MHL Article 81 Guardianship- Best Practices and Caselaw Review

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Alex J. Cameron, Deputy County Attorney, Monroe County Law Department

Mark E. Maves, Esq., Counsel, NYPWA

APS Best Practices for Guardianships

Alex Cameron, Esq. – Deputy County Attorney, Monroe County Law Department

Mandate to Act as Guardian Once Appointed by Court

- Protective Services for adults is state mandated. 18 NYCRR § 457.1(a).
- "Services" includes "functioning as guardian . . . where it is determined such services are needed and there is no one else available or capable of acting in this capacity." 18 NYCRR § 457.1(d)(9); *see also* 18 NYCRR § 457.6(c)(2).
- Only one way to be guardian – appointment by court
- Regulations do not differentiate between MHL Art. 81 or SCPA 17-a guardian.

Challenges in Monroe County

- Too many appointments by the court and not enough staff in APS to handle day-to-day functions
- Pro-Guardianship Judges, no Court Evaluator
- Accessing finances, gathering financial records
- Becoming payee of all income and securing income/resources
- Budgeting finances and paying bills
- Financial reporting
- Property Management vs. Personal Needs

Solutions to Challenges

- Intervention and Contesting Third-Party Guardianships
- Contracts w/ third parties – 18 NYCRR 405.1 et seq. allows purchase of "*services* for eligible individuals"
  - "Agency" powers included in order/commission to expand third party vendor's authority
- Discharge – MHL 81.36
  - Only for persons with rep payee services in place who live in community
- Community Guardianship Program 18 NYCRR 457.12
  - Not practical in Monroe County – most clients permanently institutionalized in Nursing Homes

Temporary Guardianship – General Requirements

- MHL 81.23 – should only be used in emergency situations
  - Statute states that showing must be made "of danger in the reasonably foreseeable future" to either well-being or finances
- No 24-hour notice requirement in MHL 81.23
  - Law revisions comments state that AIP should be given notice (rarely occurs in Monroe County). *See also* Fosmire v. Nicoleu, 75 N.Y.2d 218, 224 [1990].
- Authority begins upon "issuance of commission." MHL 81.23 (a)(3).
  - Will likely need signed Designation from Commissioner first.
  - No such requirement found with permanent guardianships

Temporary Guardianships – Best Practices

- Designation and Commission
  - Designation should not include “consent”
  - 3 Copies of Certified Commission
- MHL 81.23 – must visit at least once and submit a “report” to the court describing all actions taken as guardian
  - Statute does not specify contents of report (unlike other portions of the MHL)
  - Existence of family, friends or close relatives willing to be guardian
  - SHOULD NOT include medical information, ability of AIP to conduct ADLs, or whether AIP lacks capacity
  - Direct testimony instead of report?

Permanent Guardianships – Judgment & Commission

- Request that Order and Judgment be settled on notice
  - Waiver of bond, educational requirements
  - Inclusion of agency language
  - All responsibilities/powers must match what is requested in Petition
- Designation/Commission
  - Only need one designation – if already filed for temporary guardianship then unnecessary
  - Three copies of certified commission – one for legal file, two for APS

Visitation – General Rule

- Article 81 different than Part 457
- Mental Hygiene Law – guardian must visit not less than four times a year, or more frequently as specified in court order
- General rule in regs: must visit as *frequently as necessary* to assure that needs of client are met. Type and frequency of visits depends on:
  - Specific circumstances of client's situation
  - Ability and willingness of family, friends, neighbors to assist individual; and
  - Involvement of other agencies in the provision of services to clients. 18 NYCRR 457.5(b)(1).

Visits for Clients Residing in the Community

- APS clients who live in the community must be visited *in their home* at least once a month when either:
  - Abuse, neglect or exploitation by another person is suspected or documented;
  - Environmental conditions exist in the home which are a threat to the health and safety of the client; or
  - When a client is homebound or when there is no other way to have a face to face contact with the client without making a home visit. 18 NYCRR 457.5(b)(2).
- If a client does not meet on of the categories above, must have face-to-face contact every month and meet in the home at least once every three months. 18 NYCRR 457.5(b)(4).

