

## Summary of 2004 Amendments Mental Hygiene Law Article 81

Mental Hygiene Law Article 81 has been amended by Chapter 438 of the Laws of 2004 (approved September 14, 2004; effective December 13, 2004). The amendment enacts several substantive changes in the law, while also making many technical corrections.

### Highlights of substantive changes:

- definition of life sustaining treatment in a new subdivision (j) of § 81.03
- commencement of a proceeding by the filing of a petition, with the 28 day period for hearing to begin with the signing of the order to show cause, § 81.07 (a), (b)(1)
- specific prohibition in § 81.07 (b)(3) against any court requirement for the attachment of medical information to the order to show cause as supporting papers
- changes in the notice and service provisions of § 81.07
- court evaluator appointments are mandated to be made from the OCA list, § 81.09 (b)(1)
- clarification of §81.10 (a) to ensure an AIP's right to choose and engage counsel, but also to require appointed counsel to remain of record until the court determines that the engagement of counsel was free and independent
- the only temporary relief under § 81.23 that will require the appointment of counsel is that of temporary guardian, § 81.10 (c)(5)
- MHLS may be appointed court evaluator or counsel for AIPs in the community, § 81.09 (b)(1); 81.10 (e)
- the AIP is the only party who may demand a jury trial on the issue of incapacity, § 81.11 (f)
- courts only have 7 days to render decisions after hearing, § 81.13, and a judgment must be entered and served within 10 days of signature, § 81.16 (e) [timing for the commission is still confusing, *see*, § 81.13]
- more detail has been included in the powers of property management guardian, § 81.21
- major medical/dental treatment consent expressly limited by the exception for life sustaining treatment in § 81.29 (e), § 81.22 (a)(8)
- the purpose of a TRO or preliminary injunction is extended to include the health and safety of an AIP, § 81.23 (b)(1), (2)
- changes in bonding requirements and provision for depositing assets into court and including trustees for bonding, § 81.25
- reference to SCPA 2309 deleted from the compensation provisions of § 81.28 (a)
- court's power to vacate POA and HCP extended to permit the exercise of that power for breach of fiduciary power in addition to invalidity ab initio, § 81.29 (d)
- upon application for modification of powers, a court may dispense with the need for a hearing for good cause, § 81.36 (c)

### **§ 81.01. Legislative findings and purpose**

The legislature hereby finds that the needs of persons with incapacities are as diverse and complex as they are unique to the individual. The current system of conservatorship and committee does not provide the necessary flexibility to meet these needs. Conservatorship which traditionally compromises a person's rights only with respect to property frequently is insufficient to provide necessary relief. On the other hand, a committee, with its judicial finding of incompetence and the accompanying stigma and loss of civil rights, traditionally involves a deprivation that is often excessive and unnecessary. Moreover, certain persons require some form of assistance in meeting their personal and property management needs but do not require either of these drastic remedies. The legislature finds that it is desirable for and beneficial to persons with incapacities to make available to them the least restrictive form of intervention which assists them in meeting their needs but, at the same time, permits them to exercise the independence and self-determination of which they are capable. The legislature declares that it is the purpose of this act to promote the public welfare by establishing a guardianship system which is appropriate to satisfy either personal or property management needs of an incapacitated person in a manner tailored to the individual needs of that person, which takes in account the personal wishes, preferences and desires of the person, and which affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life.

### **§ 81.02. Power to appoint a guardian of the person and/or property; standard for appointment**

(a) The court may appoint a guardian for a person if the court determines:

1. that the appointment is necessary to provide for the personal needs of that person, including food, clothing, shelter, health care, or safety and/or to manage the property and financial affairs of that person; and
2. that the person agrees to the appointment, or that the person is incapacitated as defined in subdivision (b) of this section. In deciding whether the appointment is necessary, the court shall consider the report of the court evaluator, as required in paragraph five of subdivision (c) of section 81.09 of this article, and the sufficiency and reliability of available resources, as defined in subdivision (e) of section 81.03 of this article, to provide for personal needs or property management without the appointment of a guardian. Any guardian appointed under this article shall be granted only those powers which are necessary to provide for personal needs and/or property management of the incapacitated person in such a manner as appropriate to the individual and which shall constitute the least restrictive form of intervention, as defined in subdivision (d) of section 81.03 of this article.

(b) The determination of incapacity shall be based on clear and convincing evidence and shall consist of a determination that a person is likely to suffer harm because:

1. the person is unable to provide for personal needs and/or property management;  
and
2. the person cannot adequately understand and appreciate the nature and consequences of such inability.

(c) In reaching its determination, the court shall give primary consideration to the functional level and functional limitations of the person. Such consideration shall include an assessment of that person's:

1. management of the activities of daily living, as defined in subdivision (h) of section 81.03 of this article;
2. understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living;
3. preferences, wishes, and values with regard to managing the activities of daily living; and
4. the nature and extent of the person's property and financial affairs and his or her ability to manage them.

It shall also include an assessment of (i) the extent of the demands placed on the person by that person's personal needs and by the nature and extent of that person's property and financial affairs; (ii) any physical illness and the prognosis of such illness; (iii) any mental disability, as that term is defined in section 1.03 of this chapter, alcoholism or substance dependence as those terms are defined in section 19.03 of this chapter, and the prognosis of such disability, alcoholism or substance dependence; and (iv) any medications with which the person is being treated and their effect on the person's behavior, cognition and judgment.

(d) In addition, the court shall consider all other relevant facts and circumstances regarding the person's:

1. functional level; and
2. understanding and appreciation of the nature and consequences of his or her functional limitations.

### **§ 81.03. Definitions**

When used in this article,

(a) "guardian" means a person who is eighteen years of age or older, a corporation, or a public agency, including a local department of social services, appointed in accordance with terms of this article by the supreme court, the surrogate's court, or the county court to act on behalf of an incapacitated person in providing for personal needs and/or for property management.

(b) "functional level" means the ability to provide for personal needs and/or the ability with respect to property management.

(c) "functional limitations" means behavior or conditions of a person which impair the ability to provide for personal needs and/or property management.

(d) "least restrictive form of intervention" means that the powers granted by the court to the guardian with respect to the incapacitated person represent only those powers which are necessary to provide for that person's personal needs and/or property management and which are consistent with affording that person the greatest amount of independence and self-determination in light of that person's understanding and appreciation of the nature and consequences of his or her functional limitations.

(e) "available resources" means resources such as, but not limited to, visiting nurses, homemakers, home health aides, adult day care and multipurpose senior citizen centers, powers of attorney, health care proxies, trusts, representative and protective payees, and residential care facilities..

(f) "personal needs" means needs such as, but not limited to, food, clothing, shelter, health care, and safety.

(g) "property management" means taking actions to obtain, administer, protect, and dispose of real and personal property, intangible property, business property, benefits, and income and to deal with financial affairs.

(h) "activities of daily living" means activities such as, but not limited to, mobility, eating, toileting, dressing, grooming, housekeeping, cooking, shopping, money management, banking, driving or using public transportation, and other activities related to personal needs and to property management.

(i) "major medical or dental treatment" means a medical, surgical or diagnostic intervention or procedure where a general anesthetic is used or which involves any significant risk or any significant invasion of bodily integrity requiring an incision or producing substantial pain, discomfort, debilitation, or having a significant recovery period, or which involves the administration of psychotropic medication or electroconvulsive therapy; it does not include any routine diagnosis or treatment such as the administration of medications other than chemotherapy for non-psychiatric conditions or nutrition or the extraction of bodily fluids for analysis; dental care performed with a local anesthetic; and any procedures which are provided under emergency circumstances, pursuant to section two thousand five hundred four of the public health law.

(j) "life sustaining treatment" means medical treatment which is sustaining life functions and without which, according to reasonable medical judgment, the patient will die within a relatively short time period.

(k) "facility" means a facility, hospital, or school, or an alcoholism facility in this state as such terms are defined in section 1.03 of this chapter, a substance abuse program as such term is defined in article nineteen of this chapter, an adult care facility as such term is defined in section two of the social services law, or a residential health care facility or a general hospital as such terms are defined in section two thousand eight hundred one of the public health law.

(l) "mental hygiene facility" means a facility, hospital, or school, or an alcoholism facility in this state as such terms are defined in section 1.03 of this chapter.

#### **§ 81.04. Jurisdiction**

(a) If after a hearing or trial in accordance with the provisions of this article it is determined that relief under this article is necessary, the supreme court, and the county courts outside the city of New York, shall have the power to provide the relief set forth in this article:

1. for a resident of the state;
2. for a nonresident of the state present in the state;
3. for a nonresident of the state pursuant to section 81.18 of this article.

(b) Notwithstanding the provisions of subdivision (a) of this section, when it appears in any proceeding in the surrogate's court that a person interested in an estate is entitled to money or property as a beneficiary of the estate, or entitled to the proceeds of any action as provided in section 5-4.1 of the estates, powers and trusts law, or to the proceeds of a settlement of a cause of action brought on behalf of an infant for personal injuries, and that the interested person is a resident of, or is physically present, **or has any property** in, the county in which the proceeding is pending and is allegedly incapacitated with respect to property management under the provisions of this article, and the surrogate's court is satisfied after a hearing or trial in accordance with the provisions of this article that the interested person is incapacitated with respect to property management, the surrogate's court shall have the power to order relief for that person with respect to property management in accordance with the provisions of this article.

#### **§ 81.05. Venue**

(a) A proceeding under this article shall be brought in the supreme court within the judicial district, or in the county court of the county in which the person alleged to be incapacitated resides, or is physically present, or in the surrogate's court having jurisdiction pursuant to subdivision (b) of section 81.04 of this article. If the person alleged to be incapacitated is being cared for as a resident in a facility, ~~hospital, or school, or an alcoholism facility in this state as those terms are defined in section~~

~~1.03 of this chapter, a substance abuse program as that term is defined in section 19.03 of this chapter, an adult care facility as that term is defined in section two of the social services law, or a residential health care facility or a general hospital as those terms are defined in section two thousand eight hundred one of the public health law, the residence of that person shall be deemed to be in the county where the facility is located and the proceeding shall be brought in that county, subject to application by an interested party for a change in venue to another county because of the inconvenience of the parties or witnesses or the condition of the person alleged to be incapacitated. If the person alleged to be incapacitated is not present in the state, or the residence of such person cannot be ascertained, the residence shall be deemed to be in the county in which all or some of such person's property is situated.~~

(b) After the appointment of a **guardian**, temporary guardian, special guardian, standby guardian, or alternate standby guardians, any proceeding to modify a prior order shall be brought in the supreme court, county court, or surrogate's court which granted the prior order. If, at the time of the application to modify a prior order, the incapacitated person is being cared for as a resident in a facility, ~~hospital, or school, or an alcoholism facility in this state as those terms are defined in section 1.03 of this chapter, a substance abuse program as that term is defined in section 19.03 of this chapter, an adult care facility as that term is defined in section two of the social services law, or a residential health care facility or a general hospital as those terms are defined in section two thousand eight hundred one of the public health law,~~ the proceeding shall be brought in the county where the facility is located, subject to application by an interested party for a change in venue to the court which granted the prior order because of the inconvenience of the parties or witnesses or the condition of the incapacitated person.

