Y.S.2d at 521.

become a voluntary one, and the result is satisfactory to everyone.

Seeing the person also allows the court to draw a carefully crafted and nuanced order which takes into account the person's dignity, autonomy, and abilities because the judge has had the opportunity to learn more about the person as an individual rather than a case description in a report.⁹²

A hearing has always been considered necessary to the appointment of a guardian.⁹³ Barring exceptional circumstances, the hearing “must be conducted in the presence of the person alleged to be incapacitated.”⁹⁴ Indeed, if for some reason the individual cannot come to the courthouse then the court must go to the person.⁹⁵ The statutory emphasis on the individual’s presence at the hearing is underscored by the language of subdivision (c) which states that it permits “the court to obtain its own impression of the person's capacity.”⁹⁶

Section 81.11 gives the alleged incapacitated individual rights regarding his or her participation in the hearing, including the right to present evidence, call witnesses, including expert witnesses, cross examine witnesses, including witnesses called by the court, and to be represented by counsel of his or her choice.⁹⁷ The statute, does not, however, address the issue of whether the alleged incapacitated individual can be called as a witness and compelled to testify at the hearing.⁹⁸

Two recent cases, *In re Allers*⁹⁹ and *In re United Health Services Hospitals, Inc. (AG)*,¹⁰⁰ have concluded that the fifth amendment privilege against self-incrimination and the CPLR § 4501 protection against self-incrimination are implicated in an Article 81 proceeding because of the liberty interest at stake.

* * * *

⁹² Comments of the New York State Law Revision Commission to Section 81.11 of the Mental Hygiene Law, McKinney’s Consolidated Law of New York, Civil Practice Law and Rules, Book 34A, pages 148-149.

⁹³ N.Y. Men. Hyg. Law §81.11(a).

⁹⁴ N.Y. Men. Hyg. Law §81.11; *In re Anthon*, 11 A.D.3d 937, 783 N.Y.S.2d 168 (4th Dept. 2004).

⁹⁵ N.Y. Men. Hyg. Law §81.11(c).

⁹⁶ N.Y. Men. Hyg. Law §81.11(c).

⁹⁷ N.Y. Men. Hyg. Law §81.11(b).

⁹⁸ *In re Allers*, 37 Misc.3d 418, 948 N.Y.S.2d 902 (N.Y. Sup. Ct. Dutchess Co. 2012).

⁹⁹ 37 Misc.3d 418, 948 N.Y.S.2d 902.

¹⁰⁰ 6 Misc.3d 447, 785 N.Y.S.2d 313 (Sup. Ct. Broome Co. 2004).

At the heart of the debate on the nature of the participation of the allegedly incapacitated individual in the proceedings is the inherent contradiction¹⁰¹ between the adversarial guardianship model reflected in decisions like *Allers and United Health Services Hospitals* and the paternalistic model of guardianship.¹⁰² That statutory contradiction in article 81 allows the court flexibility in addressing the needs, interests and rights of the individual. New York's other guardianship statute, article 17A of the Surrogate's Court Procedure Act is a decidedly paternalistic model and, consequently, a statute that allows for less flexibility.¹⁰³

Right to Jury Trial

Section 81.11(f) provides:

If on or before the return date designated in the order to show cause the alleged incapacitated person or counsel for the alleged incapacitated person raises issues of fact regarding the need for an appointment under this article and demands a jury trial of such issues, the court shall order a trial by jury thereof. Failure to make such a demand shall be deemed a waiver of the right to trial by jury.

The section limits the right to jury trial in several respects. First, the request can be made only by the allegedly incapacitated individual or his or her counsel.¹⁰⁴ Secondly, the demand must be made on or before the return date of the order to show cause. Thirdly, the subdivision limits the jury's area of concern to the need for an appointment of a guardian.

The limitation on what issues the jury will hear has been interpreted to mean that where there are no issues of fact about the individual's capacity, a motion demanding a jury trial should be denied.¹⁰⁵ In *Claiman*, the petitioner and the hospital where the respondent Ms. Claiman was a patient agreed that there was no issue of fact as to Ms. Claiman's need for a guardian. They concurred about her incapacity as demonstrated by her need for round-the-clock care, inability to communicate, and complete dependency on others.¹⁰⁶ She was even excused from attending the hearing on the grounds that she would be unable to participate or provide any meaningful participation in the hearing.¹⁰⁷ The court thus denied the petitioner's request for a jury trial

¹⁰¹ 37 Misc.3d at 421, 948 N.Y.S.2d at 903 (citing Dan Fish, *Does the Fifth Amendment Apply in Guardianship Proceedings?* N.Y.L.J., 02/25/11 at 3, col. 1, which refers to the statute as "at war with itself.").

¹⁰² 37 Misc.3d at 421, 948 N.Y.S.2d at 904.

¹⁰³ See, e.g., Rose Mary Bailly and Charis Nick Torok, *Should We Be Talking? - Beginning a Dialogue on Guardianship for the Developmentally Disabled in New York*, 75 Alb. L. Rev. 807 (2011-2012).

¹⁰⁴ The original statutory language allowed any party to demand a jury trial. This section was amended in 2004 to limit the demand to the allegedly incapacitated individual and that individual's counsel. L.2004, c. 438, § 10, eff. Dec. 13, 2004.

¹⁰⁵ *Matter of Claiman*, 169 Misc. 2d 881, 646 N.Y.S.2d 940 (N.Y. Sup Ct. Queens Co. 1996).

¹⁰⁶ 169 Misc. 2d at 882-883, 646 N.Y.S.2d at 940-941.

because her incapacity was not at issue.¹⁰⁸ The only question to be determined was who should be appointed as guardian, a subject outside of the language of section 81.11(f).¹⁰⁹

It should be noted that petitioner's demand was made before the statute was amended to limit such demands to the allegedly incapacitated individual and his or her counsel.¹¹⁰ A demand by a petitioner under the amended statute would not be authorized.