Visits for Clients in Nursing Homes, Hospitals

- Nothing specific in APS regulations – so must follow MHL and visit four times a year
- Nursing Homes: APS must maintain phone contact with facility staff at least once every three months to monitor condition of client. 18 NYCRR 457.5(b)(5).
- Hospitals: APS must maintain monthly phone contact with discharge planning staff to monitor client's condition and to plan for the discharge of the client to home or other appropriate setting. 18 NYCRR 457.5(b)(6).

Banks – Identifying, Accessing and Securing (Part 1)

- Accounts should be secured at the beginning of the case to prevent waste, misappropriation and exploitation
- Process
  - Identification: pleadings, visits with IP, mail/paperwork of IP, family/friends, financial assistance records, IRS, credit reports
  - Access: three letters sent signed by Commissioner
    - Request access to records and safe deposit boxes
    - Authorization to Communicate – allows APS staff to talk to banks
    - Authorization regarding financial transactions
  - Letters are hand-delivered to bank with certified commission
  - Follow within three days to ensure receipt and that letters are processed

Banks – Identifying, Accessing and Securing (Part 2)

- Review of bank statements
  - Direct deposits
  - Unknown or large withdrawals
  - Creditors
  - Safe Deposit box rent
- Joint Accounts vs. Convenience Accounts
  - Closure of convenience accounts immediately
- Additional letter sent to bank to request further bank statements (if necessary), restrict access or freeze the account, or other actions

Chronic Care Medicaid

- Applicable for most hospital cases and all NH cases
  - Provisional eligibility. *See* 03 OMM/ADM – 1, 92 ADM – 45
- PRI (Patient Review Instrument)
- Medicare application
- Five years of bank/financial statements
- Transfers greater than $2K
- Real Estate
- If approved – will receive budget and must pay NAMI

Budgeting / Use of Income and Resources

- Must afford client greatest amount of self-determination possible in light of the client's:
  - Functional level;
  - Understanding and appreciation of functional limitations; and
  - Personal wishes, preferences, and desires with regard to managing activities of daily living
- But ultimately, up to property management guardian on how money is spent
- Prioritize essential goods and services (NAMI, rent, utilities)
- Guardianship fees

Guardianship Reports

- Initial Report
  - Due 90 days after the issuance of the Commission
  - Designed to be a “snapshot” of the IP’s circumstances at the time of appointment
  - Must contain “plan” consistent with the order of appointment
- Annual Report
  - Due in the month of May for preceding year, unless court directs otherwise
  - If appointed for Property Management, content must follow SCPA 1719 and contain schedules
- Court Examiner reviews reports

Guardianship Discharges – MHL 81.36

- Three separate grounds:
  - IP has become able to exercise some or all of the powers necessary to provide for their personal needs or property management which the guardian is authorized to exercise;
  - For some other reason, the appointment of the guardian is no longer necessary, or the powers of the guardian should be modified based on a change of circumstances; or
  - IP has died.
- If seeking to terminate guardianship, <u>burden of proof is on person objecting to such relief</u>. MHL 81.36(d).

Post-Death Procedures (Part 1)

- Statement of Death – must be submitted within twenty days
- Death Certificate – in Monroe County, from Department of Public Health/Vital Records
- **Rule:** all estate property must be delivered within 150 days to either:
  - Personal Representative of Estate; or
  - If no Personal Representative, the Public Administrator.
  - Exception: funds necessary to pay for funeral expenses or guardianship fees.
- Guardian <u>not responsible</u> for disposing of estate assets to general creditors or heirs of an estate.

Post-Death Procedures (Part 2)

- Statement of Assets and Notice of Claim – due 150 days after IP's death
  - Description of the nature and approximate value of estate property at the IP's death
  - Approximate amount of claims, debts or liens against property, including Medicaid Liens
- Final Report – also due 150 days after IP's death
  - Practice in Monroe Co.: disburse funds before final report is completed
  - Same content as with annual report except certain personal information (medical records, current residence needs, etc.) need not be included
- Requirement in statute that final reports be "judicially settled." MHL 81.44(f).