### **§ 81.06. Who may commence a proceeding**

(a) A proceeding under this article shall be commenced by the filing of the petition with the court by:

1. the person alleged to be incapacitated;
2. a presumptive distributee of the person alleged to be incapacitated, as that term is defined in subdivision forty-two of section one hundred three of the surrogate's court procedure act;
3. an executor or administrator of an estate when the alleged incapacitated person is or may be the beneficiary of that estate;
4. a trustee of a trust when the alleged incapacitated person is or may be the grantor or a beneficiary of that trust;
5. the person with whom the person alleged to be incapacitated resides;
6. a person otherwise concerned with the welfare of the person alleged to be

incapacitated. For purposes of this section a person otherwise concerned with the welfare of the person alleged to be incapacitated may include a corporation, or a public agency, including the department of social services in the county where the person alleged to be incapacitated resides regardless of whether the person alleged to be incapacitated is a recipient of public assistance;

7. the chief executive officer, **or the designee of the chief executive officer**, of a facility, ~~hospital, school, or an alcoholism facility in this state as those terms are defined in section 1.03 of this chapter, a substance abuse program as that term is defined in section 19.03 of this chapter, an adult care facility as that term is defined in section two of the social services law, or a residential health care facility or a general hospital as those terms are defined in section two thousand eight hundred one of the public health law,~~ in which the person alleged to be incapacitated is a patient or resident.

### **§ 81.07. Notice**

(a) **Proceeding.** A proceeding under this article shall be commenced upon the filing of the petition.

(b) Order to show cause. Upon the filing of the petition, the court shall:

1. set a **the** date **on which the order to show cause is heard** no more than twenty-eight days from the date of the filing **signing** of the petition ~~on which the order to show cause is returnable~~ **order to show cause**. The court may for good cause shown set a date less than twenty-eight days from the date of the filing of the petition. ~~The order to show cause shall fix the hearing date pursuant to section 81.11 of this article as the same date on which the order to show cause is returnable;~~ **the signing of the order to show cause.** The date of the hearing may be adjourned only for good cause shown;

2. include in the order to show cause the name, address, and telephone number of the person appointed as court evaluator in accordance with section 81.09 of this article; ~~and~~

3. require the order to show cause to be served together with a copy of the petition and any supporting papers upon **the alleged incapacitated person, the court evaluator, and counsel for the alleged incapacitated person in the form and manner prescribed in this section;** ~~the court shall not require that supporting papers contain medical information;~~ **and**

4. **require notice of the proceeding together with a copy of the order to show cause to be given to the persons identified in paragraph one of subdivision ~~(d)~~ (e) of this section and in the form and manner prescribed herein in this section.**

~~(b)~~ **(c)** **Form of the order to show cause.** The order to show cause shall be written in large type, in plain language, and in a language other than English if necessary to

inform the person alleged to be incapacitated of his or her rights, and shall include the following information:

1. date, time, and place of the hearing of the petition;
2. a clear and easily readable statement of the rights of the person alleged to be incapacitated that are set forth in section 81.11 of this article;
3. the name, address, and telephone number of the person appointed as court evaluator pursuant to section 81.09 of this article;
4. the name, address, and telephone number of the attorney if one has been appointed for the person alleged to be incapacitated pursuant to section 81.10 of this article; and
5. a list of the powers which the guardian would have the authority to exercise on behalf of the person alleged to be incapacitated if the relief sought in the petition is granted.

~~(e)~~ **(d)** Legend. The order to show cause shall also include on its face the following legend in twelve point or larger bold face double spaced type:

An application has been filed in court by \_\_\_\_\_ who believes you may be unable to take care of your personal needs or financial affairs. \_\_\_\_\_ is asking that someone be appointed to make decisions for you. With this paper is a copy of the application to the court showing why \_\_\_\_\_ believes you may be unable to take care of your personal needs or financial affairs. Before the court makes the appointment of someone to make decisions for you the court holds a hearing at which you are entitled to be present and to tell the judge if you do not want anyone appointed. This paper tells you when the court hearing will take place. If you do not appear in court, your rights may be seriously affected.

You have the right to demand a trial by jury. You must tell the court if you wish to have a trial by jury. If you do not tell the court, the hearing will be conducted without a jury. The name and address, and telephone number of the clerk of the court are:

The court has appointed a court evaluator to explain this proceeding to you and to investigate the claims made in the application. The court may give the court evaluator permission to inspect your medical, psychological, or psychiatric records. You have the right to tell the judge if you do not want the court evaluator to be given that permission. The court evaluator's name, address, and telephone number are:

You are entitled to have a lawyer of your choice represent you. If you want the court to appoint a lawyer to help you and represent you, the court will appoint a lawyer for you. You will be required to pay that lawyer unless you do not have the money to do so.



~~(d)~~ (e) Service of the order to show cause.

1. The persons entitled to service of the order to show cause shall include:

(i) the person alleged to be incapacitated; and

(ii) the attorney for the person alleged to be incapacitated, if known to the petitioner; and

(iii) the court evaluator.

2. Manner of service.

(i) the order to show cause and a copy of the petition shall be personally delivered to the person alleged to be incapacitated not less than fourteen days prior to the hearing date of the order to show cause. However, the court may direct that the order to show cause and a copy of the petition be served on the person alleged to be incapacitated in a manner other than personal delivery when the petitioner demonstrates to the court's satisfaction that the person alleged to be incapacitated has refused to accept service.

(ii) the order to show cause and a copy of the petition shall be served upon the court evaluator and the attorney for the alleged incapacitated person, if there is one, by facsimile, provided that a facsimile telephone number is designated by the attorney for that purpose, or by delivering the papers personally or by overnight delivery service to the office of the court evaluator and the attorney for the alleged incapacitated person, if there is one, within three business days following the appointment of the court evaluator and the appointment of the attorney or the appearance of an attorney retained by the alleged incapacitated person.

3. The court may direct that the order to show cause be served within a time period less than the period required in paragraph two of this subdivision for good cause shown.

(f) Form of the notice of the proceeding. The notice of the proceeding shall substantially set forth:

1. The name and address of the alleged incapacitated person to whom the guardianship proceeding relates;

2. The name and address of the petitioner;

3. The names of all persons to be given notice of the proceeding;

4. The time when and the place where the order to show cause shall be heard;

5. The object of the proceeding and the relief sought in the petition;

6. The name, address and telephone number of the petitioner's attorney.

(g) Notice of the proceeding.

1. Persons entitled to notice of the proceeding shall include:

(i) the following persons, other than the petitioner, who are known to the petitioner or whose existence and address can be ascertained by the petitioner with reasonably diligent efforts: the spouse of the person alleged to be incapacitated, if any; the parents of the person alleged to be incapacitated, if living; the adult children of the person alleged to be incapacitated, if any; the adult siblings of the person alleged to be incapacitated, if any; the person or persons with whom person alleged to be incapacitated resides; and

~~(iii)~~ (ii) in the event no person listed in subparagraph ~~(ii)~~ (i) of this paragraph is given notice, then notice shall be given to at least one and not more than three of the living relatives of the person alleged to be incapacitated in the nearest degree of kinship who are known to the petitioner or whose existence and address can be ascertained by the petitioner with reasonably diligent efforts; and

~~(iv)~~ (iii) any person or persons designated by the alleged incapacitated person with authority pursuant to sections 5-1501, ~~5-1601, and 5-1602~~ 5-1505, and 5-1506 of the general obligations law, or sections two thousand nine hundred five and two thousand nine hundred eighty-one of the public health law, if known to the petitioner; and

~~(v)~~ (iv) if known to the petitioner, any person, whether or not a relative of the person alleged to be incapacitated, or organization that has demonstrated a genuine interest in promoting the best interests of the person alleged to be incapacitated such as by having a personal relationship with the person, regularly visiting the person, or regularly communicating with the person; and

~~(vi) the attorney for the person alleged to be incapacitated, if known to the petitioner; and~~

~~(vii) the court evaluator; and~~

~~(viii)~~ (v) if it is known to the petitioner that the person alleged to be incapacitated receives public assistance or protective services under article nine-B of the social services law, the local department of social services; and

~~(ix)~~ (vi) if the person alleged to be incapacitated resides in a facility, ~~hospital, school, or an alcoholism facility in this state as those terms are defined in section 1.03 of this chapter, a substance abuse program as that term is defined in section 19.03 of this chapter, an adult care facility as that term is defined in section two of~~

~~the social services law, a residential health care facility or a general hospital as those terms are defined in section two thousand eight hundred one of the public health law, the chief executive officer in charge of the facility;~~ and

(vii) if the person alleged to be incapacitated resides in a mental hygiene facility, the mental hygiene legal service of the judicial department in which the residence is located; and

~~(x)~~ (viii) such other persons as the court may direct based on the recommendation of the court evaluator in accordance with subparagraph (xvii) of paragraph five of subdivision (c) of section 81.09 of this article.

## 2. ~~manner of service:~~

~~(i) the order to show cause and a copy of the petition shall be personally delivered to the person alleged to be incapacitated not less than fourteen days prior to the return date of the order to show cause. However, the court may direct that the order to show cause and a copy of the petition be served on the person alleged to be incapacitated in a manner other than personal delivery when the petitioner demonstrates to the court's satisfaction that the person alleged to be incapacitated has refused to accept service. A copy of the order to show cause and the petition also shall be left with a person of suitable age and discretion at the residence of the person alleged to be incapacitated if he or she is not served there; and~~

~~(ii) the order to show cause and a copy of the petition shall be served by mail or by delivery to the office of the court evaluator and court appointed attorney, if there is one, within seven days following the appointment of the court evaluator and attorney; and~~

~~(iii) the order to show cause and a copy of the petition shall be personally served or served by mail upon the other persons identified in paragraph one of this subdivision not less than fourteen days prior to the return date of the order to show cause.~~

## ~~(e) Time period:~~

~~The court may direct that the order to show cause be served within a time period less than the period required in paragraph two of subdivision (d) of this section for good cause shown. Notice of the proceeding together with a copy of the order to show cause shall be mailed to the persons identified in paragraph one of this subdivision not less than fourteen days prior to the hearing date in the order to show cause.~~

3. The court may direct that the notice of proceeding be mailed within a time period less than the period required in paragraph two of this subdivision for good cause shown.

## § 81.08. Petition

(a) The petition shall be verified under oath and shall include the following information:

1. the name, age, address, and telephone number of the person alleged to be incapacitated;
2. the name, address, and telephone number of the person or persons with whom the person alleged to be incapacitated resides, if any, and the name, address and telephone number of any persons that the petitioner intends to serve with the order to show cause and the nature of their relationship to the alleged incapacitated person;
3. a description of the alleged incapacitated person's functional level including that person's ability to manage the activities of daily living, behavior, and understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living;
4. if powers are sought with respect to the personal needs of the alleged incapacitated person, specific factual allegations as to the personal actions or other actual occurrences involving the person alleged to be incapacitated which are claimed to demonstrate that the person is likely to suffer harm because he or she cannot adequately understand and appreciate the nature and consequences of his or her inability to provide for personal needs;
5. if powers are sought with respect to property management for the alleged incapacitated person, specific factual allegations as to the financial transactions or other actual occurrences involving the person alleged to be incapacitated which are claimed to demonstrate that the person is likely to suffer harm because he or she cannot adequately understand and appreciate the nature and consequences of his or her inability to provide for property management; if powers are sought to transfer a part of the alleged incapacitated person's property or assets to or for the benefit of another person, including the petitioner or guardian, the petition shall include the information required by subdivision (b) of section 81.21 of this article;
6. the particular powers being sought and their relationship to the functional level and needs of the person alleged to be incapacitated;
7. the duration of the powers being sought;
8. the approximate value and description of the financial resources of the person alleged to be incapacitated and whether, to the best of the petitioner's knowledge, the person is a recipient of public assistance;
9. the nature and amount of any claim, debt, or obligations of the person alleged to

be incapacitated, to the best of the petitioner's knowledge;

10. the names, addresses, and telephone numbers of presumptive distributees of the person alleged to be incapacitated as that term is defined in subdivision forty-two of section one hundred three of the surrogate's court procedure act unless they are unknown and cannot be reasonably ascertained;

11. the name, address, and telephone number of the petitioner;

12. the name, address, and telephone number of the person or persons, if any, proposed as guardian and standby guardian, the relationship of the proposed guardian or standby guardian to the person alleged to be incapacitated, and the reasons why the proposed guardian or standby guardian is suitable to exercise the powers necessary to assist the person alleged to be incapacitated;

13. any relief sought pursuant to section 81.23 of this article;

14. the available resources, if any, that have been considered by the petitioner and the petitioner's opinion as to their sufficiency and reliability;

15. any other information which in the petitioner's opinion will assist the court evaluator in completing the investigation and report in accordance with section 81.09 of this article.