In *Beth Israel Medical Center*, a hospital sought a guardian as part of the discharge plan for a patient who had been admitted for treatment of a foot ulcer and who the hospital determined was delusional and mentally ill.¹¹¹ She claimed her boyfriend was abusive to her so she feared returning home.¹¹² On a conference call prior to the hearing, counsel for the patient asserted a demand for a jury trial, which the court ignored.¹¹³ When counsel repeated the demand the next day at an in-person conference, the court indicated that it intended to hold a preliminary hearing "to evaluate the [individual]'s competence and whether a guardian should be appointed [and] to decide whether [the individual] made a prima facie showing of entitlement to a jury trial."¹¹⁴ The court proceeded to hold a full hearing over counsel's objections both as to the failure to grant the demand for a jury trial and a lack of notice that there was to be a full hearing.¹¹⁵ After listening to testimony from the hospital's witnesses, the court, again over counsel's objection, "granted the hospital's request for a temporary discharge" of the individual to a nursing home and advised counsel for the individual that it would decide whether a "prima facie case" for a jury trial had been established.¹¹⁶ The court noted that "[i]f it's obvious that this patient is ill mentally, then it would just be a waste of time according to case law to have a jury trial just for exercising this."¹¹⁷ The trial court ultimately held that the allegedly incapacitated individual had failed to raise any issues of fact about the need for a guardian.¹¹⁸

¹⁰⁷ 169 Misc. 2d at 883, 646 N.Y.S.2d at 941.

¹⁰⁸ 169 Misc. 2d at 883, 646 N.Y.S.2d at 941.

¹⁰⁹ 169 Misc. 2d at 883, 646 N.Y.S.2d at 941.

¹¹⁰ See note 106.

¹¹¹ 308 A.D.2d 350, 764 N.Y.S.2d 87 (1st Dept. 2003).

¹¹² 308 A.D.2d at 351, 764 N.Y.S.2d at 87.

¹¹³ 308 A.D.2d at 352, 764 N.Y.S.2d at 88.

¹¹⁴ 308 A.D.2d at 352, 764 N.Y.S.2d at 88.

¹¹⁵ 308 A.D.2d at 352, 764 N.Y.S.2d at 88.

¹¹⁶ 308 A.D.2d at 352-353, 764 N.Y.S.2d at 89.

¹¹⁷ 308 A.D.2d at 353, 764 N.Y.S.2d at 89.

¹¹⁸ 308 A.D.2d at 353, 764 N.Y.S.2d at 89.

The hospital appealed because there was a dispute between it and counsel for the allegedly incapacitated individual about whether the nursing home placement was permanent or temporary and the hospital's desire for the appointment of a guardian without further proceedings.¹¹⁹

On appeal, the court concerned itself with the demand for the jury trial.¹²⁰

The court held that:

The [trial] court's conclusion that no jury trial was warranted because there were no unresolved factual disputes ignores that no factual record of any value was even developed, through no fault of appellant. We are not holding that a jury trial is required under article 81 merely because it is demanded, without consideration of whether there are facts to be decided, but only that on this record, we cannot conclude that there were no factual issues to be resolved. Since the record is clear that appellant denied the need for a guardian and [counsel] was not afforded an opportunity to make a record in support of this position, we find that a trial by jury is in order.¹²¹

One might question whether the expression "need for a guardian" as it is used in 81.11(f) is the correct terminology. In both *Claiman* and *Beth Israel Medical Center*, the courts focus on the question of the individual's incapacity. However, section 81.02, which deals with the standard of appointment of a guardian, uses the term "necessary" to mean "need." It is only when a guardianship is necessary or "needed" that the court, pursuant to section 81.02, turns to the question of whether the person is incapacitated.¹²²

Relationship between Family Health Care Decisions Act (FHCDA) and Article 81

The Family Health Care Decisions Act (FHCDA) lists in the order of their priority individuals who can make health care decisions of a patient who lacks the capacity to do so and does not have a health care proxy.¹²³ The first listed surrogate is an article 81 guardian with authority to make health care decisions.¹²⁴ Thereafter listed in the following order are: the spouse or domestic partner, son or daughter eighteen years of age or older, a parent, brother or sister eighteen years of age or older, and close friend.¹²⁵ These surrogates can make decisions based on

¹¹⁹ 308 A.D.2d at 353, 764 N.Y.S.2d at 89.

¹²⁰ 308 A.D.2d at 353, 764 N.Y.S.2d at 89.

¹²¹ 308 A.D.2d at 354, 764 N.Y.S.2d at 90.

¹²² See, e.g., *In re Buffalino*, 960 N.Y.S.2d 627 (N.Y. Sup. Ct. Suff. Co. 2013)

¹²³ N.Y. Pub. Health L. §2994-d. For a detailed discussion of the FHCDA, see Robert N. Swidler, *The Family Health Care Decisions Act: A Summary of Key Provisions*, 15 N.Y. St. B. A. Health L. J. 32 (Spring 2010).

¹²⁴ N.Y. Pub. Health L. §2994-d(1)(a).