Caselaw Review

Summaries of Cases for When Your DSS is Appointed as Guardian

Mark E. Maves, Counsel, NYPWA

Foundation and Prohibited Powers

- Foundation- “least restrictive alternative”
- Prohibited Powers

Foundation of Article 81

Rivers v Katz, 67 NY2d 485 (1986)

Whether and under what circumstances the State may forcibly administer antipsychotic drugs to a mentally ill patient who has been involuntarily confined to a State facility.

Neither the fact that appellants were mentally ill nor that they have been involuntarily committed, without more, constituted a sufficient basis to conclude that they lacked the mental capacity to comprehend the consequences of their decision to refuse medication that poses a significant risk to their physical well-being.

It is well accepted that mental illness often strikes only limited areas of functioning, leaving other areas unimpaired, and consequently, that many mentally ill persons retain the capacity to function in a competent manner.

Nor does the fact of mental illness result in the forfeiture of a person's civil rights, including the fundamental right to make decisions concerning one's own body.

MHL 81.01- “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.”

Psychiatric Medication Over Objection

Matter of Rhodanna C.B., 36 AD3d 106 (2nd Dept., 2006)

- Following a brief hearing at which no medical testimony or expert evidence was adduced, the court not only granted the petition to appoint the guardians based on Rhodanna's perceived lack of mental capacity, but which also effectively authorized the guardians to consent to the administration of psychotropic drugs or electroconvulsive therapy to Rhodanna over her objection, without any durational limitation on that authority or judicial review of Rhodanna's capacity or the propriety and necessity of the proposed medical treatment.

- The appointment of guardians with the authority to consent in perpetuity to the administration of psychotropic medication to their ward, over her objection and without any further judicial review or approval, is inconsistent with the due process requirements of *Rivers v Katz.*

Effect of the Guardianship Upon Particular Rights

- Marriage
- Executing or Modifying a Will
- Voting

Marriage

Matter of Edgar V.L., 228 AD3d 549 (1st Dept., 2024)

The 1st Dept. affirmed the order which, after a hearing, adjudged that the marriage between Edgar and Naciri was annulled *ab initio*, ordered that the prenuptial agreement between Edgar and Naciri was *void ab initio* and unenforceable, ordered that Naciri was not entitled to any equitable distribution, support, maintenance, or right of election, stayed all transfer of Edgar's funds and property, and ordered that all property removed by Naciri from his residences be returned.

The record demonstrated that Edgar, who was suffering from significant mental health issues and long-standing and worsening dementia, lacked the capacity to enter into either the prenuptial agreement (which was highly one-sided and detrimental to his interests) or the marriage to Naciri, given the volume of medical records and testimony to that end.

Marriage

Matter of John M., 234 AD3d 487 (1st Dept., 2025)

After a hearing on John M.'s capacity to marry, the court properly revoked the marriage rendering it void *ab initio*. Petitioner proved by clear and convincing evidence that John M. was incapacitated at the time of the parties' marriage. The temporary guardian, the court evaluator, petitioner, and a longtime close friend of John M., consistently testified that at the time of the June 2022 marriage, John M. lacked the mental capacity to understand the significance of a decision to marry.

The marriage took place one month after John M.'s daughter, commenced the guardianship proceeding based on her concerns about his worsening cognitive impairment and possible financial exploitation. The evidence at the hearing established that Helen E., John M.'s former home health aide from his time in a care facility, made multiple attempts to marry him while the investigation into his capacity was ongoing. The Art. 81 court's determination that John M. was incapacitated and in need of a guardian came mere weeks after the parties' marriage**.**

Contrary to Helen E.'s assertion, medical evidence was not necessary to prove incapacity.

Executing/Modifying a Will

Matter of Colby, 40 AD2d 338 (1st Dept., 1997)

The First Department affirmed the Surrogate Count finding that the appointment of a guardian only months before the incapacitated person executed first of three will codicils did not collaterally estop her from arguing that decedent possessed testamentary capacity at the time he executed the codicils, since finding of incapacity under MHL article 81 is based upon different factors from those involved in finding of testamentary capacity.