### **§ 81.09. Appointment of court evaluator**

a) At the time of the issuance of the order to show cause, the court shall appoint a court evaluator.

(b) 1. the court may appoint as court evaluator any person including, but not limited to, the mental hygiene legal service in the judicial department where the person resides, a not-for-profit corporation, an attorney-at-law, physician, psychologist, accountant, social worker, or nurse, with knowledge of property management, personal care skills, the problems associated with disabilities, and the private and public resources available for the type of limitations the person is alleged to have. The name of the court evaluator shall be drawn from a list maintained by the office of court administration with knowledge of property management, personal care skills, the problems associated with disabilities, and the private and public resources available for the type of limitations the person is alleged to have, including, but not limited to, an attorney-at-law, physician, psychologist, accountant, social worker, or nurse;

2. if the person alleged to be incapacitated resides in a facility, hospital, school, or an alcoholism facility as those terms are defined in section 1.03 of this chapter, or a substance abuse program as that term is defined in section 19.03 of this chapter, an adult care facility as that term is defined in section two of the social services law, a

~~residential health care facility or a general hospital as those terms are defined in section two thousand eight hundred one of the public health law, the mental hygiene legal service in the judicial department where the person resides may be appointed court evaluator;~~

3. if the court appoints the mental hygiene legal service as the evaluator and upon investigation in accordance with section 81.10 of this article it appears to the mental hygiene legal service that the mental hygiene legal service represents the person alleged to be incapacitated as counsel, or that counsel should otherwise be appointed in accordance with section 81.10 of this article for the person alleged to be incapacitated, the mental hygiene legal service shall so report to the court. The mental hygiene legal service shall be relieved of its appointment as court evaluator whenever the mental hygiene legal service represents as counsel, or is assigned to represent as counsel, the person alleged to be incapacitated.

(c) The duties of the court evaluator shall include the following:

1. meeting, interviewing, and consulting with the person alleged to be incapacitated regarding the proceeding.

2. determining whether the alleged incapacitated person understands English or only another language, and explaining to the person alleged to be incapacitated, in a manner which the person can reasonably be expected to understand, the nature and possible consequences of the proceeding, the general powers and duties of a guardian, available resources, and the rights to which the person is entitled, including the right to counsel.

3. determining whether the person alleged to be incapacitated wishes legal counsel of his or her own choice to be appointed and otherwise evaluating whether legal counsel should be appointed in accordance with section 81.10 of this article.

4. interviewing the petitioner, or, if the petitioner is a facility or government agency, a person within the facility or agency fully familiar with the person's condition, affairs and situation.

5. investigating and making a written report and recommendations to the court; the report and recommendations shall include the court evaluator's personal observations as to the person alleged to be incapacitated and his or her condition, affairs and situation, as well as information in response to the following questions:

(i) does the person alleged to be incapacitated agree to the appointment of the proposed guardian and to the powers proposed for the guardian;

(ii) does the person wish legal counsel of his or her own choice to be appointed or is the appointment of counsel in accordance with section 81.10 of this article otherwise appropriate;

(iii) can the person alleged to be incapacitated come to the courthouse for the hearing;

(iv) if the person alleged to be incapacitated cannot come to the courthouse, is the person completely unable to participate in the hearing;

(v) if the person alleged to be incapacitated cannot come to the courthouse, would any meaningful participation result from the person's presence at the hearing;

(vi) are available resources sufficient and reliable to provide for personal needs or property management without the appointment of a guardian;

(vii) how is the person alleged to be incapacitated functioning with respect to the activities of daily living and what is the prognosis and reversibility of any physical and mental disabilities, alcoholism or substance dependence? The response to this question shall be based on the evaluator's own assessment of the person alleged to be incapacitated to the extent possible, and where necessary, on the examination of assessments by third parties, including records of medical, psychological and/or psychiatric examinations obtained pursuant to subdivision (d) of this section. As part of this review, the court evaluator shall consider the diagnostic and assessment procedures used to determine the prognosis and reversibility of any disability and the necessity, efficacy, and dose of each prescribed medication;

(viii) what is the person's understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living;

(ix) what is the approximate value and nature of the financial resources of the person alleged to be incapacitated;

(x) what are the person's preferences, wishes, and values with regard to managing the activities of daily living;

(xi) has the person alleged to be incapacitated made any appointment or delegation pursuant to section 5-1501, ~~5-1601, or 5-1602~~ 5-1505, or 5-1506 of the general obligations law, section two thousand nine hundred sixty-five or two thousand nine hundred eighty-one of the public health law, or a living will;

(xii) what would be the least restrictive form of intervention consistent with the person's functional level and the powers proposed for the guardian;

(xiii) what assistance is necessary for those who are financially dependent upon the person alleged to be incapacitated;

(xiv) is the choice of proposed guardian appropriate, including a guardian nominated by the allegedly incapacitated person pursuant to section 81.17 or subdivision (c) of section 81.19 of this article; and what steps has the proposed guardian taken or does the proposed guardian intend to take to identify and meet the current and

emerging needs of the person alleged to be incapacitated unless that information has been provided to the court by the local department of social services when the proposed guardian is a community guardian program operating pursuant to the provisions of title three of article nine-B of the social services law;

(xv) what potential conflicts of interest, if any, exist between or among family members and/or other interested parties regarding the proposed guardian or the proposed relief;

(xvi) what potential conflicts of interest, if any, exist involving the person alleged to be incapacitated, the petitioner, and the proposed guardian; and

(xvii) are there any additional persons who should be given notice and an opportunity to be heard.

In addition, the report and recommendations shall include any information required under subdivision (e) of this section, and any additional information required by the court.

6. interviewing or consulting with professionals having specialized knowledge in the area of the person's alleged incapacity including but not limited to mental retardation, developmental disabilities, alcohol and substance abuse, and geriatrics.

7. retaining an independent medical expert where the court finds it is appropriate, the cost of which is to be charged to the estate of the allegedly incapacitated person unless the person is indigent.

8. conducting any other investigations or making recommendations with respect to other subjects as the court deems appropriate.

9. attending all court proceedings and conferences.

(d) The court evaluator may apply to the court for permission to inspect records of medical, psychological and/or psychiatric examinations of the person alleged to be incapacitated; except as otherwise provided by federal or state law, if the court determines that such records are likely to contain information which will assist the court evaluator in completing his or her report to the court, the court may order the disclosure of such records to the court evaluator, notwithstanding the physician/patient privilege, the psychologist/patient privilege, or the social worker/client privilege as set forth in sections four thousand five hundred four, four thousand five hundred seven, and four thousand five hundred eight of the civil practice law and rules; if the court orders that such records be disclosed to the court evaluator, the court may, upon the court's own motion, at the request of the court evaluator, or upon the application of counsel for the person alleged to be incapacitated, or the petitioner, also direct such further disclosure of such records as the court deems proper.



(e) The court evaluator shall have the authority to take the steps necessary to preserve the property of the person alleged to be incapacitated pending the hearing in the event the property is in danger of waste, misappropriation, or loss; if the court evaluator exercises authority under this subdivision, the court evaluator shall **immediately advise the court of the actions taken and** include in his or her report to the court an explanation of the actions the court evaluator has taken and the reasons for such actions.

(f) When judgment grants a petition, the court may award a reasonable ~~allowance~~ **compensation** to a court evaluator, including the mental hygiene legal service, payable by the estate of the allegedly incapacitated person. When a judgment denies or dismisses a petition, the court may award a reasonable allowance to a court evaluator, including the mental hygiene legal service, payable by the petitioner or by the person alleged to be incapacitated, or both in such proportions as the court may deem just. When the person alleged to be incapacitated dies before the determination is made in the proceeding, the court may award a reasonable allowance to a court evaluator, payable by the petitioner or by the estate of the decedent, or by both in such proportions as the court may deem just.

#### **§ 81.10. Counsel**

(a) Any person for whom relief under this article is sought shall have the right to be ~~represented by~~ **choose and engage** legal counsel of the person's choice. **In such event, any attorney appointed pursuant to this section shall continue his or her duties until the court has determined that retained counsel has been chosen freely and independently by the alleged incapacitated person.**

(b) If the person alleged to be incapacitated is not represented by counsel at the time of the issuance of the order to show cause, the court evaluator shall assist the court in accordance with subdivision (c) of section 81.09 of this article in determining whether counsel should be appointed.

(c) The court shall appoint counsel in any of the following circumstances unless the court is satisfied that the alleged incapacitated person is represented by counsel of his or her own choosing:

1. the person alleged to be incapacitated requests counsel;
2. the person alleged to be incapacitated wishes to contest the petition;
3. the person alleged to be incapacitated does not consent to the authority requested in the petition to move the person alleged to be incapacitated from where that person presently resides to a nursing home or other residential facility as those terms are defined in section two thousand eight hundred one of the public health law, or other similar facility;

4. if the petition alleges that the person is in need of major medical or dental treatment and the person alleged to be incapacitated does not consent;

5. the petition requests temporary powers **the appointment of a temporary guardian** pursuant to section 81.23 of this article;

6. the court determines that a possible conflict may exist between the court evaluator's role and the advocacy needs of the person alleged to be incapacitated;

7. if at any time the court determines that appointment of counsel would be helpful to the resolution of the matter.

(d) If the person refuses the assistance of counsel, the court may, nevertheless, appoint counsel if the court is not satisfied that the person is capable of making an informed decision regarding the appointment of counsel.

~~(e) If the person alleged to be incapacitated resides in a facility, hospital, school, or an alcoholism facility as those terms are defined in section 1.03 of this chapter, a substance abuse program as that term is defined in section 19.03 of this chapter, an adult care facility as that term is defined in section two of the social services law, or a residential health care facility or a general hospital as those terms are defined in section two thousand eight hundred one of the public health law, the~~ **The** court may appoint as counsel the mental hygiene legal service in the judicial department where the residence is located.

(f) The court shall determine the reasonable compensation for the mental hygiene legal service or any attorney appointed pursuant to this section. The person alleged to be incapacitated shall be liable for such compensation unless the court is satisfied that the person is indigent. If the petition is dismissed, the court may in its discretion direct that petitioner pay such compensation for the person alleged to be incapacitated. When the person alleged to be incapacitated dies before the determination is made in the proceeding, the court may award reasonable compensation to the mental hygiene legal service or any attorney appointed pursuant to this section, payable by the petitioner or the estate of the decedent or by both in such proportions as the court may deem just.

