

INTRODUCTION TO ARTICLE 81 OF THE MENTAL HYGIENE LAW

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1. COMMENCEMENT OF A GUARDIANSHIP PROCEEDING

- For a person who is mentally and/or physically incapacitated who cannot make medical and/or financial decisions for themselves, cannot not handle their normal activities of daily living, and does not have a Health Care Proxy or Power of Attorney. If the person has family members who are involved with their care, then they can make medical decisions under the Family Healthcare Act. However, the family member cannot access financial information or handle financial matters. Therefore, a Guardian of the Property (§81.21 MHL) would be required. If there are no family members to make medical decisions, then a Guardian of the Person (§81.22 MHL) would also be required. The person for whom the proceeding is commenced is referred to as the Alleged Incapacitated Person (or AIP), until the Court makes a finding after a hearing.
- The proceeding shall be brought in the Supreme Court in the County in which the AIP resides or is present (§81.04 and §81.05). If the AIP's resident is in Queens County, however, they are in a facility in Nassau County, the proceeding would be commenced in Nassau County. It can also be brought in a County Court or Surrogate's Court in some circumstances, however, for the purpose of this presentation the discussion will be based on Supreme Court matters.

2. COMMENCED BY ORDER TO SHOW CAUSE AND VERIFIED PETITION

- Each County within the City of New York, Nassau, and Suffolk, have a slightly different form for the Order to Show. The Verified Petition is basically the same. Westchester has a completely different form of its own. Some of the upstate counties follow Westchester, while others do not and will accept any form compliant with §81.07(4)(d), which requires that the legend in the Order to Show Cause be in twelve point or larger bold face, double spaced type (we also put it in all caps). In addition, each County has its own way of setting up the Order to Show Cause and Petition. It is best to check with the Guardianship Clerk in each County for it's form and how they want it submitted.
- A Notice of Proceeding (§81.07(3)(f)) and Request for Judicial Intervention must be filed with the Order to Show Cause and Verified Petition, together with filing fees of \$210.00 for an index number and \$95.00 for an RJI. No motion fee is necessary.

3. WHO CAN PETITION

- The person alleged to be incapacitated (they can self-petition and consent if they have the mental capacity);

- The next of kin of the AIP (eg: spouse, child, parent, sibling);
- An executor or administrator when the AIP is the beneficiary of an estate;
- A trustee of a trust when the AIP is the beneficiary of a trust;
- A person with whom the AIP resides or a person otherwise concerned with the welfare of the AIP; and
- The Administrator of a facility where the AIP is either a patient or a resident.

4. DRAFTING THE ORDER TO SHOW CAUSE AND VERIFIED PETITION

- Legend in Order to Show Cause, pursuant to §81.07(b)(4)(d):

IMPORTANT

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.

- Order to Show Cause should also include:
 - the powers illustrated in §81.21 (personal needs) and §81.22 (property management)
 - who should be served
 - a decretal paragraph for the date and time of the hearing;
 - a decretal paragraph to appoint counsel;
 - paragraphs for any provisional remedies as necessary.

(As aforesaid, a form for each county should be obtained from the Guardianship Clerk of the Court)

- The petition (§81.08) should be sworn to under oath and should include:
 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.

- The petition must also state that no prior action for this relief has been commenced in this Court or any Court of competent jurisdiction. If there was a prior proceeding then the petition must state the facts surrounding same and its disposition.