While the decedent (IP) was concededly susceptible to undue influence, there was no evidence of the preliminary executrix/guardian's involvement in the drafting of the testamentary instruments, and thus the burden never shifted to her to demonstrate freedom from undue influence. The objectant's evidence of undue influence was negligible, and the mere opportunity for undue influence does not mean that it was exercised.

The factors for testamentary capacity are: (1) whether the person understood the nature and consequences of executing a will; (2) whether they knew the nature and extent of the property they are disposing of; and (3) whether they knew those who would be considered the natural objects of their bounty and their relations with them. If the petition is concerned about the AIP not having the capacity to execute a will, or if the guardian has this concern after their appointment, they could raise the issue and prove it at the initial hearing or in the context of a modification of powers petition. You would also likely have to demonstrate to the court the necessity of the restriction, such as a person attempting influence the IP.

The statute also requires that title to all property of the incapacitated person shall remain in title to the incapacitated 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. This is something that the property management guardian must keep in mind as a fiduciary of the incapacitated person.

Executing/Modifying a Will

Matter of McCloskey, 307 AD2d 737 (4th Dept., 2003)

The Fourth Department reversed the Surrogate, finding that the proponents of the alleged incapacitated person's will had proved that the testator possessed testamentary capacity. When deciding the issue of testamentary capacity, the court must look to the following factors: (1) whether she understood the nature and consequences of executing a will; (2) whether she knew the nature and extent of the property she was disposing of; and (3) whether she knew those who would be considered the natural objects of her bounty and her relations with them.

In this case, the alleged incapacitated person had executed her will after the filing of the Article 81 petition.

Executing/Modifying a Will

In re Rita R. 26 AD3d 502 (2nd Dept., 2006)

The Second Department held that the Surrogate's Court, having properly found that mental incapacity invalidated incompetent individual's durable powers of attorney, health care proxy, and amended and restated certificate of trust, executed prior to appointment of guardian, should also have invalidated will signed and witnessed at approximately same time.

Voting?

New York State Election Law §5-106(6): “No person who has been adjudged **incompetent** by order of a court of competent judicial authority shall have the right to register for or vote at any election in this state unless thereafter he shall have been adjudged competent pursuant to law.”

An old case decided under MHL Article 77 noted that the appointment of a committee has serious consequences, including the loss of the right to vote, that flowed from the declaration of incompetence made in such a proceeding. ***Matter of Fisher***, 147 Misc2d 329 (Supreme Court, New York County, 1989).

However, there does not appear to be any reported cases decided upon the basis of MHL Article 81 that have addressed the issue of voting for an **incapacitated** person.

Other Issues During the Guardianship

- Removal of Guardian
- Legal Obligations of the IP
- Medical Decision Making
- Choice of Abode and Living Arrangements
- Social Environment

Removal of Guardian

Matter of Edgar V.L., 214 AD3d 501 (1st Dept., 2023)

While removal requires a motion on notice, there is no statutory right to a hearing, although a guardian cannot be summarily removed in the absence of a fully developed record or without any findings, and a hearing may be required where material facts are disputed.

Legal Obligations of the IP

M. of Mozelle W., 167 AD3d 636, (2nd Dept., 2018)

The Second Department found that Supreme Court properly denied the motion of a landlord requesting that the local district be liable for the rent arrears of the APS client that APS had filed the Art. 81 petition for and obtained a restraining order against the landlord from evicting the client. Neither of these actions created a legal obligation on the part of the local district to assume any debts of the AIP.

Medical Decision Making

In re Doe, 53 Misc3d 829 (Supreme Court, Kings County, 2016)

The special guardian was designated as the surrogate of the IP with regard to all health care decisions, including the withdrawal of life-sustaining treatment pursuant to Public Health Law §§2994–d[4] and [5]. When the special guardian determined to withdraw life-sustaining treatment, relatives of the IP brought a special proceeding to prevent the withdrawal.