(g) If the court appoints counsel under this section, the court may dispense with the appointment of a court evaluator or may vacate or suspend the appointment of a previously appointed court evaluator.

## **§ 81.11. Hearing**

(a) A determination that the appointment of a guardian is necessary for a person alleged to be incapacitated shall be made only after a hearing.

(b) In a proceeding brought pursuant to this article any party to the proceeding shall have the right to:

1. present evidence;
2. call witnesses, including expert witnesses;
3. cross examine witnesses, including witnesses called by the court;
4. be represented by counsel of his or her choice.

(c) The hearing must be conducted in the presence of the person alleged to be incapacitated, either at the courthouse or where the person alleged to be incapacitated resides, so as to permit the court to obtain its own impression of the person's capacity. If the person alleged to be incapacitated physically cannot come or be brought to the courthouse, the hearing must be conducted where the person alleged to be incapacitated resides unless:

1. the person is not present in the state; or
2. 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.

(d) If the hearing is conducted without the presence of the person alleged to be incapacitated and the court appoints a guardian, the order of appointment shall set forth the factual basis for conducting the hearing without the presence of the person for whom the appointment is made.

(e) If the hearing is conducted in the presence of the person alleged to be incapacitated and the person is not represented by counsel, the court shall explain to that person, on the record, the purpose and possible consequences of the proceeding, the right to be represented by counsel and the fact that the court will appoint an attorney to represent the person alleged to be incapacitated if the person wishes to be represented by counsel, and shall inquire of the person whether he or she wishes to have an attorney appointed. If the person refuses the assistance of counsel, the court may nevertheless appoint counsel if the court is not satisfied that the person is capable of making an informed decision regarding the appointment of counsel.

(f) If ~~any party to the proceeding~~ 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 there-of. Failure to make such a demand shall be deemed a waiver of the right to trial by jury.

## **§ 81.12. Burden and quantum of proof**

(a) A determination that a person is incapacitated under the provisions of this article must be based on clear and convincing evidence. The burden of proof shall be on the petitioner.

(b) The court may, for good cause shown, waive the rules of evidence. The report of the court evaluator may be admitted in evidence if the court evaluator testifies and is subject to cross examination; provided, however, that if the court determines that information contained in the report is, in the particular circumstance of the case, not sufficiently reliable, the court shall require that the person who provided the information testify and be subject to cross examination.

### **§ 81.13. Timing of hearing**

Unless the court, for good cause shown, orders otherwise, a proceeding under this article is entitled to a preference over all other causes in the court. Unless the court, for good cause shown, orders otherwise, the hearing or trial shall be conducted within the time set forth in subdivision ~~(a)~~ (b) of section 81.07 of this article. A decision shall be rendered within ~~forty-five~~ seven days ~~of the date of the signing of the order to show cause~~ after the hearing, unless for good cause shown, the court extends the time period for rendering the decision. In the event the time period is extended, the court shall set forth the factual basis for the extension. The commission shall be issued to the guardian within fifteen days after the decision is rendered.

### **§ 81.14. Record of the proceedings**

(a) A record of the proceedings shall be made in all cases.

(b) The court shall not enter an order sealing the court records in a proceeding under this article, either in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interest of the public, the orderly and sound administration of justice, the nature of the proceedings, and the privacy of the person alleged to be incapacitated. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard. Court records shall include all documents and records of any nature filed with the clerk in connection with the proceeding. Documents obtained through disclosure and not filed with the clerk shall remain subject to protective orders under the civil practice law and rules.

(c) The court shall not exclude a person or persons or the general public from a proceeding under this article except upon written findings of good cause shown. In determining whether good cause has been shown, the court shall consider the interest of the public, the orderly and sound administration of justice, the nature of the proceedings, and the privacy of the person alleged to be incapacitated.

(d) At the time of the commencement of the hearing, the court shall inform the

allegedly incapacitated person of his or her right to request for good cause that the court records be sealed and that a person, persons, or the general public be excluded from the hearing.

### **§ 81.15. Findings**

(a) Where the court determines that the person agrees to the appointment and that the appointment is necessary, the court shall make the following findings on the record:

1. the person's agreement to the appointment;
2. the person's functional limitations which impair the person's ability to provide for personal needs or property management;
3. the necessity of the appointment of a guardian as a means of providing for personal needs and/or property management for the person;
4. the specific powers of the guardian which constitute the least restrictive form of intervention consistent with the person's functional limitations; and
5. the duration of the appointment.

(b) Where the petition requests the appointment of a guardian to provide for the personal needs for a person alleged to be incapacitated and the court determines that such person is incapacitated and that the appointment is necessary, the court shall make the following findings on the record:

1. the person's functional limitations which impair the person's ability to provide for personal needs;
2. the person's lack of understanding and appreciation of the nature and consequences of his or her functional limitations;
3. the likelihood that the person will suffer harm because of the person's functional limitations and inability to adequately understand and appreciate the nature and consequences of such functional limitations;
4. the necessity of the appointment of a guardian to prevent such harm;
5. the specific powers of the guardian which constitute the least restrictive form of intervention consistent with the findings of this subdivision; ~~and~~
6. the duration of the appointment-; **and**
7. whether the incapacitated person should receive copies of the initial and annual report.

(c) Where the petition requests the appointment of a guardian for property management for the person alleged to be incapacitated, and the court determines that the person is incapacitated and that the appointment of a guardian is necessary, the court shall make the following findings on the record:

1. the type and amount of the property and financial resources of the person alleged to be incapacitated;
2. the person's functional limitations which impair the person's ability with respect to property management;
3. the person's lack of understanding and appreciation of the nature and consequences of his or her functional limitations;
4. the likelihood that the person will suffer harm because of the person's functional limitations and inability to adequately understand and appreciate the nature and consequences of such functional limitations;
5. any additional findings that are required under section 81.21 of this article;
6. the necessity of the appointment of a guardian to prevent such harm;
7. if so, the specific powers of the guardian which constitute the least restrictive form of intervention consistent with the person's functional limitations and the likelihood of harm because of the person's inability to adequately understand and appreciate the nature and consequences of such functional limitations; ~~and~~
8. the duration of the appointment-; **and**
9. whether the incapacitated person should receive copies of the initial and annual report.

## **§ 81.16. Dispositional alternatives**

(a) Dismissal of the petition.

If the person alleged to be incapacitated under this article is found not to be incapacitated, the court shall dismiss the petition.

(b) Protective arrangements and single transactions. If the person alleged to be incapacitated is found to be incapacitated, the court without appointing a guardian, may authorize, direct, or ratify any transaction or series of transactions necessary to achieve any security, service, or care arrangement meeting the foreseeable needs of the incapacitated person, or may authorize, direct, or ratify any contract, trust, or other transaction relating to the incapacitated person's property and financial affairs if the court determines that the transaction is necessary as a means of providing for

personal needs and/or property management for the alleged incapacitated person. Before approving a protective arrangement or other transaction under this subdivision, the court shall consider the interests of dependents and creditors of the incapacitated person, and in view of the person's functional level, whether the person needs the continuing protection of a guardian. The court may appoint a special guardian to assist in the accomplishment of any protective arrangement or other transaction authorized under this subdivision. The special guardian shall have the authority conferred by the order of appointment, shall report to the court on all matters done pursuant to the order of appointment and shall serve until discharged by order of the court. The court may approve a reasonable compensation for the special guardian; however, if the court finds that the special guardian has failed to discharge his or her duties satisfactorily in any respect, the court may deny or reduce the amount of compensation or remove the special guardian.

(c) Appointing a guardian.

1. If the person alleged to be incapacitated is found to have agreed to the appointment of a guardian and the court determines that the appointment of a guardian is necessary, the order of the court shall be designed to accomplish the least restrictive form of intervention by appointing a guardian with powers limited to those which the court has found necessary to assist the person in providing for personal needs and/or property management.

2. If the person alleged to be incapacitated is found to be incapacitated and the court determines that the appointment of a guardian is necessary, the order of the court shall be designed to accomplish the least restrictive form of intervention by appointing a guardian with powers limited to those which the court has found necessary to assist the incapacitated person in providing for personal needs and/or property management.

3. The order of appointment shall identify all persons entitled to notice of all further proceedings.

(d) The court shall direct that a judgment be entered determining the rights of the parties.

(e) The order and judgment must be entered and served within ten days of the signing of the order. A copy of the order and judgment shall be personally served upon and read explained to the person who is the subject of the proceedings in a manner which the person can reasonably be expected to understand by the court evaluator, or by counsel for the person, or by the guardian.

(f) When a petition is granted, or where the court otherwise deems it appropriate, the court may award reasonable compensation for the attorney for the petitioner, including the attorney general and the attorney for a local department of social services.

### **§ 81.17. Nomination of guardian**

In the petition, or in a written instrument duly executed, acknowledged, and filed in the proceeding before the appointment of a guardian, the person alleged to be incapacitated may nominate a guardian.

### **§ 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.

### **§ 81.19. Eligibility as guardian**

(a) 1. Any individual over eighteen years of age, or any parent under eighteen years of age, who is found by the court to be suitable to exercise the powers necessary to assist the incapacitated person may be appointed as guardian, including but not limited to a spouse, adult child, parent, or sibling.

2. A not-for-profit corporation organized to act in such capacity, a social services official, or public agency authorized to act in such capacity which has a concern for the incapacitated person, and any community guardian program operating pursuant to the provisions of title three of article nine-B of the social services law which is found by the court to be suitable to perform the duties necessary to assist the incapacitated person may be appointed as guardian, provided that a community guardian program shall be appointed as guardian only where a special proceeding for the appointment of a guardian under this article has been commenced by a social services official with whom such program was contracted.

3. A corporation, except that no corporation (other than as provided in paragraph two of this subdivision) may be authorized to exercise the powers necessary to assist the incapacitated person with personal needs.

(b) The court shall appoint a person nominated as the guardian in accordance with the provisions of section 81.17 of this article unless the court determines the nominee is unfit or the alleged incapacitated person indicates that he or she no longer wishes the nominee to be appointed.

(c) In the absence of a nomination in accordance with section 81.17 of this article, the court shall appoint a person nominated by the person alleged to be incapacitated orally or by conduct during the hearing or trial unless the court determines for good cause that such appointment is not appropriate.



(d) In making any appointment under this article the court shall consider:

1. any appointment or delegation made by the person alleged to be incapacitated in accordance with the provisions of section 5-1501, 5-1601 or 5-1602 of the general obligations law and sections two thousand nine hundred sixty-five and two thousand nine hundred eighty-one of the public health law;
2. the social relationship between the incapacitated person and the person, if any, proposed as guardian, and the social relationship between the incapacitated person and other persons concerned with the welfare of the incapacitated person;
3. the care and services being provided to the incapacitated person at the time of the proceeding;
4. the powers which the guardian will exercise;
5. the educational, professional and business experience relevant to the nature of the services sought to be provided;
6. the nature of the financial resources involved;
7. the unique requirements of the incapacitated person; and
8. any conflicts of interest between the person proposed as guardian and the incapacitated person.

(e) Unless the court finds that no other person or corporation is available or willing to act as guardian, or to provide needed services for the incapacitated person, the following persons or corporations may not serve as guardian:

1. one whose only interest in the person alleged to be incapacitated is that of a creditor;
2. one, other than a relative, who is a provider, or the employee of a provider, of health care, day care, educational, or residential services to the incapacitated person, whether direct or indirect.