¹²⁵ N.Y. Pub. Health L. §2994-d(1)(b)-(f).

the patient's wishes, including religious and moral beliefs, and if they are not known or cannot be reasonably ascertained, then based on the best interests of the patient.¹²⁶ The enactment of FHCDA addressed, among other concerns, the requirement under prior common law that "in the absence of a health proxy or clear and convincing evidence of the patient's wishes, spouses, relatives, or close friends . . . had no authority to make medical decisions for a loved one who could no longer make health care decisions for themselves."¹²⁷

On its face the FHCDA would appear, given the list of other surrogates, to eliminate the need for the appointment of a guardian to make health care decisions. A New York Supreme Court recently held, however, that the FHCDA is not a substitute for an article 81 guardian.¹²⁸ The issue arose when a long term care facility petitioned for the appointment of a limited guardian of the property with authority to apply for Medicaid for one of its residents who was allegedly incapacitated.¹²⁹ The individual was 80 years old and suffered from a myriad of health problems, including dementia.¹³⁰ When the court questioned the wisdom of the limited application given the gentleman's mental and physical state, the petitioner informed the court that it believed that the availability of a son in the area who could act as a surrogate under the FHCDA for determinations regarding the resident's health care eliminated the need for a guardian for personal and health care.¹³¹

The court did not accept this interpretation of the FHCDA. Although the court acknowledged that the FHCDA was designed to "fill the gap" where an incapacitated individual had not executed a health care proxy, it concluded that the statute was not intended as a replacement for a guardian.¹³² The court based its decision on several factors: the guardian's first place in the statutory list of surrogates,¹³³ the ability of the allegedly incapacitated individual to override the decisions of all the surrogates in the absence of a judicial determination that the individual "lacks decision-making capacity" or is "incompetent for all purposes,"¹³⁴ and the breadth of the article 81 guardian's authority which provides more protection to an incapacitated individual than a surrogate under the FHCDA.¹³⁵

¹²⁶ N.Y. Pub. Health L. §2994(4)(i)(ii).

¹²⁷ Edward F. McArdle, Kirsten A. Lerch, *Health Law 2009-2010 Survey of New York Law*, 61 Syracuse L. Rev. 801, 811-812 (2011).

¹²⁸ *In re Restaino*, 37 Misc.3d 586, 950 N.Y.S.2d 687 (N.Y. Sup. Nassau Co. 2012).

¹²⁹ 37 Misc.3d at 587-588, 950 N.Y.S.2d at 689.

¹³⁰ 37 Misc.3d at 588, 950 N.Y.S.2d at 689.

¹³¹ 37 Misc.3d at 588, 950 N.Y.S.2d at 689.

¹³² 37 Misc.3d at 587, 950 N.Y.S.2d at 689.

¹³³ 37 Misc.3d at 589, 950 N.Y.S.2d at 690.

¹³⁴ 37 Misc.3d at 590, 950 N.Y.S.2d at 690.

The court cautioned that any residential facility, such as the petitioner, who commences a guardianship proceeding under article 81 of the Mental Hygiene Law, claiming a person is incapacitated, should not limit its application to a special guardian of the property for purposes of Medicaid applications and payment of outstanding debt, but should also move for a guardian of the person. In these circumstances where an individual is in need of a guardian of any type and there is no healthcare proxy or power of attorney, the court must protect that individual's interests as though it were its own.¹³⁶

After a hearing, the court determined that the resident was incapacitated and appointed the son as the guardian for personal needs and the petitioner as the special guardian of the property.¹³⁷

Time will tell whether this interpretation of the FHCDA will be adopted more broadly.

¹³⁵ 37 Misc.3d at 590, 950 N.Y.S.2d at 691.

¹³⁶ 37 Misc.3d at 590-591, 950 N.Y.S.2d at 691.

¹³⁷ 37 Misc.3d at 592, 950 N.Y.S.2d at 692.

Case Update: Article 81 Guardianships

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1. *Matter of Sigal* - 42 Misc. 3d 379; 975 N.Y.S.2d 634; 2013 NY Slip Op 23379 – County Court, Nassau County, November 12, 2013, Decided

Infant's funds in guardianship account are not "community property" available for family's use.

Parent-guardians of the infant IP petitioned the Nassau County Court to be reimbursed from IP's trust for costs incurred throwing the infant a bat mitzfeh, totaling \$33,348.64. Petitioners also requested that the court authorize \$65,000 to be withdrawn from the trust to fund a family vacation. Court rejected the request for reimbursement for the bat mitzfeh because the parents had sufficient funds to afford it, having an annual income of roughly \$300,000. Similarly, the court limited the amount authorized for the family vacation to only cover the cost of "the hotel accommodations and airfare of [the infant] and her aide, the airfare for [the mother] and the wheelchair accessible van." Pursuant to the original court order appointing the parents as co-guardians, the co-guardians were permitted to withdrawal up to \$20,000 per year for the family vacation. In limiting the amount authorized to withdraw from the trust, "the court admonishe[d] the family that [the infant]'s funds 'are not community property for family use.'"

2. *Matter of Krushnauckas* - 40 Misc. 3d 1218(A); 975 N.Y.S.2d 708; 2013 NY Slip Op 51225(U), Surrogate's Court, Nassau County June 28, 2013, Decided

Over Attorney General's objections, Guardian vested with authority to create and fund SNT with IP's funds, with SNT provisions directing pour over to pooled trust in the event of a failure of Trustee.

In anticipation of a \$400,000 inheritance from IP's mother, the guardian for IP petitioned the court to authorize the creation of a Supplemental Needs Trust (SNT) for the benefit of the IP. The Attorney General objects to the language of the SNT allowing property to be subsequently transferred to a pooled trust in the event that the initial trustee resigns. The Attorney General claimed that such a transfer would result in a penalty for the IP. The court found no merit in the Attorney General's objection because it is within the court's discretion to approve the transfer of property into a pooled trust. Pooled trusts are permitted by the state to protect the IP from losing benefits during IP's life in exchange for allowing the state to reimburse itself for any benefits paid on behalf of IP. Therefore, the court authorized the guardian to create an SNT.