The Court reviewed the special guardian's testimony about her attempts to ascertain the IP's wishes, and found that the IP's wishes could not be ascertained. The Court then reviewed what the guardian did in attempting to determine the IP's best interests pursuant to PHL §2994–d[4](a)(ii). The guardian had conducted interviews with medical personnel, and with family members, visited the IP, reviewed the medical chart and consulted with IP's treating physician, and consulted with two doctors to obtain independent medical opinions.

The court found that the special guardian had ascertained that the IP's wishes could not be determined, and that the guardian's decision to withdraw life-sustaining treatment from the IP satisfied the best interests standard set forth in PHL §2994–d[4](a)(ii).

The Court then considered whether the Special Guardian's decision to withdraw life-sustaining treatment from the IP complied with PHL §2994–d[5], which has two tests. If the medical decision maker can satisfy either test, they are permitted to withdraw life-sustaining treatment. The court held the special guardian was able to show that the treatment would be an extraordinary burden to the patient and concurring medical opinions that the patient is permanently unconscious, thus satisfying the requirements of PHL §2994–d[5](a)(i). The Special Guardian did not establish whether a patient in a persistent vegetative state is able to feel pain so as to satisfy the requirement of PHL §2994–d[5](a)(ii), which requires a finding that the provision of treatment would involve such pain, suffering or other burden that it would reasonably be deemed inhumane or extraordinarily burdensome under the circumstances and the patient has an irreversible or incurable condition, as determined by an attending physician with the independent concurrence of another physician to a reasonable degree of medical certainty and in accord with accepted medical standards.

Choice of Abode and Living Arrangements

Matter of McNally (Williams), 194 Misc.2d 793 (2003).

The Court ruled that a woman who suffered from mild to moderate dementia living in an assisted living facility was in an appropriate residence. Although the woman's expressed preference to return to her home was to be respected, returning to her home was not in her best interests because the home is the scene of contentious disputes between two family factions. The women's disinterested psychiatrist and her impartial guardian supported her residing at the facility, as did one of the combative family factions. Moreover, the IP stated that she was comfortable and content at the facility. The court concluded that it:

> …is fully aware of, and sensitive to, the fact that neither it nor a guardian should be empowered to substitute their judgment for that of a person for whom a guardian has been appointed merely because they believe that the decision of such person is not the best one. This is not the case here. Medical testimony establishes that Marion A. Williams suffers from dementia. Her expressed preference is not simply undesirable, it is not rational and abundantly contrary to her best interests.

Choice of Abode and Living Arrangements

Matter of Jospe (McGarry), 2003 N.Y. Slip Op. 50588(U) (Supreme Court, Suffolk Co., 2003).

The court found that Article 81 required that the least restrictive living alternative be utilized and required that the IP's proposed living arrangements be given at least a chance to be tested for viability. The IP was in a psychiatric hospital at the time of the petition and hearing. The treatment team maintained that she could be discharged only to an assisted living facility or adult home. The IP wanted only to return home to her own apartment. While in the hospital she met another patient who happened to be a licensed home health aide. This woman needed a job and a place to live. She and the IP agreed that she would assist the IP in exchange for her room and board.

Citing MHL Section 81.22 (a)(9) the court held that the availability of less restrictive alternative resources in the community dictated that the IP should not be removed from her home and granted the guardian the power to change the IP's abode only subject to further court order.

Social Environment

Matter of Hultay v. Mei Wu S., 140 AD3d 502, (1st Dept., 2016)

A guardian who has the authority to limit the IP's social environment may restrict others from contacting the IP, and enforce that right via a restraining order. The record reflected that the IP had expressed that he did not want contact with his ex-wife, and that he was vulnerable to manipulation.

Social Environment

In Re Luisa P., 153 AD3d 1262 (2nd Dept., 2017)

Luisa P.'s son, Joseph P. was appointed as personal needs guardian, with the authority to limit Luisa P's social environment, including who may visit and contact her, as permitted by MHL §81.22(a)(2). The guardianship order also limited another son's (Giacinto) visitation with the mother to a set schedule and prohibited shouting or raised voices in front of the mother at any time.