(f) (Added, L 1993) Mental hygiene legal service may not serve as a guardian.

## **§ 81.20. Duties of guardian**

(a) Duties of guardian generally.

1. a guardian shall exercise only those powers that the guardian is authorized to exercise by court order;
2. a guardian shall exercise the utmost care and diligence when acting on behalf of

the incapacitated person;

3. a guardian shall exhibit the utmost degree of trust, loyalty and fidelity in relation to the incapacitated person;

4. a guardian shall file an initial and annual reports in accordance with sections 81.30 and 81.31 of this article;

5. a guardian shall visit the incapacitated person not less than four times a year or more frequently as specified in the court order;

6. a guardian who is given authority with respect to property management for the incapacitated person shall:

(i) afford the incapacitated person the greatest amount of independence and self-determination with respect to property management in light of that person's functional level, understanding and appreciation of his or her functional limitations, and personal wishes, preferences and desires with regard to managing the activities of daily living;

(ii) preserve, protect, and account for such property and financial resources faithfully;

(iii) determine whether the incapacitated person has executed a will, determine the location of any will, and the appropriate persons to be notified in the event of the death of the incapacitated person and, in the event of the death of the incapacitated person, notify those persons;

(iv) use the property and financial resources and income available therefrom to maintain and support the incapacitated person, and to maintain and support those persons dependent upon the incapacitated person;

(v) at the termination of the appointment, deliver such property to the person legally entitled to it;

(vi) file with the recording officer of the county wherein the incapacitated person is possessed of real property, an acknowledged statement to be recorded and indexed under the name of the incapacitated person identifying the real property possessed by the incapacitated person, and the tax map numbers of the property, and stating the date of adjudication of incapacity of the person regarding property management, and the name, address, and telephone number of the guardian and the guardian's surety; and

(vii) perform all other duties required by law.

7. a guardian who is given authority relating to the personal needs of the incapacitated person shall afford the incapacitated person the greatest amount of independence and self-determination with respect to personal needs in light of that person's functional level, understanding and appreciation of that person's functional limitations, and personal wishes, preferences and desires with regard to managing the activities of daily living.

## **§ 81.21. Powers of guardian; property management**

(a) Consistent with the functional limitations of the incapacitated person, that person's understanding and appreciation of the harm that he or she is likely to suffer as the result of the inability to manage property and financial affairs, and that person's personal wishes, preferences, and desires with regard to managing the activities of daily living, and the least restrictive form of intervention, the court may authorize the guardian to exercise those powers necessary and sufficient to manage the property and financial affairs of the incapacitated person; to provide for the maintenance and support of the incapacitated person, and those persons depending upon the incapacitated person; to transfer a part of the incapacitated person's assets to or for the benefit of another person on the ground that the incapacitated person would have made the transfer if he or she had the capacity to act.

Transfers made pursuant to this article may be in any form that the incapacitated person could have employed if he or she had the requisite capacity, except in the form of a will or codicil.

Those powers which may be granted include, but are not limited to, the power to:

1. make gifts;
2. provide support for persons dependent upon the incapacitated person for support, whether or not the incapacitated person is legally obligated to provide that support;
3. convey or release contingent and expectant interests in property, including marital property rights and any right of survivorship incidental to joint tenancy or tenancy by the entirety;
4. exercise or release powers held by the incapacitated person as trustee, personal representative, guardian for minor, guardian, or donee of a power of appointment;
5. enter into contracts;
6. create revocable or irrevocable trusts of property of the estate which may extend beyond the incapacity or life of the incapacitated person;
7. exercise options of the incapacitated person to purchase securities or other property;
8. exercise rights to elect options and change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value;
9. exercise any right to an elective share in the estate of the incapacitated person's deceased spouse;
10. renounce or disclaim any interest by testate or intestate succession or by inter vivos transfer consistent with paragraph (c) of section 2-1.11 of the estates, powers and trusts law;

11. authorize access to or release of confidential records; ~~and~~

12. apply for government and private benefits;

13. marshal assets;

14. pay the funeral expenses of the incapacitated person;

15. pay such bills as may be reasonably necessary to maintain the incapacitated person;

16. invest funds of the incapacitated person as permitted by section 11-2.3 of the estates, powers and trusts law;

17. lease the primary residence for up to three years;

18. retain an accountant;

19. pay bills after the death of the incapacitated person provided the authority existed to pay such bills prior to death until a temporary administrator or executor is appointed; and

20. defend or maintain any judicial action or proceeding to a conclusion until an executor or administrator is appointed.

The guardian may also be granted any power pursuant to this subdivision granted to committees and conservators and guardians by other statutes subject to the limitations, conditions, and responsibilities of the exercise thereof unless the granting of such power is inconsistent with the provisions of this article.

(b) If the petitioner or the guardian seeks the authority to exercise a power which involves the transfer of a part of the incapacitated person's assets to or for the benefit of another person, including the petitioner or guardian, the petition shall include the following information:

1. whether any prior proceeding has at any time been commenced by any person seeking such power with respect to the property of the incapacitated person and, if so, a description of the nature of such application and the disposition made of such application;

2. the amount and nature of the financial obligations of the incapacitated person including funds presently and prospectively required to provide for the incapacitated person's own maintenance, support, and well-being and to provide for other persons dependent upon the incapacitated person for support, whether or not the incapacitated person is legally obligated to provide that support; a copy of any court order or written agreement setting forth support obligations of the incapacitated

person shall be attached to the petition if available to the petitioner or guardian;

3. the property of the incapacitated person that is the subject of the present application;

4. the proposed disposition of such property and the reasons why such disposition should be made;

5. whether the incapacitated person has sufficient capacity to make the proposed disposition; if the incapacitated person has such capacity, his or her written consent shall be attached to the petition;

6. whether the incapacitated person has previously executed a will or similar instrument and if so, the terms of the most recently executed will together with a statement as to how the terms of the will became known to the petitioner or guardian; for purposes of this article, the term "will" shall have the meaning specified in section 1-2.19 of the estates, powers and trusts law and "similar instrument" shall include a revocable or irrevocable trust:

(i) if the petitioner or guardian can, with reasonable diligence, obtain a copy, a copy of the most recently executed will or similar instrument shall be attached to the petition; in such case, the petition shall contain a statement as to how the copy was secured and the basis for the petitioner or guardian's belief that such copy is a copy of the incapacitated person's most recently executed will or similar instrument.

(ii) if the petitioner or guardian is unable to obtain a copy of the most recently executed will or similar instrument, or if the petitioner or guardian is unable to determine whether the incapacitated person has previously executed a will or similar instrument, what efforts were made by the petitioner or guardian to ascertain such information.

(iii) if a copy of the most recently executed will or similar instrument is not otherwise available, the court may direct an attorney or other person who has the original will or similar instrument in his or her possession to turn a photocopy over to the court for its examination, in camera. A photocopy of the will or similar instrument shall then be turned over by the court to the parties in such proceeding unless the court finds that to do so would be contrary to the best interests of the incapacitated person;

7. a description of any significant gifts or patterns of gifts made by the incapacitated person;

8. the names, post-office addresses and relationships of the presumptive distributees of the incapacitated person as that term is defined in subdivision forty-two of section one hundred three of the surrogate's court procedure act and of the beneficiaries under the most recent will or similar instrument executed by the incapacitated person.

(c) Notice of a petition seeking relief under this section shall be served upon:

(i) the persons entitled to notice in accordance with paragraph one of subdivision (d) of section 81.07 of this article;

(ii) if known to the petitioner or guardian, the presumptive distributees of the incapacitated person as that term is defined in subdivision forty-two of section one hundred three of the surrogate's court procedure act unless the court dispenses with such notice; and

(iii) if known to the petitioner or guardian, any person designated in the most recent will or similar instrument of the incapacitated person as beneficiary whose rights or interests would be adversely affected by the relief requested in the petition unless the court dispenses with such notice.

(d) In determining whether to approve the application, the court shall consider:

1. whether the incapacitated person has sufficient capacity to make the proposed disposition himself or herself, and, if so, whether he or she has consented to the proposed disposition;
2. whether the disability of the incapacitated person is likely to be of sufficiently short duration such that he or she should make the determination with respect to the proposed disposition when no longer disabled;
3. whether the needs of the incapacitated person and his or her dependents or other persons depending upon the incapacitated person for support can be met from the remainder of the assets of the incapacitated person after the transfer is made;
4. whether the donees or beneficiaries of the proposed disposition are the natural objects of the bounty of the incapacitated person and whether the proposed disposition is consistent with any known testamentary plan or pattern of gifts he or she has made;
5. whether the proposed disposition will produce estate, gift, income or other tax savings which will significantly benefit the incapacitated person or his or her dependents or other persons for whom the incapacitated person would be concerned; and
6. such other factors as the court deems relevant.

(e) The court may grant the application if satisfied by clear and convincing evidence of the following and shall make a record of these findings:

1. the incapacitated person lacks the requisite mental capacity to perform the act or acts for which approval has been sought and is not likely to regain such capacity within a reasonable period of time or, if the incapacitated person has the requisite capacity, that he or she consents to the proposed disposition;

2. a competent, reasonable individual in the position of the incapacitated person would be likely to perform the act or acts under the same circumstances; and

3. the incapacitated person has not manifested an intention inconsistent with the performance of the act or acts for which approval has been sought at some earlier time when he or she had the requisite capacity or, if such intention was manifested, the particular person would be likely to have changed such intention under the circumstances existing at the time of the filing of the petition.

(f) Nothing in this article imposes any duty on the guardian to commence a special proceeding pursuant to this article seeking to transfer a part of the assets of the incapacitated person to or for the benefit of another person and the guardian shall not be liable or accountable to any person for having failed to commence a special proceeding pursuant to this article seeking to transfer a part of the assets of the incapacitated person to or for the benefit of another person.

### **§ 81.22. Powers of guardian; personal needs**

(a) Consistent with the functional limitations of the incapacitated person, that person's understanding and appreciation of the harm that he or she is likely to suffer as the result of the inability to provide for personal needs, and that person's personal wishes, preferences, and desires with regard to managing the activities of daily living, and the least restrictive form of intervention, the court may grant to the guardian powers necessary and sufficient to provide for the personal needs of the incapacitated person. Those powers which may be granted include, but are not limited to, the power to:

1. determine who shall provide personal care or assistance;
2. make decisions regarding social environment and other social aspects of the life of the incapacitated person;
3. determine whether the incapacitated person should travel;
4. determine whether the incapacitated person should possess a license to drive;
5. authorize access to or release of confidential records;
6. make decisions regarding education;
7. apply for government and private benefits;
8. consent to or refuse generally accepted routine or major medical or dental treatment **subject to the provisions of subdivision (e) of section 81.29 of this article dealing with life sustaining treatment;** the guardian shall make treatment decisions consistent with the findings under section 81.15 of this article and in accordance with the patient's wishes, including the patient's religious and moral beliefs, or if the patient's wishes are not known and cannot be ascertained with reasonable diligence,

in accordance with the person's best interests, including a consideration of the dignity and uniqueness of every person, the possibility and extent of preserving the person's life, the preservation, improvement or restoration of the person's health or functioning, the relief of the person's suffering, the adverse side effects associated with the treatment, any less intrusive alternative treatments, and such other concerns and values as a reasonable person in the incapacitated person's circumstances would wish to consider;

9. choose the place of abode; the choice of abode must be consistent with the findings under section 81.15 of this article, the existence of and availability of family, friends and social services in the community, the care, comfort and maintenance, and where appropriate, rehabilitation of the incapacitated person, the needs of those with whom the incapacitated person resides; placement of the incapacitated person in a nursing home or residential care facility as those terms are defined in section two thousand eight hundred one of the public health law, or other similar facility shall not be authorized without the consent of the incapacitated person so long as it is reasonable under the circumstances to maintain the incapacitated person in the community, preferably in the home of the incapacitated person.