¹ JulieAnn Calareso, Esq., became a partner of Burke & Casserly in 2011, after having joined the firm in 2004 following a clerkship at the NYS Supreme Court, Appellate Division, Third Judicial Department. She focuses her practice on all areas of Elder Law, Trusts & Estates, and Special Needs Planning. She is grateful to Jenna Dana, the third year law student at Albany Law School pursuing concentrations in Business Law, Estate Law and Family & Elder Law. She is the President of the Pro Bono Society and a member of Albany Law Journal of Science and Technology.

3. *Matter of I.V.* - 39 Misc. 3d 1232(A); 971 N.Y.S.2d 71; 2013 NY Slip Op 50838(U), Supreme Court Bronx County, May 23, 2013, Decided

Be truthful in your pleadings. Failure of Petitioner to disclose his own status as illegal alien and to mischaracterize condition of AIP sufficient to have court impose sanctions.

Husband of AIP petitioned the court to appoint him as temporary guardian for the purpose of timely commencing a personal injury action on the AIP's behalf. AIP was injured when struck by a vehicle. Petitioner's attorney failed to disclose that the petitioner was an illegal alien in the verified petition. The attorney also mischaracterized AIP's condition, stating that she was in "persistent vegetative state with the inability to provide for her personal or property needs." At the hearing, AIP's attorney stated that AIP had the ability to accept service of process and the ability to move around via a wheelchair. The court removed the husband from his role as temporary guardian due to his failure to inform the court of his illegal alien status and set a hearing to determine the need for a guardian. The court also set a return date for his attorney to impose sanctions for "materially misrepresenting petitioner's alien status and the [AIP]'s physical and mental conditions."

4. *Matter of Gabr* - 39 Misc. 3d 746; 961 N.Y.S.2d 736; 2013 NY Slip Op 23079, Supreme Court, Kings County, March 13, 2013, Decided

Be truthful in your pleadings. Failure to disclose Petitioner's own shortcomings undermines credibility with the Court.

AIP's son petitioned the court to be appointed foreign guardian of AIP. AIP worked and lived in New York until he retired in 2000, when he returned to his native country of Egypt. AIP was married in 2001. Petitioner was appointed guardian of his father in Egypt after his father suffered a stroke in 2002, but faced problems when trying to "marshal the AIP's New York State Chase bank account." Petitioner claims that AIP's wife was unduly influencing the AIP to transfer property to her. The court required a hearing to determine the need for a guardian because the Egyptian laws regarding guardianship are vastly different and in conflict with the guardianship laws in New York. AIP was appointed a GAL and AIP nominated his wife as guardian. At the hearing, the court discovered that the Petitioner falsified documents, failed to make the required spousal support payments to AIP's wife, and had filed bankruptcy. The court rejected Petitioner's request and instead named AIP's wife as personal needs guardian pursuant to the AIP's wishes. The AIP was deemed to have the capacity to make decisions for himself, such as appoint an attorney in fact and therefore no guardian of the property was needed.

5. *Matter of Gulizar N.O.* - 111 A.D.3d 749; 974 N.Y.S.2d 801; 2013 NY Slip Op 7489, Appellate Division, Second Department, November 13, 2013, Decided

Presence of AIP at hearing is mandatory, absent statutory provisions; failure to include AIP in proceeding absent the requisite findings is grounds for reversal.

AIP appealed from an order appointing a guardian of the person and property. AIP's father brought the action. AIP was not present at the original hearing and there was no evidence that explained her absence or her inability to be present. The court reversed and remanded for a new hearing to determine the need for a guardian.

6. *Matter of Buchwald* - 38 Misc. 3d 1225(A); 967 N.Y.S.2d 865; 2013 NY Slip Op 50272(U) – Surrogate's Court, Queens County, February 8, 2013, Decided

Scope of Guardian's authority limited after death of IP and attempts at overreaching, particularly when self-serving.

Guardian of the, now deceased, IP commenced an action to revoke letters of Administration under the premise that Petitioner had located the decedent's Will. Guardian failed to follow statutory mandates regarding her diminished authority after IP passed away. Although Petitioner would have had the authority to commence and execute a proceeding during life, after the IP died, that authority lapsed. Petitioner commenced an action, after the death of the IP, seeking the turnover of funds from the IP's former attorney and later settled that action. Petitioner attempted to have the distributees nominate her as co-fiduciary. The court found that she was only trying to increase her commissions so it denied her petition to revoke letters because the Public Administrator could administer the Will.

7. *Matter of Doar* - 39 Misc. 3d 1242(A); 975 N.Y.S.2d 365; 2013 NY Slip Op 50988(U) – Kings County, June 21, 2013, Decided

Caregiver-turned-wife 46 year old woman found disingenuous by the Court. Racking up credit card debt, alienating AIP from friends, and changing accounts of 83 year old, dementia riddled man not appointed guardian.

Adult Protective Services petitioned the court to appoint a guardian of the person and property for the AIP. The AIP's wife cross-petitioned to be appointed guardian. The court ordered pendent lite orders to protect the AIP while these proceedings took place, including barring AIP's wife from accessing accounts and requiring her to make spousal support payments. AIP was an 83 year-old man suffering from dementia. AIP married his 46 year-old home health aide after she alienated him from his friend of 20 years and attorney in fact. AIP's wife convinced AIP to revoke his previous POA and execute a new POA naming her as agent. She also had AIP replace his friend and name her as POD designee on his Morgan Stanley account. Once in the fiduciary capacity, she began to avail herself of his funds until he was destitute with credit card debt. The court found AIP's wife to be disingenuous, so they rejected her request and ordered her to continue paying spousal support. The court appointed the Jewish Association of Services for the Aged (JASA) as guardian, suggesting that JASA might commence a dissolution of marriage action and a turnover proceeding.

8. *Matter of Alice G.* - 113 A.D.3d 609; 979 N.Y.S.2d 77; 2014 NY Slip Op 103 - Appellate Division, Second Department, January 8, 2014, Decided

Article 81 Guardian Fee Dispute and Potential Fraud.