Following an incident that took place between Giacinto and one of the mother's home health aides in the presence of the mother and the father at their home, Joseph moved to enjoin Giacinto from visiting or contacting the mother and the father. At a hearing held on the motion, video recordings of the incident made by Giacinto and his son were entered into evidence. The recordings depicted Giacinto conducting himself in a manner that violated the guardianship order's prohibition on shouting or raised voices in front of the mother. It was established at the hearing that the mother and the father no longer wanted Giacinto or his wife and two children to visit them at their home.

Supreme Court enjoined Giacinto from visiting or contacting the mother and the father for a period of two years, and permitted Giacinto's wife and two children to visit them only on Sundays between 2:00 p.m. and 4:00 p.m.

The 2nd Dept. upheld the order, finding that the Supreme Court properly enjoined Giacinto from visiting or contacting the mother and, under the unique circumstances presented in this case, the father as well, in effect, under MHL §81.23(b)(1). The relief granted by the court was warranted in view of the events of May 3, 2015, the expressed desire of the mother and the father that Giacinto not contact them, and the evidence establishing that continued contact with Giacinto was detrimental to the mother's health and welfare.

Proceedings After the Death of the IP

- Financial Claims, Costs, and Liens
  - Objections to Final Account

Financial Claims, Costs, and Liens

Matter of Shannon, 25 NY3d 345 (2015)

The Court of Appeals held that MHL §81.44 permits a guardian to retain property of an incapacitated person after the incapacitated person has died only for the purpose of paying expenses incurred with respect to the administration of the guardianship, i.e., *administrative* costs, *administrative* liens, and *administrative* claims, and not other claims. The administrative expenses include court examiner fees, guardian fees, attorney fees, and any filing fees for final report.

Otherwise, the guardian's duty is to get the estate assets to the IP's estate representative.

Financial Claims, Costs, and Liens

Matter of Ralph C. (Cavigliano), 175 AD3d 1077 (4th Dept., 2019)

The 4th Department reversed the Supreme Court's decision which had denied the request from the guardian that assets of the incapacitated person be used to pay the guardian's attorney fees incurred in discharging the guardianship after the incapacitated person's death.

Financial Claims, Costs, and Liens

Matter of Lillian G., 208 AD3d 877 (2nd Dept., 2022)

The 2nd Department, following the reasoning in *Matter of Shannon*, modified the order of Supreme Court to delete the provision that the property management guardian pay a $255,000 claim sought by the IP's son, in as much as the claim was unrelated to the administration of the guardianship. Once the IP had died, the guardian lacked the authority to make payment to the son from the guardianship, rather, his recourse was to seek payment from Lillian's estate.

Financial Claims, Costs, and Liens

Matter of Hart (D.S.), 79 Misc3d 1101 (Supreme Court, Chemung County, 2023)

The guardian filed for the discharge of the guardianship after the death of the IP. In reviewing the final accounting, the Court surcharged the guardian for failing to pay the court evaluator's and IP's counsel fees. The Court found that the IP had sufficient funds at the time of the guardianship appointment and that the fees should have been paid as a priority over other expenses of the IP.

Objections to Final Account

Matter of Shauntray T. (Margaret T.), 176 AD3d 719 (2nd Dept., 2019)

The mother of the IP, who was also personal needs guardian, filed objections to the final account of the successor guardian of the property. Supreme Court, without conducting a hearing denied those objections, and judicially settled the final account. The 2nd Department affirmed the decision, holding that:

- A party who objects to a guardian's final account has the initial burden of coming forward with evidence to establish that the amounts set forth are inaccurate or incomplete

- If the objections raise disputed issues of fact concerning the necessity of disbursements, reasonableness of fees, or management of assets, a hearing should be held

- If the objectant meets their initial burden, the accounting party must prove by a preponderance of the evidence that the accounting is accurate and complete

• In this case, to the extent that the objectant raised disputed issues as to the propriety of certain disbursements made from guardianship funds for the IP's expenses, the Court agreed with the Court Examiner, who reviewed the final account and extensive supporting documentation, the largely conclusory and unsubstantiated objections, and the responses thereto, and concluded that the challenged disbursements were proper, and that under the circumstances presented, the Supreme Court was not required to hold a hearing.

Questions?

Thank You!

Attorneys!

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