(b) No guardian may:

1. consent to the voluntary formal or informal admission of the incapacitated person to a mental hygiene facility under article nine or fifteen of this chapter or to a chemical dependence facility under article twenty-two of this chapter;
2. revoke any appointment or delegation made by the incapacitated person pursuant to sections 5-1501, 5-1601 and 5-1602 of the general obligations law, sections two thousand nine hundred sixty-five and two thousand nine hundred eighty-one of the public health law, or any living will.

### **§ 81.23. Provisional remedies**

(a) Temporary guardian.

1. At the commencement of the proceeding or at any subsequent stage of the proceeding prior to the appointment of a guardian, the court may, upon showing of danger in the reasonably foreseeable future to the health and well being of the alleged incapacitated person, or danger of waste, misappropriation, or loss of the property of the alleged incapacitated person, appoint a temporary guardian for a period not to extend beyond the date of the issuance of the commission to a guardian appointed pursuant to this article. The powers and duties of the temporary guardian shall be specifically enumerated in the order of appointment and are limited in the same manner as are the powers of a guardian appointed pursuant to this article. Prior to the expiration of the term of appointment, the temporary guardian shall report to the court all actions taken pursuant to the order[of] \* appointment. The court may approve a reasonable compensation for the temporary guardian; however, if the court finds that the temporary guardian has failed to discharge his or



her duties satisfactorily in any respect, the court may deny or reduce the amount of compensation or remove the temporary guardian.

2. Notice of the appointment of the temporary guardian shall be given to the person alleged to be incapacitated and to any person having custody or control over the person or property of the person alleged to be incapacitated in such manner as the court may prescribe.

3. The authority and responsibility of a temporary guardian begins upon the issuance of the commission of temporary guardianship.

4. The court may require the temporary guardian to file a bond in accordance with section 81.25 of this article.

(b) Injunction and temporary restraining order.

1. The court may, at any time prior to or after the appointment of a guardian or at the time of the appointment of a guardian with or without security, enjoin any person, other than the incapacitated person or the person alleged to be incapacitated from selling, assigning, or from disposing of property or confessing judgment which may become a lien on property or receiving or arranging for another person to receive property from the incapacitated person or the person alleged to be incapacitated or doing or suffering to be done any act or omission endangering the health, safety or welfare of the incapacitated person or the person alleged to be incapacitated when an application under this article seeks such an injunction and it satisfactorily appears from the application, affidavits, and other proofs that a person has done, has suffered to be done or omitted to do, or threatens to do or is about to do an act that endangers the health, safety or welfare of the incapacitated person or the person alleged to be incapacitated or has acquired or is about to acquire any property from the incapacitated person or person alleged to be incapacitated during the time of that person's incapacity or alleged incapacity without adequate consideration. Such order shall be made upon an order to show cause or upon the initiative of the court and may, upon the application for the appointment of a guardian, in the discretion of the court, be continued for ten days after the appointment of ~~an adult~~ a guardian. Notice of any injunction shall be given to any person enjoined, to the incapacitated person or the person alleged to be incapacitated, and to any person having custody or control over the person or property of the incapacitated person or the person alleged to be incapacitated in such manner as the court may prescribe.

2. A temporary restraining order may be granted with or without security when an application seeks an injunction under paragraph one of this subdivision and where the court is satisfied that in the absence of such restraining order, the property of the incapacitated person or person alleged to be incapacitated would be dissipated to that person's detriment or that the health, safety or welfare of the incapacitated person or the person alleged to be incapacitated would be endangered. Notice of the temporary restraining order shall be given to any person restrained, to the

incapacitated person or the person alleged to be incapacitated, and to any person having custody or control over the person or property of the incapacitated person or person alleged to be incapacitated in such manner as the court may prescribe. Such temporary restraining order shall neither be vacated nor modified except upon notice to the petitioner and to each person required to receive notice of the petition pursuant to paragraph one of subdivision ~~(d)~~ (g) of section 81.07 of this article.

3. When the court is satisfied that the interest of the incapacitated person or person alleged to be incapacitated would be appropriately served, the court may provide in a temporary restraining order that such temporary restraining order shall have the effect of:

(i) a restraining notice when served in a manner and upon such persons as the court in its discretion shall deem appropriate;

(ii) conferring information subpoena power upon the attorney for the petitioner when the court in its discretion shall deem appropriate.

4. Where such a temporary restraining order provides for a restraining notice a person having custody or control over the person or property of the incapacitated person or the person alleged to be incapacitated is forbidden to make or suffer any sale, assignment, transfer or interference with any property of the incapacitated person or the person alleged to be incapacitated except pursuant to the order of the court.

5. Where such a temporary restraining order provides the petitioner's attorney with information subpoena power, service of a copy of the order together with an information subpoena shall require any person so subpoenaed to provide petitioner's attorney with any information concerning the financial affairs of the incapacitated person or the person alleged to be incapacitated.

#### **§ 81.24. Notice of pendency**

The petitioner shall, prior to judgment, file a notice of pendency if real property or any interest therein is or may be affected by the proceeding.

#### **§ 81.25. Filing of bond by guardian**

(a) Before the guardian, or special guardian appointed under this article, **or a trustee of a trust created pursuant to this article,** enters upon the execution of ~~the guardian's~~ **his or her duties,** the court may require or dispense with the filing of a bond.

(b) The court may require or dispense with the filing of a bond by the temporary guardian. If the temporary guardian is required to file a bond, such bond must be filed within ten days after the issuance of the temporary guardian's commission.

(c) If the value of the estate of the person for whom a guardian, special guardian, temporary guardian, or trustee is appointed is so great or for other sufficient reason the court deems it inexpedient to require security in the full amount prescribed by law it may direct that all or part of the assets of the estate be delivered subject to the further order of the court to the county treasurer, or other proper fiscal officer, the clerk of the court or a trust company, bank or safe deposit company or otherwise restrict the authority of the guardian or trustee. The court may thereupon fix the amount of the bond taking into consideration the value of the remainder only of the estate. The assets so deposited shall not be withdrawn from the custody of the depository and no person other than the proper fiscal officer of such county or depository shall receive or collect any principal or income or other benefits derived from such assets without order of the court.

(d) Notwithstanding any other provision of this section, any community guardian program operating pursuant to the provisions of title three of article nine-B of the social services law, appointed as guardian pursuant to subdivision (a) of section 81.19 of this article, may file with the clerk of the court before the thirty-first day of January of each year, a consolidated undertaking up to the amount of one million five hundred thousand dollars, in lieu of filing individual undertakings for each incapacitated person for whom it serves as guardian, as required by subdivision (a) of this section. To the extent of the aggregate value of such consolidated undertaking, the community guardian program will certify to the clerk of the court faithful discharge of the trust imposed upon it, obey all directions of the court in regard to the trust, and make and render a true account of all properties received by it and the application thereof and of its acts in the administration of its trust whenever so required to do by the court. At such time as the aggregate amount of the individual bonds, fixed by the court pursuant to subdivision (a) of this section for persons for whom the community guardian program is appointed guardian, shall exceed the consolidated bond filed by such program, the program shall before entering upon the execution of its duties, file with the clerk of the court individual undertakings, in the amounts fixed by the court, that it will faithfully discharge the trust imposed upon it.

~~(d)~~ (e) If the court requires the filing of a bond, the guardian or special or temporary guardian, or trustee, appointed under this article shall file with the clerk of the court by which such guardian was appointed a bond that he or she will faithfully discharge the powers granted by the court to the guardian or special or temporary guardian, or trustee, obey all directions of the court in regard to the powers, and make and render a true account of all properties received by him or her and the application thereof and a true report of his or her acts in the administration of his or her powers, whenever so required to do by the court. The amount of the bond shall be fixed by the court. If the guardian, special or temporary guardian, or trustee, receives after-acquired property not covered by the bond, such guardian, special or temporary guardian, or trustee, shall immediately have such acquisition approved by the court and file a further bond.

## **§ 81.26. Designation of clerk to receive process**

No commission shall issue nor shall any order which in itself constitutes a commission become effective until an instrument executed and acknowledged by the guardian has been filed with the clerk of the court designating the clerk and the clerk's successor in office as a person on whom service of any process may be made in like manner and with like effect as if it were served personally upon the guardian whenever the guardian cannot, with due diligence, be served within the state.

## **§ 81.27. Commission to guardian**

Within five days after the guardian has filed a designation under section 81.26 of this article, and has filed a bond in accordance with the provisions of section 81.25 of this article unless the court has waived the filing of the bond or unless the guardian's appointment is pursuant to section 81.23 of this article, the clerk of the court shall issue a commission which shall state:

1. the title of the proceeding and the name, address, and telephone number of the incapacitated person; and
2. the name, address, and telephone number of the guardian and the specific powers of such guardian; and
3. the date when the appointment of the guardian was ordered by the court; and
4. the date on which the appointment terminates if one has been ordered by the court.

## **§ 81.28. Compensation of guardian**

(a) The court shall establish, and may from time to time modify, a plan for the reasonable compensation of the guardian **or guardians**. The plan for compensation of the **such** guardian ~~may be similar to the compensation of a trustee pursuant to section two thousand three hundred nine of the surrogate's court procedure act; however, the plan~~ must take into account the specific authority of the guardian **or guardians** to provide for the personal needs and/or property management for the incapacitated person, **and the services provided to the incapacitated person by such guardian.**

(b) If the court finds that the guardian has failed to discharge his or her duties satisfactorily in any respect, the court may deny or reduce the compensation which would otherwise be allowed.

## **§ 81.29. Effect of the appointment on the incapacitated person**

(a) An incapacitated person for whom a guardian has been appointed retains all powers and rights except those powers and rights which the guardian is granted.

(b) Subject to subdivision (a) of this section, the appointment of a guardian shall not be conclusive evidence that the person lacks capacity for any other purpose, including the capacity to dispose of property by will.

(c) The title to all property of the incapacitated person shall be in such person and not in the guardian. The property shall be subject to the possession of the guardian and to the control of the court for the purposes of administration, sale or other disposition only to the extent directed by the court order appointing the guardian.

(d) If the court determines that the person is incapacitated and appoints a guardian, the court may modify, amend, or revoke any previously executed appointment, power, or delegation under section 5-1501, ~~5-1601, or 5-1602~~ 5-1505, or 5-1506 of the general obligations law or section two thousand nine hundred sixty-five of the public health law, or section two thousand nine hundred eighty-one of the public health law notwithstanding section two thousand nine hundred ninety-two of the public health law, or any contract, conveyance, or disposition during lifetime or to take effect upon death, made by the incapacitated person prior to the appointment of the guardian if the court finds that the previously executed appointment, power, delegation, contract, conveyance, or disposition during lifetime or to take effect upon death, was made while the person was incapacitated or if the court determines that there has been a breach of fiduciary duty by the previously appointed agent. In such event, the court shall require that the agent account to the guardian.

(e) Nothing in this article shall be construed either to prohibit a court from granting, or to authorize a court to grant, to any person the power to give consent for the withholding or withdrawal of life sustaining treatment, including artificial nutrition and hydration. When used in this article, life sustaining treatment means medical treatment which is sustaining life functions and without which, according to reasonable medical judgment, that patient will die within a relatively short time period.