5. NOTICE AND SERVICE OF ORDER TO SHOW CAUSE (§81.07)

- When the Order to Show Cause is signed by the Court, the service of same is one of the most important tasks a paralegal must do. Unless otherwise directed by the Court, the AIP must be served personally with a copy of the Notice of Proceeding, Order to Show Cause and Verified Petition at least 14 days prior to the return date of the hearing. If the AIP cannot be served personally, then an additional Order from the Court must be obtained directing the manner of service. Since the hearing is usually scheduled by the Court according to the statute within 28 days of the signing of same, this usually presents a short window for service. It is best to serve it ASAP, because this will present a jurisdictional defect that cannot be waived if the AIP is not properly served.
- The Court Evaluator who is appointed by the Court to investigate the facts in the proceeding and report back to the Court, and the Counsel for the AIP, must be served within 3 business days of the signing of the Order to Show Cause with the Notice of Proceeding, Order to Show Cause and Verified Petition by overnight delivery or fax (or email if consented to by the Court Evaluator or Counsel. Counsel may be appointed by the Court at the time of signing of the Order to Show Cause, or may be appointed at a later date. The Court Evaluator should also be provided with copies of any relevant information in the file such as bank records, or deeds.
- All other interested parties must be served at least 14 days prior to the hearing unless otherwise directed by the Court with a copy of the Order to Show Cause and Notice of Proceeding only.
- Who must be given notice (§81.07(g)(1)):
 - The AIP;
 - The CEO of the facility where the AIP resides (if not they are not the Petitioner);
 - Mental Hygiene Legal Service if the AIP is in a facility such as a nursing home

- or a hospital (not an assisted living);
- All immediate relatives of the AIP (parents, spouse, adult children, brothers, sisters, or any other relative that may be involved with the AIP);
- Any person who has been designated as an agent by the AIP in a Power of Attorney or Health Care Proxy;
- The Department of Social Services if the AIP receives public assistance or protective services;
- Any other person that is deemed to have an interest in the proceeding.

6. PRIOR TO THE HEARING:

- Provide the Court Evaluator with assistance in meeting with your client and the attorney;
- Provide the Court Evaluator with whatever documents they require (financial documents, deed, etc.)
- Prepare and file a Notice of Pendency (§81.24), if the AIP owns and/or has an interest in real property;;
- Prepare Subpoenas for witnesses and records if necessary;
- Make sure your witnesses are lined up for testimony and schedule a meeting for attorney to prep them if necessary (If the petitioner is a nursing home or hospital, a Social Worker's testimony will be sufficient. Also, someone from the nursing home's finance office may be required to testify);

7. AFTER THE HEARING:

- Obtain the transcript of the hearing to prepare the Order and Judgment Appointing Guardian (All counties require the transcript or the decadal portion of the transcript except for the Bronx where the judge issues his/her own decision and sends it to you to follow);
- Prepare Order and Judgment Appointing Guardian (OAG) with Notice of Settlement and serve on all parties; file the original (and in some counties a copy) of the Order and Judgment, together with an Affirmation of Legal Services and the transcript and/or decision with the Guardianship Clerk; (As with the Order to Show Cause, all of the downstate counties have their own forms. In Westchester and New York County it is called "Findings of Fact, Conclusions of Law and Judgment". Check with each county for its form).
- Upon the signing of the OAG, it is served on all parties with Notice of Entry. The Court

Evaluator or the Guardian or Counsel for the AIP (who has now been adjudicated an Incapacitated Person), is usually designated by the Court to serve the IP and read and explain to them the Order.

-The Guardian and the Court Examiner (who is appointed in the Order Appointing Guardian to review the annual accountings of the Guardian), should also be mailed copies of the Order to Show Cause, Verified Petition, Court Evaluator's Report, and transcript of the hearing. The Guardian should also get copies of any financials in the file, any personal documents, deeds, etc.

-It is usually the responsibility of the petitioner' counsel to help qualify the Guardian if:

1. The petitioner is the Guardian;
2. If a family member or other lay person who does not have their own counsel is appointed Guardian.

-If the Guardian is an attorney appointed from the Part 36 List, then they usually qualify themselves.;

8. QUALIFYING A GUARDIAN:

-The following is an excerpt written by Debra L. Falsone, from the New York State Bar Association Guardianship Treatise, 3rd Edition, which has not yet been published:

There are several types of Guardians that can be appointed. There are Guardians for Personal Needs and Property Management of the Incapacitated Person appointed with full powers as specified in §§81.21 and 8.22 of the Mental Hygiene Law. There are also Special Guardians, Temporary Guardians or Interim Guardians appointed with specific powers, for a specified period of time. A Temporary Guardian or an Interim Guardian is usually appointed to act immediately, and usually in contemplation of appointing a permanent Guardian.

