

**GUARDIANS,
LAW GUARDIANS
AND
GUARDIANS AD LITEM:
REDUNDANCY OR REAL DIFFERENCES?**

**GUARDIANSHIP PURSUANT TO
ARTICLE 81
OF THE NEW YORK
MENTAL HYGIENE LAW**

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GUARDIANS, LAW GUARDIANS AND GUARDIANS AD LITEM: REDUNDANCY OR REAL DIFFERENCES?

I. GUARDIANS:

A. Generally

Infants (under 18 years old) or incapacitated adults. Current legal approach focuses on "incapacity" rather than "incompetence."

Judicially designated guardian or natural guardians (parents).

No requirement to be attorney.

B. Types of cases

Guardian may be appointed for adult or child. Guardian may be appointed for the person or property or both.

C. Statutes

CPLR §1210 (guardian of an infant)

SCPA Article 17 (infants) and Article 17-A (§§1750 et seq., includes adults who are mentally retarded or developmentally disabled.)

Includes guardianship of person and property

Family Court Act Article 6 (guardian of the person only)

Mental Hygiene Law Article 81 (guardian for personal needs or property management), adults; disputed applicability to infants.

II. LAW GUARDIANS

A. Generally

Appointed by a judge to be the attorney for the child and to provide representation in Family Court or Supreme Court.

B. Types of cases

Custody, adoption, juvenile delinquency, PINS (persons in need of supervision) abuse or neglect, divorce or post-divorce issues.

C. Standard

Must act as an advisor to the child and advocate for the child's position in the litigation. Some controversy exists regarding the role as advocate for the child's best interests or advocate for the child's preferences. No reports to be submitted. Is to act as attorney.

III. GUARDIANS AD LITEM

A. Generally

May be appointed for a minor or an adult incapable of adequately prosecuting or defending his rights.

Problem for infant or incapacitated person to retain an attorney.

A GAL is appointed only to represent someone in litigation.

A GAL may be any adult person. Need not be a lawyer except in Surrogate's Court, where GAL must be NY attorney.

May be appointed upon the court's own initiative or upon motion of a party.

B. Types of cases and statutes

May be appointed in any case where the court sees a need.

CPLR Article 12 (§§ 1201 et seq.): Representation of infant or incompetent person (defined as an adult incapable of adequately prosecuting or defending his or her rights although not judicially declared incompetent.)

SCPA 403 for an infant or a person under a disability

MENTAL HYGIENE LAW ARTICLE 81 PROCEEDINGS FOR THE APPOINTMENT OF A GUARDIAN FOR PERSONAL NEEDS OR PROPERTY MANAGEMENT

A. Guardianship Proceedings: Background, overview, concepts

1. Prior statutes: conservatorship and committees.
2. Concepts and Legislative Findings: Civil rights deprivation, due process issues, last resort, drastic remedy, tailoring, flexibility, exercise self-determination and independence and participation in all decisions to extent able. Terminology: Alleged Incapacitated Person "AIP"; Incapacitated Person "IP"
3. Necessity plus agreement or incapacity (MHL §81.02(a))
 - a. Guardian is necessary to provide for personal needs, food, clothing shelter, health care, safety or property and financial needs
 - b. Incapacity: Person is likely to suffer harm because cannot provide for needs and/or cannot understand the consequences of such inability.
4. Definitions (MHL§ 81.03)
 - a. Functional level and functional limitations
 - b. Least Restrictive Form of Intervention
 - c. Activities of daily living

B. Pre-Hearing Procedural Issues

1. Who may commence a proceeding? Almost anyone: "a person otherwise concerned with the welfare" of the AIP
2. Many notifications required
3. Proceeding is commenced by Order to Show Cause which must include language of the AIP; statement of AIP's rights; name, address and phone number of Court Evaluator and/or Attorney; powers requested; statutory legend.
4. Court must appoint court evaluator and /or attorney
5. Provisional Remedies
 - a. Temporary Guardians (MHL §81.23(a))
 - b. Injunction and Temporary Restraining Order (MHL §81.23(b))

C. The Court Evaluator: Duties, Responsibilities and Ethics

1. Who may serve: not only attorneys, many disciplines.
2. Role of the court evaluator: independent witness v. advocate; responsibility is to the court; "eyes and ears of the court"
3. Statutory duties (MHL §81.09)
 - a. Meet, explain, determine if counsel is necessary
 - b. Interview petitioner/parties/professionals
 - c. Attend all court proceedings
 - d. Preservation of endangered property
4. The Report: investigation, recommendations, tailoring, least restrictive form of intervention
5. Access to medical, psychological and/or psychiatric records; consent/privilege/court order; HIPAA and other federal statutes
6. Employment of medical and other experts by Court Evaluator
7. Role during the hearing and afterwards; party to the proceeding or not?