Guardian was sued for selling real property at an auction for well below fair value after ignoring legitimate offers. The first case, brought in the Federal District court, claimed a violation of the "Racketeer Influenced and Corrupt Organizations" (RICO) as well as fraud and breach of fiduciary duties. It was dismissed, and affirmed on appeal, when the court found no violation of RICO and declined to decide the state law issues. Plaintiffs then brought an action in Supreme Court of Queens County for fraud and breach of fiduciary duties, which was also dismissed. Plaintiffs appealed again. The Appellate court said the Supreme Court erred in awarding fees to guardian when the scope of his services was still in dispute, awarding fees to guardian's attorney without a "clear and concise explanation" for the reasonable fees, and for imposing sanctions for frivolous claims when the previous actions were not brought in that court. The case was remanded to the Supreme Court for a hearing to determine the facts and the appropriate fees.

9. *Cangro v. Rosado* - 2014 N.Y. Misc. LEXIS 672; 2014 NY Slip Op 50207(U) – Supreme Court, New York County, February 21, 2014, Decided

Suing a former guardian - Pro Se Plaintiff Sanctioned for Frivolous Claims.

Pro se Plaintiff was subjected to the maximum sanction of \$10,000 after repeatedly filing baseless claims against defendant, her former Guardian, and ordered to pay defendant's costs. Plaintiff has been barred from bringing any subsequent claims against defendant without leave of an appropriate Administrative Judge. Plaintiff was an experienced pro se litigant and could not claim ignorance of these laws after being sanctioned in prior actions and warned previously regarding frivolous claims.

10. *Matter of Imre B.R.* - 40 Misc. 3d 464; 965 N.Y.S.2d 860; NY Slip Op 23183 – Supreme Court, Dutchess County, June 5, 2013, Decided

Article 81 is remedy of last resort; Agent under Power of Attorney must resort to remedies under General Obligations Law prior to turning to Article 81 for relief.

Stepson of AIP petitions court to be appointed Article 81 limited Guardian after Merrill Lynch declines to accept the Power of Attorney naming petitioner as attorney in fact. The same POA was accepted by every other financial institution so the court suggested that Petitioner compel Merrill Lynch to honor the POA by referencing the General Obligations Law. The court rejects this petition because Article 81 is available only as the least restrictive means to protect the AIP from harm and here, the petitioner has the executed POA and can compel Merrill Lynch.

UNIFORM GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION ACT

Section

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<< NY MENT HYG § 83.01 >>

§ 83.01 Short title

This article shall be known and may be cited as the “uniform adult guardianship and protective proceedings jurisdiction act”.

<< NY MENT HYG § 83.03 >>

§ 83.03 Definitions

For purposes of this article, the following definitions shall apply:

- (a) “Adult” means an individual who has attained eighteen years of age.

- (b) "Emergency" means a circumstance that likely will result in substantial harm to a respondent's health, safety or welfare, and for which the appointment of a guardian is necessary because no other person has authority and is willing to act on the respondent's behalf.
- (c) "Guardian of the property" means a person appointed by the court to administer the property of an adult, including a person appointed under article eighty-one of this title and article seventeen-A of the surrogate's court procedure act, and including a conservator appointed by a court in another state.
- (d) "Guardian of the person" means a person appointed by the court to make decisions regarding the person of an adult, including a person appointed under article eighty-one of this title and article seventeen-A of the surrogate's court procedure act.
- (e) "Home state" means the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months immediately before the filing of a petition for a protective order or the appointment of a guardian of the person; or if none, the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months ending within the six months prior to the filing of the petition.
- (f) "Party" means the respondent, petitioner, guardian of the person, conservator guardian of the property, or any other person allowed by the court to participate in a guardianship proceeding for the appointment of a guardian of the person or a protective proceeding.
- (g) "Person", except in the term incapacitated person for whom a guardian of the person has been appointed or protected person, means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.
- (h) "Protected person" means an adult for whom a protective order has been issued.
- (i) "Protective order" means an order appointing a conservator guardian of the property or other order related to management of an adult's property.
- (j) "Protective proceeding" means a judicial proceeding in which a protective order is sought or has been issued.
- (k) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- (l) "Respondent" means an adult for whom a protective order or the appointment of a guardian of the person is sought.
- (m) "Significant-connection state" means a state, other than the home state, with which a respondent has a significant connection other than mere physical presence and in which substantial evidence concerning the respondent is available.

(n) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

<< NY MENT HYG § 83.05 >>

§ 83.05 International application of this article

A court of this state may treat a foreign country as if it were a state for the purpose of applying sections 83.01 through 83.37 of this article.

<< NY MENT HYG § 83.07 >>

§ 83.07 Communication between courts

(a) A court of this state may communicate with a court in another state concerning a proceeding arising under this article. The court may allow the parties to participate in the communication.

(b) If the parties are not allowed to participate in the communication, the court shall give all parties the opportunity to present facts and legal arguments before the court issues an order establishing jurisdiction.

(c) Except as otherwise provided in subdivision (d) of this section, the court shall make a record of any communication under this section and promptly inform the parties of the communication and grant them access to the record.

(d) Courts may communicate concerning schedules, calendars, court records and other administrative matters without making a record.

<< NY MENT HYG § 83.09 >>

§ 83.09 Cooperation between courts

(a) In a proceeding for the appointment of a guardian of the person or protective proceeding in this state, a court of this state may request the appropriate court of another state to do any of the following:

1. hold an evidentiary hearing;
2. order a person in that state to produce evidence or give testimony pursuant to procedures of that state;
3. order that an evaluation or assessment be made of the respondent;
4. order any appropriate investigation of a person involved in a proceeding;

5. forward to the court of this state a certified copy of the transcript or other record of a hearing under paragraph one of this subdivision or any other proceeding, any evidence otherwise produced under paragraph two of this subdivision, and any evaluation or assessment prepared in compliance with an order under paragraph three or four of this subdivision;

6. issue any order necessary to assure the appearance in the proceeding of a person whose presence is necessary for the court to make a determination, including the respondent or the person subject to a guardianship of the person or protected person; and

7. issue an order authorizing the release of medical, financial, criminal, or other relevant information in that state, including protected health information.