There are multiple ways that a Guardian can be appointed. Some examples are:

- One person for the Personal Needs and Property Management;
- Two people, one for the Personal Needs and one for Property Management;
- Two people as Co-Guardians for the Personal Needs and Property Management;

or any other combination that may be necessary to meet the needs of the Incapacitated Person. When two separate guardians are appointed for personal needs and property management, each perform his/her duties separately guided by powers and authority granted in order. However, the guardians should work together as some personal needs decisions will effect the Incapacitated Person's finances. If co-guardians are appointed, they must act together and perform services jointly, unless otherwise specified in the Order appointing.

Naming a Guardian in an Order does not automatically give the Guardian authority to act. The Guardian must file certain documentation with Court such as a bond (where applicable) and a Consent to Act and Designation, in order to qualify, and obtain a certified copy of his/her Commission before being able to act.

A. How to Obtain a Bond

Pursuant to §81.25 of the Mental Hygiene Law, the Court may require the filing of a bond by the Guardian of the Property. The amount of the bond is set by the Court and is calculated by adding the amount of the Incapacitated Person's liquid assets plus two years income.

The first step in obtaining a bond is to contact a surety agency. The Guardian will be required to complete an application for the surety which may include questions and request information such as:

- Have you or your spouse filed for bankruptcy?
- Do you have any judgments against you?
- Have you had a criminal conviction?
- Are you indebted to the Incapacitated Person?
- Your employment history.
- Your personal net worth.

The application will also request the name of the Guardian's attorney (if the Guardian is a lay person) and if the attorney will remain involved throughout the guardianship. The surety may also require a "letter of involvement" from the Guardian's attorney. The Guardian's credit rating will be checked by the surety. The surety company will also require with the application, a copy of the Order and Judgment Appointing Guardian, the Verified Petition, the Court Evaluator's Report, the Incapacitated Person's Last Will and Testament (if any), and any Trusts (*i.e.* Supplemental Needs Trust) if any are in place. Once the Guardian's application is approved, the bond is issued by the surety company. The bond must be reviewed carefully to make sure that names are spelled correctly, dates are correct and all other information is correct, otherwise the bond will be rejected by the Court. The bond is then filed with the Court for approval, along with the Guardian's Commission and a Consent to Act (or Oath) and Designation.

In recent years, the Courts are finding it more difficult to appoint a person as Guardian of the property who is bondable, as the surety companies are scrutinizing the credit history of the Guardian. While the Court prefers to appoint a relative of the Incapacitated Person as Guardian, that relative's credit score may not be sufficient to obtain a bond. If the relative who is going to be appointed Guardian is at the guardianship hearing, either petitioner's counsel, or the Court, should question the proposed guardian with regard to his/her credit rating, if they ever claimed bankruptcy, if they have a criminal record, or if there are any judgments against them. If the Court finds that the guardian is not bondable, there are several options available.

The first option is that the Court can appoint an independent Guardian from the Part 36 List, to act either alone as Guardian of the Property or as Co-Guardian of the Property with the Incapacitated Person's relative. The second option is that the surety company can have a relative of the Guardian who is bondable sign an indemnity agreement, indemnifying the Guardian, and guaranteeing payment of all premiums and losses and/or misappropriation of the Incapacitated Person's assets. The surety may demand that the indemnitor deposit with its company a sum of money to cover any claim, suit, loss or judgment against the Guardian that it deems necessary. The third option, pursuant to §81.25(c) of the Mental Hygiene Law, is that the Court direct that a restricted account be opened. This means that the Court will direct that either all or part of the Incapacitated Person's assets be deposited with 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. No funds can be withdrawn from the account without further order of the Court. The Guardian can be permitted to open a guardianship account with a portion of the assets of the Incapacitated Person. When the Guardian requires additional funds to replenish the guardianship account, an accounting of what was spent on behalf of the Incapacitated Person should be submitted to the Court along with an application to withdraw funds from the depository that is holding the funds.