D. The Attorney for Alleged Incapacitated Person: Role, Duties and Ethics

1. Right to Counsel; AIP's choice or court appointed
2. When the court must appoint counsel: e.g. temporary guardian; contested petition or medical treatment; AIP requests
3. Communication with client
 - a. Refusal by client
 - b. Disability, mental illness
4. Ethical issues of representation: zealous advocate vs. best interests
5. Formulate a care plan for personal and property management; seek creative alternatives, include neighbors, church, agencies etc.
6. Access to and use of medical psychological and/or psychiatric records; HIPAA and other federal statutes
7. Order and Judgment; Notices

E. Rights of the Alleged Incapacitated Person

1. Right to the least restrictive form of intervention
2. Functional assessment and functional limitations
3. Narrowly tailored orders
4. Rights during the proceeding
 - a. Right to counsel
 - b. Right to object to the disclosure of medical records,
 - c. Right to be present at the hearing; court must travel to AIP if necessary
 - d. Right to present evidence and call and cross-examine witnesses
 - e. Right to demand a jury trial
 - f. Nomination of guardian by AIP
 - g. Alternatives to guardianship / alternative resources (POA, HCP, "Living Wills")
 - h. Burden of proof: clear and convincing evidence, affirmative defense

F. The Hearing

1. Always must be held and must be conducted in the presence of the AIP (some exceptions; if AIP completely unable to participate or no meaningful participation will result)
2. Hearing held at the courthouse or where the AIP resides
3. Emphasis on holding a hearing is so the court will formulate its own impression of the person's capacity and limitations.
4. Court must explain AIP's rights, e.g right to counsel, right to sealed record
5. Right to a jury trial
6. Rules of evidence, may be waived if proceeding is uncontested.
7. Burden of proof: clear and convincing evidence and burden is on petitioner.
8. Court must consider all resources and alternatives: financial, social, medical
9. Standby, alternate and or successive alternate guardians; empowered to act, must be confirmed withing 60 days

G. Rights of the Incapacitated Person ("IP")

1. Findings of the court (MHL §81.15); Order and Judgment
 - a. Necessity, agreement, functional limitations, specific powers, duration, OR
 - b. Necessity, incapacity, harm, lack of understanding and appreciation, functional limitations, specific powers, duration
 - c. Type and Amount of Property and Financial Resources
2. Effect of the appointment of a guardian on the IP

3. Due process rights: all powers not granted to Guardian are retained by IP
4. Dispositional Alternatives
 - a. Dismissal
 - b. Protective arrangements
 - c. Single Transactions
 - d. Special Guardian
 - e. Appointment of Guardian; Least Restrictive Form of Intervention

H. Duties, Responsibilities and Ethics of Guardian

1. Who may serve: eligibility (MHL §81.19, cf Part 36)
 - a. Individual over 18 or parent of child
 - b. Not-for-profit corporation; community guardian program
 - c. Corporation
 - d. Who should not serve: creditor, provider
2. Understanding and Complying with Court Orders
 - a. The order and judgment: powers must be specified and enumerated
 - b. The Commission: guardian's warrant to act
 - i. Issued by the clerk
 - ii. Within 5 days of filing the designation, bond
 - iii. Specific powers to be listed
3. Fiduciary Relationship: utmost care and diligence, utmost degree of trust, loyalty and fidelity; limitation on powers; afford greatest amount of independence and self-determination
4. Powers of Guardian: Guardian for property management
 - a. Marshaling assets and establishing an accurate inventory
 - b. Developing and submitting budget and care plan for the needs of incapacitated person and any dependents of incapacitated person
 - c. Determining eligibility for government and private benefits and make application
 - d. Keeping accurate financial records that reflect all income and expenditures
 - e. Seek court approval for any unusual expenditures: renovation, vehicles
 - f. Contracts for sale of property require court approval
 - g. Locate and secure Last Will and Testament
 - h. Prudent Investor Rule: overall strategy of market risk, trustee may delegate investment responsibility
 - i. Court approval to hire specific professionals: counsel to guardian, accountant, appraiser, property manager, real estate broker
 - (i) Distinguish "lay" guardians
 - (ii) Part 36 guardians
5. Powers of Guardians: Guardian for personal needs
 - a. Devising a care plan and supervising medical, dental, mental health or related services for the incapacitated person

- b. Powers: personal care and assistance, social environment, travel, license, authorize access to or release of confidential records, education, apply for benefits
 - c. Special Powers: medical treatment, life sustaining treatment including nutrition and hydration (Article 81 does not change current NY law), place of abode, title to property, bond amount fixed by court (MHL 81.25)
 - d. Unauthorized action: voluntary admission to mental hygiene facility; revocation of power of attorney, health care proxy or living will; court revocation of POA, HCP, DNR, contract or conveyance if court finds incapacity at time of making; court's inherent power
6. Mandatory minimal visits with the IP
 7. Locate Last Will and Testament and determine persons to be notified in case of death of ward
 8. File statement identifying real property (MHL §81.20(a)(6)(vi))
 9. Preparation of Reports
 - a. Initial Report
 - b. Annual Report
 - c. Final Report, when guardian is removed or dies or IP dies
 - d. Examination of Reports by court
 10. Removal of guardian: failure to comply with court order, misconduct or cause
 11. Discharge or modification of guardian's powers, must return to court
 - a. Regained ability
 - b. Inability increased
 - c. Death of IP, or guardian no longer necessary, or change in circumstances
 12. Proceedings to discover property withheld (MHL §81.44)
 13. Compensation of Guardian: court shall establish a plan for reasonable compensation