(b) The court may receive any evidence produced pursuant to subdivision (a) of this section in the same manner that it would admit into evidence the report of a court evaluator after the court evaluator had been subject to cross examination;

(c) If a court of another state in which a guardianship or protective proceeding is pending requests assistance of the kind provided in subdivision (a) of this section, a court of this state has jurisdiction for the limited purpose of granting the request or making reasonable efforts to comply with the request.

<< NY MENT HYG § 83.11 >>

§ 83.11 Taking testimony in another state

(a) In a proceeding for the appointment of a guardian of the person or protective proceeding, in addition to other procedures that may be available, testimony of a witness who is located in another state may be offered by deposition or other means allowable in this state for testimony taken in another state. The court on its own motion may order that the testimony of a witness be taken in another state and may prescribe the manner in which and the terms upon which the testimony is to be taken.

(b) In a proceeding for the appointment of a guardian of the person or protective proceeding, a court in this state may permit a witness located in another state to be deposed or to testify by telephone or audiovisual or other electronic means. A court of this state shall cooperate with the court of the other state in designating an appropriate location for the deposition or testimony.

(c) Documentary evidence transmitted from another state to a court of this state by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the best evidence rule.

<< NY MENT HYG § 83.13 >>

§ 83.13 Significant connection factors

In determining under section 83.17 and subdivision (e) of section 83.31 of this article whether a respondent has a significant connection with a particular state, the court shall consider:

- (a) the location of the respondent's family and other persons required to be notified of the proceeding;
- (b) the length of time the respondent at any time was physically present in the state and the duration of any absence;
- (c) the location of the respondent's property; and
- (d) the extent to which the respondent has ties to the state such as voting registration, state or local tax return filing, vehicle registration, driver's license, social relationship, and receipt of services.

<< NY MENT HYG § 83.15 >>

§ 83.15 Exclusive basis

Subject to section 81.18 of this title, this article provides the exclusive jurisdictional basis for a court of this state to appoint a guardian of the person or issue a protective order for an adult.

<< NY MENT HYG § 83.17 >>

§ 83.17 Jurisdiction

A court of this state has jurisdiction to appoint a guardian of the person or issue a protective order for a respondent if:

(a) the state is the respondent's home state;

(b) on the date the petition is filed, this state is a significant-connection state and:

1. the respondent does not have a home state or a court of the respondent's home state has declined to exercise jurisdiction because this state is a more appropriate forum; or

2. the respondent has a home state, a petition for an appointment or order is not pending in a court of that state or another significant connection state, and before the court makes the appointment or issues the order:

(i) a petition for an appointment or order is not filed in the respondent's home state;

(ii) an objection to the court's jurisdiction is not filed by a person required to be notified of the proceeding; and

(iii) the court in this state concludes that it is an appropriate forum under the factors set forth in section 83.23 of this article;

(c) this state does not have jurisdiction under either subdivision (a) or (b) of this section, the respondent's home state and all significant-connection states have declined to exercise jurisdiction because this state is the more appropriate forum, and jurisdiction in this state is consistent with the constitutions of this state and the United States; or

(d) the requirements for special jurisdiction under section 83.19 of this article are met.

<< NY MENT HYG § 83.19 >>

§ 83.19 Special jurisdiction

(a) A court of this state lacking jurisdiction under section 83.17 of this article has special jurisdiction to do any of the following:

- 1. appoint a guardian of the person in an emergency for a term not exceeding ninety days for a respondent who is physically present in this state;**
- 2. issue a protective order with respect to a real or tangible personal property located in this state; and**
- 3. appoint a guardian of the person or a guardian of the property for a person subject to a guardianship of the person or protected person for whom a provision order to transfer the proceeding from another state has been issued under procedures similar to section 83.31 of this article.**

(b) If a petition for the appointment of a guardian of the person in an emergency is brought in this state and this state was not the respondent's home state on the date the petition was filed, the court shall dismiss the proceeding at the request of the court of the home state, if any, whether dismissal is requested before or after the emergency appointment.

<< NY MENT HYG § 83.21 >>

§ 83.21 Exclusive and continuing jurisdiction

Except as otherwise provided in section 83.19 of this article, a court that has appointed a guardian of the person or issued a protective order consistent with this article has exclusive and continuing jurisdiction over the proceedings until it is terminated by the court or the appointment or order expires by its own terms.

<< NY MENT HYG § 83.23 >>

§ 83.23 Appropriate forum

(a) A court of this state having jurisdiction under section 83.17 of this article to appoint a guardian of the person or issue a protective order may decline to exercise its jurisdiction if it determines at any time that a court of another state is a more appropriate forum.

(b) If a court of this state declines to exercise its jurisdiction under subdivision (a) of this section, it shall either dismiss or stay the proceeding. The court may impose any condition the court considers just and proper, including the condition that a petition for the appointment of a guardian of the person or issuance of a protective order be filed promptly in another state.