In addition, if the Guardian is appointed from the Part 36 list, the amount of bonds that have previously been issued to the Guardian on prior appointments will be taken into consideration. If the Part 36 Guardian has over a million dollars in bonds from prior appointments, the insurance companies may ask the Guardian to complete a form with all of his/her personal financial net worth.

If the Incapacitated Person owns real property, upon the application to the Court by the Guardian to sell the real property, a bond will be required for the purchase price of the house. Upon completion of the sale of the house, the Court will direct that the real property bond be cancelled and the bond that was first issued to the Guardian to be increased to include the amount of the proceeds of the sale.

B. The Commission.

The signed Order and Judgment Appointing Guardian alone does not give the Guardian the authority to act on his/her powers. A Commission must be issued by the County Clerk once the Bond (if required) is filed with the Court and approved, and Consent to Act and Designation is filed with the County Clerk. It is good practice to file all of the documents together, so that once the presiding Judge approves the bond, all of the documents can be filed with the County Clerk.

A Commission is the document that gives Guardian authority to act. Pursuant to MHLS §81.27 Commission must include:

- The title of proceeding;
- The name, address and telephone number of Incapacitated Person;

- The name, address and telephone number of Guardian(s);
- The specific powers of Guardian(s);
- The date of appointment of Guardian;
- The date of termination of guardianship, if directed in the Order;

There is no state-wide form for Guardian's Commission, and it is best to contact the County Clerk or Guardianship Part, if there is one, as to the local practice. All of the Counties in New York State will accept a short form Commission which is attached to the Order and Judgment Appointing, and then, signed and certified by the County Clerk. The short form Commission must have a certified copy of the Order and Judgment Appointing Guardian annexed to it or the Commission will not be valid. Nassau and Suffolk Counties have also adopted this practice. If two different people are appointed as Guardian of the Person and Guardian of the Property, a separate Commission will have to be filed for each. Nassau County requires that a certified copy of the Order and Judgment Appointing be obtained first. It then must be attached to the Short Form Commission and resubmitted to the County Clerk's Office to have the Commission certified. Westchester County has its own form that includes all of the powers that are in the Findings of Fact, Conclusions of Law and Judgment. As a courtesy, if the Guardian(s) are lay persons and not attorneys from the Part 36 List, and they are not the petitioner in the proceeding, the Court may direct that petitioner's counsel qualify the Guardian(s).

Even counties that accept a short form Commission may permit a long form to be issued. It is sometimes desirable to separate the order from the Commission, where decretal paragraphs in the Order may deal with issues ancillary to the powers being awarded to the guardian(s), or maintain privacy with respect to certain issues.

If a Temporary Guardian or Interim Guardian is appointed by the Court during a pending proceeding, a certified copy of the Order Appointing the Temporary Guardian or Interim Guardian can act as the Commission as long as it is indicated in the Order, as soon as a Designation is filed by the Temporary Guardian or Interim Guardian with the County Clerk. This may also, on occasion, occur if a Special Guardian is appointed with only one or two specific powers. A certified copy of the Order Appointing the Special Guardian will be sufficient provided it is indicated in the Order.

C. Other Requirements for Qualifying a Guardian

Pursuant to MHLS §81.26, before a Commission issues, a Designation must be filed by the Guardian(s) appointed. This is an instrument executed by Guardian(s) designating the County Clerk or the Clerk's Successor in office, in the County where the proceeding was commenced, as the person on whom process may be made as if the Guardian was served personally upon him /her, in the event that the Guardian(s) cannot, after due diligence, be served within the state. In addition, some counties require an Oath (Consent to Act) to be filed along with a Designation. It would be good practice to file both with all Counties.

Further, Part 36 Appointees must file a Notice of Appointment and Certification of Compliance, which are usually supplied by the Fiduciary Clerk of the Court upon appointment.