### **§ 81.30. Initial report**

(a) No later than ninety days after the issuance of the commission to the guardian, the guardian shall file with the court that appointed the guardian a report in a form prescribed by the court stating what steps the guardian has taken to fulfill his or her responsibilities. Proof of completion of the guardian education requirements under section 81.39 of this article must be filed with the initial report.

(b) To the extent that the guardian has been granted powers with respect to property management, the initial report shall contain a verified and complete inventory of the property and financial resources over which the guardian has control, the location of any will executed by the incapacitated person, the guardian's plan, consistent with the court's order of appointment, for the management of such property and financial resources, and any need for any change in the powers authorized by the court.

(c) To the extent that the guardian has been granted powers regarding personal needs, the initial report shall contain a report of the guardian's personal visits with the incapacitated person, and the steps the guardian has taken, consistent with the court's order, to provide for the personal needs of that person, the guardian's plan, consistent with the court's order of appointment, for providing for the personal needs of the incapacitated person, a copy of any directives in accordance with sections two thousand nine hundred sixty-five and two thousand nine hundred eighty-one of the public health law, any living will, and any other advance directive, and any necessary change in the powers authorized by the court. The plan for providing for the personal needs of the incapacitated person shall include the following information:

1. the medical, dental, mental health, or related services that are to be provided for the welfare of the incapacitated person;
2. the social and personal services that are to be provided for the welfare of the incapacitated person;
3. any physical, dental, and mental health examinations necessary to determine the medical, dental, and mental health treatment needs; and
4. the application of health and accident insurance and any other private or government benefits to which the incapacitated person may be entitled to meet any part of the costs of medical, dental, mental health, or related services provided to the incapacitated person.

(d) If the initial report sets forth any reasons for a change in the powers authorized by the court, the guardian shall make an application within ten days of the filing of the report on notice to the persons entitled to such notice in accordance with paragraph one of subdivision (d) of section 81.07 of this article for such relief. If the initial report sets forth any reasons for a change in the powers authorized by the court and the guardian fails to act under this subdivision, any person entitled to commence a proceeding under this article may petition the court for a change in such powers on notice to the guardian and the persons entitled to such notice in accordance with paragraph one of subdivision (d) of section 81.07 of this article for such relief.

(e) The guardian shall send a copy of the initial report to the incapacitated person by mail unless the court orders otherwise pursuant to paragraph seven of subdivision (b) and paragraph nine of subdivision (c) of section 81.15 of this article.

(f) The guardian shall send a copy of the initial report to the court evaluator and counsel for the incapacitated person at the time of the guardianship proceeding unless the court orders otherwise pursuant to paragraph seven of subdivision (b) and paragraph nine of subdivision (c) of section 81.15 of this article.

(g) The guardian shall send a copy of the initial report to the court examiner.

(h) If the incapacitated person resides in a facility, the guardian shall send a duplicate of such report to the chief executive officer of that facility.

(i) If the incapacitated person resides in a mental hygiene facility, the guardian shall send a duplicate of such report to the mental hygiene legal service of the judicial department in which the residence is located.

### **§ 81.31. Annual report**

(a) Filing of annual report. Every guardian shall file a report annually in the month of May, or at any other time upon motion or order of the court.

(b) The report shall be in a form prescribed by the court and shall include the following information:

1. the present address and telephone number of the guardian.
2. the present address, and telephone number of the incapacitated person; if the place of residence of the incapacitated person is not his or her personal home, the name, address, and telephone number of the facility or place at which the person resides and the name of the chief executive officer of the facility or person otherwise responsible for the person's care.
3. any major changes in the physical or mental condition of the incapacitated person and any substantial change in medication.
4. the date that the incapacitated person was last examined or otherwise seen by a physician and the purpose of that visit.
5. a statement by a physician, psychologist, nurse clinician, or social worker, or other person that has evaluated or examined the incapacitated person within the three months prior to the filing of the report regarding an evaluation of the incapacitated person's condition and the current functional level of the incapacitated person.
6. to the extent the guardian is charged with providing for the personal needs of the incapacitated person:
  - (i) a statement of whether the current residential setting is best suited to the current needs of the incapacitated person;
  - (ii) a resume of any professional medical treatment given to the ward in the preceding year;
  - (iii) the plan for medical, dental, and mental health treatment, and related services in the coming year;
  - (iv) information concerning the social condition of the incapacitated person, including: the social and personal services currently utilized by the incapacitated

person; the social skills of the incapacitated person; and the social needs of the incapacitated person.

7. to the extent the guardian is charged with property management, information required by the provisions of the surrogate's court procedure act prescribing the form of papers to be filed upon the annual accounting of a general guardian of an infant's property.

8. where the guardian has used or employed the services of the incapacitated person or where moneys have been earned by or received on behalf of such incapacitated person an accounting of any moneys earned or derived from such services.

9. a resume of any other activities performed by the guardian on behalf of the incapacitated person.

10. facts indicating the need to terminate the appointment of the guardian, or for any alteration in the powers of the guardian and what specific authority is requested or what specific authority of the guardian will be affected.

11. any other information which the guardian may be required to file by the order of appointment.

(c) The guardian shall send a copy of the annual report to the incapacitated person by mail unless the court orders otherwise pursuant to paragraph seven of subdivision (b) and paragraph nine of subdivision (c) of section 81.15 of this article, shall send a copy of the annual report to the court examiner, and shall file a copy of the annual report as provided herein. ~~If the incapacitated person resides in a facility, hospital, school, or an alcoholism facility in this state as those terms are defined in section 1.03 of this chapter, a substance abuse program as that term is defined in section 19.03 of this chapter, an adult care facility as that term is defined in section two of the social services law, a residential health care facility or a general hospital as those terms are defined in section two thousand eight hundred one of the public health law, the guardian shall send a duplicate of such report to the chief executive officer of that facility and.~~ If the incapacitated person resides in a mental hygiene facility, the guardian shall send a duplicate of such report to the mental hygiene legal service of the judicial department in which the residence is located. If mental hygiene legal service was appointed as court evaluator or as counsel for the incapacitated person at the time of the guardianship proceeding, the guardian shall send a duplicate of such report to the mental hygiene legal service of the judicial department where venue of the guardianship proceeding was located if so ordered by the court.

(d) The report shall be filed in the office of the clerk of the county in which the incapacitated person last resided before the appointment of the guardian if he or she was at such time a resident of the city of New York. ~~If the incapacitated person was not then a resident of the city of New York, it shall be filed in the office of the clerk of the court which appointed the guardian.~~



(e) If the annual report sets forth any reasons for a change in the powers authorized by the court, the guardian shall make an application within ten days of the filing of the report on notice to the persons entitled to such notice in accordance with paragraph three of subdivision (c) of section 81.16 of this article for such relief. If the annual report sets forth any reasons for a change in the powers authorized by the court, and the guardian fails to act in accordance with this subdivision, any person entitled to commence a proceeding under this article may petition the court for a change in such powers on notice to the guardian and the persons entitled to such notice in accordance with paragraph three of subdivision (c) of section 81.16 of this article for such relief.

### **§ 81.32. Examination of initial and annual reports**

(a) Examination of reports generally.

1. Initial report. Within thirty days of the filing of the initial report, the initial report filed by a guardian under this article shall be examined.

2. Annual examination. Within thirty days after the filing of the annual report of the preceding year, the annual reports filed by guardians under this article shall be examined to determine the condition and care of the incapacitated person, the finances of the incapacitated person, and the manner in which the guardian has carried out his or her duties and exercised his or her powers.

(b) Examiners. The presiding justice of the appellate division in each department, or a justice of the supreme court or a special referee designated by a majority of the justices of the appellate division in each department at the request of the presiding justice, shall examine, or cause to be examined by persons designated by the presiding justice or the justices as examiners, all such reports.

(c) Failure to report.

1. If a guardian fails to file his or her initial or annual report, the person authorized to examine the report shall demand that the guardian file the report within fifteen days after the service of the demand upon him or her. A copy of the demand shall be served upon the guardian or his or her resident agent by certified mail.

2. Upon failure to comply with such demand, the court, may upon the motion of the court examiner, enter an order requiring compliance with the demand and may deny or reduce the amount of the compensation of the guardian, or remove the guardian pursuant to section 81.35 of this article absent a showing that the guardian has acted in good faith.

(d) Incomplete report.

1. If the person authorized to examine the report is of the opinion that a more

complete or satisfactory report should be filed, the person authorized to examine the report shall demand that the guardian file a revised report or proof of any item in the report. A copy of the demand shall be served upon the guardian or his or her resident agent by certified mail.

2. Upon failure to comply with such demand, the court, may upon the motion of the court examiner, enter an order requiring compliance with the demand and may deny or reduce the amount of the compensation of the guardian, or remove the guardian pursuant to section 81.35 of this article absent a showing that the guardian has acted in good faith.

(e) Duty of examiners. The person examining the report may examine the guardian and other witnesses under oath and reduce their testimony to writing. The person examining the report, on five days notice to the guardian, shall file a report in the form and manner prescribed by the order appointing the examiner.

(f) Expenses of examination. The expenses of the examination shall be payable out of the estate of the incapacitated person examined if the estate amounts to five thousand dollars or more, or, if the estate amounts to less than this sum, by the county treasurer of the county or, within the city of New York by the comptroller of the city of New York, out of any court funds in his or her hands.

### **§ 81.33. Intermediate and final report**

(a) A guardian may move in the court of his or her appointment for an order permitting him or her to render an intermediate report to the date of the filing thereof in a form prescribed by the court which shall include the same information as is required under section 81.31 of this article provided, however, that if the incapacitated person has died the report need not include information otherwise required in paragraphs five and six of subdivision (b) of section 81.31 of this article. The court may order the report to be filed with the clerk of the court on or before a fixed date.

(b) When a guardian dies or is removed, suspended, discharged pursuant to the provisions of this article, or allowed to resign, the court shall order a final report in a form prescribed by the court which shall include the same information as is required under section 81.31 of this article provided, however, that if the incapacitated person has died the report need not include information otherwise required in paragraphs five and six of subdivision (b) of section 81.31 of this article. When such a report has been made in the course of a proceeding to remove a guardian, the court may dispense with a further report.

(c) Notice of the filing of a report under this section shall be served upon the persons entitled to notice pursuant to paragraph three of subdivision (c) of section 81.16 of this article. If the incapacitated person is deceased, notice shall also be served upon his or her executor or administrator, if any.

(d) The court may appoint counsel for the incapacitated person, if living, for the protection of such person's rights and interests with regard to such report. The court may appoint a referee to hear the matter and report to the court.

(e) Upon the motion for a confirmation of the report of the referee, or if the report is made before the court, upon the court's determination, the report shall be judicially approved and filed. The compensation of the referee and of counsel shall be fixed by the court and shall be payable out of the estate of the incapacitated person unless it is determined that the incapacitated person is indigent.