(c) In determining whether it is an appropriate forum, the court shall consider all relevant factors, including:

- 1. any expressed preference of the respondent;**
- 2. whether abuse, neglect or exploitation of the respondent has occurred or is likely to occur, and which state could best protect the respondent from the abuse, neglect or exploitation;**
- 3. the length of time the respondent was physically present in or was a legal resident of this or another state;**
- 4. the distance of the respondent from the court in each state;**
- 5. the financial circumstances of the respondent's estate;**
- 6. the nature and location of the evidence;**
- 7. the ability of the court in each state to decide the issue expeditiously and the procedures necessary to present evidence;**
- 8. the familiarity of the court of each state with the facts and issues in the proceeding; and**
- 9. if an appointment were made, the court's ability to monitor the conduct of the guardian or conservator.**

<< NY MENT HYG § 83.25 >>

§ 83.25 Jurisdiction declined by reason of conduct

(a) If at any time a court of this state determines that it acquired jurisdiction to appoint a guardian of the person or issue a protective order because of unjustifiable conduct, the court may:

- 1. decline to exercise jurisdiction;**
- 2. exercise jurisdiction for the limited purpose of fashioning an appropriate remedy to ensure the health, safety and welfare of the respondent, or the protection of the respondent's property or prevent a repetition of the unjustifiable conduct, including staying the proceeding until a petition for the appointment of a guardian of the person or issuance of a protective order is filed in a court of another state having jurisdiction; or**

3. continue to exercise jurisdiction after considering:

(i) the extent to which the respondent and all persons required to be notified of the proceedings have acquiesced in the exercise of the court's jurisdiction;

(ii) whether it is a more appropriate forum than the court of any other state under the factors set forth in subdivision (c) of section 83.23 of this article; and

(iii) whether the court of any other state would have jurisdiction under factual circumstances in substantial conformity with the jurisdictional standards of section 83.17 of this article.

(b) If a court of this state determines that it acquired jurisdiction to appoint a guardian of the person or issue a protective order because a party seeking to invoke its jurisdiction engaged in unjustifiable conduct, it may assess against that party necessary and reasonable expenses, including attorney's fees, investigative fees, court costs, communication expenses, witness fees and expenses, and travel expenses. The court may not assess fees, costs or expenses of any kind against this state or a governmental subdivision, agency or instrumentality of this state unless authorized by law other than this article.

<< NY MENT HYG § 83.27 >>

§ 83.27 Notice of proceeding

If a petition for the appointment of a guardian of the person or issuance of a protective order is brought in this state and this state was not the respondent's home state on the date the petition was filed, in addition to complying with the notice requirements of this state, notice of the petition must be given to those persons who would be entitled to notice of the petition if a proceeding were brought in the respondent's home state. The notice must be given in the same manner as notice is required to be given in this state.

<< NY MENT HYG § 83.29 >>

§ 83.29 Proceedings in more than one state

Except for a petition for the appointment of a guardian of the person in an emergency or issuance of a protective order limited to property located in this state under paragraph one or two of subdivision (a) of section 83.19 of this article, if a petition for the appointment of a guardian of the person or issuance of a protective order is filed in this state and in another state and neither petition has been dismissed or withdrawn, the following rules apply:

(a) If the court in this state has jurisdiction under section 83.17 of this article, it may proceed with the case unless a court in another state acquires jurisdiction under provisions similar to such section before the appointment or issuance of the order.

(b) If the court in this state does not have jurisdiction under section 83.17 of this article, whether at the time the petition is filed or at any time before the appointment or issuance of the order, the court shall stay the proceeding and communicate

with the court in the other state. If the court in the other state has jurisdiction, the court in this state shall dismiss the petition unless the court in the other state determines that the court in this state is a more appropriate forum.

<< NY MENT HYG § 83.31 >>

§ 83.31 Transfer of guardianship or conservatorship to another state

(a) A guardian of the person or a guardian of the property appointed in this state may petition the court to transfer the guardianship to another state.

(b) Notice of a petition under subdivision (a) of this section must be given to the persons that would be entitled to notice of a petition in this state for the appointment of a guardian of the person or a guardian of the property.

(c) On the court's own motion or on request of the guardian of the person, the guardian of the property, the person subject to the guardianship of the person, or the protected person, or other person required to be notified of the petition, the court shall hold a hearing on a petition filed pursuant to subdivision (a) of this section.

(d) The court shall issue an order provisionally granting a petition to transfer a guardianship of the person and shall direct the guardian of the person to petition for guardianship of the person in the other state if the court is satisfied that the guardianship of the person will be accepted by the court in the other state and the court finds that:

1. the person subject to the guardianship of the person is physically present in or is reasonably expected to move permanently to the other state;
2. an objection to the transfer has not been made or, if an objection has been made, the objector has not established that the transfer would be contrary to the interests of the person subject to the guardianship of the person; and
3. plans for care and services for the person subject to the guardianship of the person in the other state are reasonable and sufficient.

(e) The court shall issue a provisional order granting a petition to transfer a guardianship of the property and shall direct the guardian of the property to petition for guardianship of the property in the other state if the court is satisfied that the guardianship of the property will be accepted by the court of the other state and the court finds that:

1. the protected person is physically present in or is reasonably expected to move permanently to the other state, or the protected person has a significant connection to the other state considering the factors in section 83.13 of this article;
2. an objection to the transfer has not been made or, if an objection has been made, the objector has not established that the transfer would be contrary to the interests of the protected person; and
3. adequate arrangements will be made for management of the protected person's property.

(f) The court shall issue a final order confirming the transfer and terminating the guardianship of the person or property upon its receipt of:

- 1. a provisional order accepting the proceeding from the court to which the proceeding is to be transferred which is issued under provisions similar to section 83.33 of this article; and**
- 2. the documents required to terminate a guardianship of the person or property in this state.**

<< NY MENT HYG § 83.33 >>

§ 83.33 Accepting guardianship or conservatorship transferred from another state

(a) To confirm transfer of a guardianship of the person or guardianship of the property transferred to this state under provisions similar to section 83.31 of this article, the guardian of the person or guardian of the property must petition the court in this state pursuant to article eighty-one of this title or article seventeen-A of the surrogate's court procedure act to accept the guardianship of the person or guardianship of the property. The petition must include a certified copy of the other state's provisional order of transfer.

(b) Notice of a petition under subdivision (a) of this section must be given to those persons that would be entitled to notice if the petition were a petition for the appointment of a guardian of the person or issuance of a protective order in both the transferring state and this state. The notice must be given in the same manner as notice is required to be given in this state.

(c) On the court's own motion or on request of the guardian of the person or guardian of the property, the person subject to the guardianship of the person or protected person, or other person required to be notified of the proceeding, the court shall hold a hearing on a petition filed pursuant to subdivision (a) of this section.

(d) The court shall issue an order provisionally granting a petition filed under subdivision (a) of this section unless:

- 1. an objection is made and the objector establishes that transfer of the proceeding would be contrary to the interests of the incapacitated or protected person; or**
- 2. the guardian of the person or guardian of the property is ineligible for appointment in this state.**

(e) The court shall issue a final order accepting the proceeding and appointing the guardian of the person or guardian of the property as guardian of the person or guardian of the property in this state upon its receipt from the court from which the proceeding is being transferred of a final order issued under provisions similar to section 83.31 of this article transferring the proceeding to this state.

(f) Not later than ninety days after issuance of a final order accepting transfer of a guardianship of the person or guardianship of the property, the court shall determine whether the guardianship of the person or guardianship of the property needs to be modified to conform to the law of this state.

(g) In granting a petition under this section, the court shall recognize a guardianship order from the other state, including the determination of incapacity and the appointment of the guardian of the person or guardian of the property.

(h) The denial by a court of this state of a petition to accept a guardianship of the person or guardianship of the property transferred from another state does not affect the ability of the guardian of the person or guardian of the property to seek appointment as guardian of the person or guardian of the property in this state under article eighty-one of this title or article seventeen-A of the surrogate's court procedure act if the court has jurisdiction to make an appointment other than by reason of the provisional order of transfer.

<< NY MENT HYG § 83.35 >>

§ 83.35 Registration of orders appointing a guardian of the person

If a guardian of the person by whatever name designated has been appointed in another state and a petition for the appointment of a guardian of the person is not pending in this state, the guardian of the person appointed in the other state, after giving notice to the appointing court of an intent to register, may register the guardianship of the person order in this state by filing as a foreign judgment in a court, in any appropriate county of this state, certified copies of the order and letters of office.

<< NY MENT HYG § 83.37 >>

§ 83.37 Registration of protective orders

If a guardian of the property has been appointed in another state and a petition for a protective order is not pending in this state, the guardian of the property appointed in the other state, after giving notice to the appointing court of an intent to register, may register the protective order in this state by filing as a foreign judgment in a court of this state, in any county in which property belonging to the protected person is located, certified copies of the order and letters of office and of any bond. Thereafter, said guardian of the property shall comply with the requirements of subparagraph (vi) of paragraph six of subdivision (a) of section 81.20 of this title with regard to any real property of the protected person in this state.

<< NY MENT HYG § 83.39 >>

§ 83.39 Effect of registration

(a) Upon registration of an order appointing a guardian of the person or protective order from another state, the guardian of the person or guardian of the property may exercise in this state all powers authorized in the order of appointment except as prohibited under the laws of this state, including maintaining actions and proceedings in this state and selling real property and, if the guardian of the person or guardian of the property is not a resident of this state, subject to any conditions imposed upon nonresident parties.

(b) A court of this state may grant any relief available under this article and other law of this state to enforce a registered order.

<< NY MENT HYG § 83.41 >>

§ 83.41 Uniformity of application and construction

In applying and construing this article, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

<< NY MENT HYG § 83.43 >>

§ 83.43 Relation to electronic signatures in global and national commerce act

This article modifies, limits and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit or supersede Section 101(c) of such act, 15 U.S.C. Section 7001 (c), or authorize electronic delivery of any of the notices described in Section 103(b) of such act, 15 U.S.C. Section 7003(b).

<< NY MENT HYG § 83.45 >>

§ 83.45 Transitional provision

(a) This article applies to proceedings begun on or after this article's effective date.

(b) Sections 83.01 through 83.05 and sections 83.31 through 83.43 of this article apply to proceedings begun before this article's effective date, regardless of whether a guardianship or protective order has been issued.

§ 2. Section 1758 of the surrogate's court procedure act, as added by chapter 675 of the laws of 1989, is amended to read as follows:

<< NY SURR CT PRO § 1758 >>

§ 1758. Court jurisdiction

1. The jurisdiction of the court to hear proceedings pursuant to this article shall be subject to article eighty-three of the mental hygiene law.

2. After the appointment of a guardian, standby guardian or alternate guardians, the court shall have and retain general jurisdiction over the mentally retarded or developmentally disabled person for whom such guardian shall have been appointed, to take of its own motion or to entertain and adjudicate such steps and proceedings relating to such guardian, standby, or alternate guardianship as may be deemed necessary or proper for the welfare of such mentally retarded or developmentally disabled person.

§ 3. Section 81.18 of the mental hygiene law, as amended by chapter 438 of the laws of 2004, is amended to read as follows:

<< NY MENT HYG § 81.18 >>

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

Where the person alleged to be incapacitated is not present in the state and a guardian, by whatever name designated, has been duly appointed pursuant to the laws of any other ~~state, territory, or~~ country where the person alleged to be incapacitated resides to assist such person in property management, the court in its discretion, may make an order appointing the foreign guardian as a guardian under this article with powers with respect to property management within this state on the foreign guardian's giving such security as the court deems proper. **In its discretion, the court may utilize the provisions of article eighty-three of this title.**

§ 4. This act shall take effect on the one hundred eightieth day after it shall have become a law.

NY LEGIS 427 (2013)

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