~~(f) If the incapacitated person resides in a facility, hospital, school or an alcoholism facility, as those terms are defined in section 1.03 of this chapter, a substance abuse program as that term is defined in section 19.03 of this chapter, an adult care facility as that term is defined in section two of the social services law, or a residential health care facility or a general hospital as those terms are defined in section two thousand eight hundred one of the public health law, a copy of a report under this section shall be served upon the chief executive officer in charge of that facility and upon the mental hygiene legal service of the judicial department in which the residence is located.~~

#### **§ 81.34. Decree on filing instruments approving accounts**

(a) The guardian or the personal representative of the guardian may present to the court a petition showing the names and addresses of all persons entitled to receive notice pursuant to paragraph three of subdivision (c) of section 81.16 of this article and showing that, to the extent the guardian is responsible for the property of the incapacitated person, all taxes have been paid or that no taxes are due and that the petitioner has fully reported and has made full disclosure in writing of all the guardian's actions affecting the property of the incapacitated person to all persons interested and seeking a decree releasing and discharging the petitioner.

(b) The petitioner shall also show that the incapacitated person has died or that the guardian has died, or has been removed, suspended, or discharged pursuant to the provisions of this article, or allowed to resign.

(c) The petitioner shall also file with the petition acknowledged instruments executed by all persons interested or in the case of an infant, or incapacitated person whose claim has been paid, by the guardian, or guardian receiving payment, approving the report of the petitioner and releasing and discharging the petitioner.

(d) The court may thereupon make a decree releasing and discharging the petitioner and the sureties on his or her bond, if any, from any further liability to the persons interested.

#### **§ 81.35. Removal of guardian**

Upon motion, the court appointing a guardian may remove such guardian when

the guardian fails to comply with an order, is guilty of misconduct, or for any other cause which to the court shall appear just. Notice of motion shall be served on the guardian and persons entitled to receive notice pursuant to paragraph three of subdivision (c) of section 81.16 of this article. The motion may be made by the person examining initial and annual reports pursuant to section 81.32 of this article, or by any person entitled to commence a proceeding under this article, including the incapacitated person. The court may fix the compensation of any attorney or person prosecuting the motion. It may compel the guardian to pay personally the costs of the motion if granted.

### **§ 81.36. Discharge or modification of powers of guardian**

(a) The court appointing the guardian shall discharge such guardian, or modify the powers of the guardian where appropriate, if it appears to the satisfaction of the court that:

1. the incapacitated person has become able to exercise some or all of the powers necessary to provide for personal needs or property management which the guardian is authorized to exercise;
2. the incapacitated person has become unable to exercise powers necessary to provide for personal needs or property management which the guardian is not authorized to exercise;
3. the incapacitated person ~~dies~~ has died; or
4. for some other reason, the appointment of the guardian is no longer necessary for the incapacitated person, or the powers of the guardian should be modified based upon changes in the circumstances of the incapacitated person.

(b) The application for relief under this section may be made by the guardian, the incapacitated person, or any person entitled to commence a proceeding under this article.

(c) There shall be a hearing on notice to the persons entitled to notice pursuant to paragraph three of subdivision (c) of section 81.16 of this article. The court may for good cause shown dispense with the hearing provided that an order of modification increasing the powers of the guardian shall set forth the factual basis for dispensing with the hearing. If any party to the proceeding the incapacitated person or his or her counsel raises an issue of fact as to the ability of the incapacitated person to provide for his or her personal needs or property management and demands a jury trial of such issue, the court shall order a trial by jury thereof.

(d) To the extent that relief sought under this section would terminate the guardianship or restore certain powers to the incapacitated person, the burden of

proof shall be on the person objecting to such relief. To the extent that relief sought under this section would further limit the powers of the incapacitated person, the burden shall be on the person seeking such relief.

(e) If the guardian is discharged because the incapacitated person becomes fully able to care for his or her property, the court shall order that there be restored to such person the property remaining in the hands of the guardian. If the incapacitated person dies, the guardian shall provide for such person's burial or other disposition the cost of which shall be borne by the estate of the incapacitated person.

### **§ 81.37. Resignation or suspension of powers of guardian**

(a) The court appointing a guardian may allow the guardian to resign or may suspend the powers of the guardian.

(b) Where a guardian is engaged in war service as defined in section seven hundred seventeen of the surrogate's court procedure act, the court, upon motion by the guardian or any other person and upon such notice as the court may direct, may suspend the powers of the guardian until further order of the court. If the suspension will leave no other person acting as guardian, the motion shall seek the appointment of a successor. When the suspended guardian becomes able to serve, he or she may be reinstated by the court upon motion and such notice as the court may direct. If the suspended guardian is reinstated, the court shall thereupon discharge his or her successor, who may be required to account, and make any other order as justice requires.

### **§ 81.38. Vacancy in office**

(a) Interim guardian. A vacancy created by the death, removal, discharge, resignation, or suspension of a guardian shall be filled by the court. Upon the application of any person entitled to commence a proceeding under this article, the court shall appoint an interim guardian who shall serve for a period of ninety days or until a final accounting is filed and a successor guardian is appointed by the court. The powers and duties of the interim guardian shall be specifically enumerated in the order of appointment. The court may require service of the order to show cause seeking the appointment of an interim guardian on any persons it deems appropriate.

(b) Standby guardian. At the time of the appointment of the guardian, the court may in its discretion appoint a standby guardian to act in the event that the guardian shall resign, die, be removed, discharged, suspended, or become incapacitated. The court may also appoint an alternate and/or successive alternates to the standby guardian, to act if the standby guardian shall resign, die, be removed, discharged, suspended, or become incapacitated. Such standby guardian, or the alternate in the event of the standby guardian's resignation, death, removal, discharge, suspension or adjudication of incapacity, shall without further proceedings be empowered to immediately assume the duties of office immediately upon resignation, death,

removal, discharge, suspension or adjudication of incapacity, of the guardian or the standby guardian as set forth in the order of appointment, subject only to the confirmation of appointment by the court sixty days following the assumption of the duties of the office. Before confirming the appointment of a standby guardian, the court may conduct a hearing in accordance with the provisions set forth in section 81.11 of this article upon petition of any person entitled to commence a proceeding under this article.

### **§ 81.39. Guardian education requirements**

(a) Each incapacitated person is entitled to a guardian whom the court finds to be sufficiently capable of performing the duties and exercising the powers of a guardian necessary to protect the incapacitated person.

(b) Each person appointed by the court to be a guardian must complete a training program approved by the chief administrator which covers:

1. the legal duties and responsibilities of the guardian;
2. the rights of the incapacitated person;
3. the available resources to aid the incapacitated person;
4. an orientation to medical terminology, particularly that related to the diagnostic and assessment procedures used to characterize the extent and reversibility of any impairment;
5. the preparation of annual reports, including financial accounting for the property and financial resources of the incapacitated person.

(c) The court may, in its discretion, waive some or all of the requirements of this section or impose additional requirements. In doing so, the court shall consider the experience and education of the guardian with respect to the training requirements of this section, the duties and powers assigned to the guardian, and the needs of the incapacitated person.

### **§ 81.40. Court evaluator education requirements**

(a) Each incapacitated person is entitled to a court evaluator whom the court finds to be sufficiently capable of performing the duties of a court evaluator necessary to ensure that all the relevant information regarding a petition for the appointment of a guardian comes before the court and to assist the court in reaching a decision regarding the appointment of a guardian.

(b) Each person appointed by the court to be an evaluator must complete a training program approved by the chief administrator which covers:

1. the legal duties and responsibilities of the court evaluator;
2. the rights of the incapacitated person with emphasis on the due process rights to aid the court evaluator in determining his or her recommendation regarding the appointment of counsel and the conduct of the hearing;
3. the available resources to aid the incapacitated person;
4. an orientation to medical terminology, particularly that related to the diagnostic and assessment procedures used to characterize the extent and reversibility of any impairment;
5. entitlements;
6. psychological and social concerns relating to the disabled and frail older adults.

(c) The court may, in its discretion, waive some or all of the requirements of this section or impose additional requirements. In doing so, the court shall consider the experience and education of the court evaluator with respect to the training requirements of this section.

#### **§ 81.41. Court examiner education requirements**

(a) Each incapacitated person is entitled to a thorough examination of all reports required to be filed by the guardian.

(b) Each person appointed pursuant to section 81.32 of this article must complete a training program approved by the chief administrator which covers the legal duties and responsibilities of the examiner and of guardians.

(c) The court may, in its discretion, waive some or all of the requirements of this section or impose additional requirements. In so doing, the court shall consider the experience and education of the court examiner with respect to the training requirements of this section.

#### **§ 81.42. Compliance**

(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.

(b) A judgment or order made pursuant to this article, unless reversed on appeal, releases the guardian and the sureties from all claims of the incapacitated person and/or any person affected thereby based on any act or omission directly authorized, approved or confirmed in the judgment or order. This section does not apply where

the judgment or order is obtained by fraud or conspiracy or by misrepresentation contained in the notice, petition, account, or in the judgment or order as to any material fact. For purposes of this subdivision, misrepresentation of a material fact includes but is not limited to the omission of a material fact.

### **§ 81.43 Proceedings to discover property withheld**

(a) To the extent that it is consistent with the authority otherwise granted by the court a guardian may commence a proceeding in the court which appointed the guardian to discover property withheld. The petition shall contain knowledge, or information and belief of any facts tending to show that any interest in real property or money or other personal property, or the proceeds or value thereof, which should be delivered and paid to the guardian, is in the possession, under the control, or within the knowledge or information of respondent who withholds the same from the guardian, whether such possession or control was obtained before or after the appointment of the guardian, or that the respondent refuses to disclose knowledge or information which such person may have concerning the same or which will aid the guardian in making discovery of such property. The petition shall request that respondent be ordered to attend an inquiry and be examined accordingly and deliver property of the incapacitated person if it is within his or her control. The petition may be accompanied by an affidavit or other written evidence, tending to support the allegations thereof. If the court is satisfied on the papers so presented that there are reasonable grounds for the inquiry, it must make an order accordingly, which may be returnable forthwith, or at a future time fixed by the court, and may be served at any time before the hearing. If it shall appear from the petition or from the answer interposed thereto, or in the course of the inquiry made pursuant to the order that a person other than the respondent in the proceeding claims an interest in the property or the proceeds or the value thereof, the court may by the original order or by supplemental order, direct such additional party to attend and be examined in the proceeding in respect of his or her adverse claim, and deliver the property if in his or her control or the proceeds or value thereof. Service of such an order must be made by delivery of a certified copy thereof to the person or persons named therein and the payment or tender, to each of the sum required by law to be paid or tendered to a witness who is subpoenaed to attend a trial in such court.

(b) If the person directed to appear submits an answer denying any knowledge concerning or the possession of any property which belongs to the incapacitated person or should be delivered to the guardian, or shall make default in answer, he or she shall be sworn to answer truly all questions put to him or her regarding the inquiry requested in the petition. Any claim of title to or right to the possession of any property of the incapacitated person must be made by verified answer in writing. If such answer is interposed, the issues raised thereby shall be tried according to the usual practice of the court as a litigated issue but the interposition of such answer shall not limit the right of the guardian to proceed with the inquiry in respect of property not so claimed by the verified answer. If possession of the property is denied, proof on that issue may be presented to the court by either party. The court may in an appropriate case make interim decrees directing the delivery of property



not claimed by verified answer and may continue the proceeding for determination of any litigated issue. If it appears that the guardian is entitled to the possession of the property, the decree shall direct delivery thereof to the guardian or if the property shall have been diverted or disposed of, the decree may direct payment of the proceeds or the value of such property or may impress a trust upon said proceeds or make any determination which a court of equity might decree in following trust property funds. In any case in which a verified answer is served and the court after a trial or hearing determines the issue, the court may in its discretion award costs not exceeding fifty dollars and disbursements to be paid by the unsuccessful party.