

**EXAMINERS OF REPORTS OF GUARDIANS,  
COMMITTEES AND CONSERVATORS**

**2005 EDUCATIONAL SEMINAR**

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**NEW YORK STATE SUPREME COURT  
APPELLATE DIVISION, THIRD DEPARTMENT**

**HON. ANTHONY V. CARDONA  
PRESIDING JUSTICE**

**COURT EXAMINERS IN THE THIRD DEPARTMENT  
PRACTICE**

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Appellate Division, Third Department**

ARTICLE 81 MENTAL HYGIENE LAW  
EXAMINER'S DUTIES AND ENFORCEMENT

Examiners are first mentioned in Mental Hygiene Law article 81 under section 81.32. The Appellate Division appoints examiners for the purpose of examining the reports of the guardians and thereafter reporting their findings. The reports authorized to be examined are initial reports (Mental Hygiene Law §81.30) and annual reports (Mental Hygiene Law §81.21). The examination of final reports is set forth under section 81.33 of the Mental Hygiene Law and is left to the Court to accomplish or it may appoint a referee for that purpose.

The guardians appointed under Article 81 are required to file their initial report within 90 days of their appointment and the issuance of their commission (Mental Hygiene Law §81.30[a]), and their annual reports in the month of May for the preceding calendar year ending December 31<sup>st</sup> (Mental Hygiene Law §81.31[a]). Besides the Mental Hygiene Law, the attention of examiners is drawn to Third Department Rules, specifically section 806.17 (22 NYCRR 806.17), which is reproduced as Attachment 1.

I. INITIAL ACTIVITY BY EXAMINERS

Generally, in the Third Department one examiner is appointed for each County. Other Appellate Division Departments handle the appointment of the examiner in a different manner so that the examiner is appointed in the original order by name from a Court list.

Initially the examiner must become known to both the bar and the court. This can be accomplished in numerous ways, including:

1. Putting a news release in the county bar publication.
2. Writing to the Supreme Court Justices, County Court Judges and Surrogates to announce your appointment as examiner.

This notice to the judge should also request that future Article 81 orders declaring an incapacitated person (IP) should include a decretal paragraph directing that a copy of the order of appointment be given to the examiner. Also, the Court order should contain a decretal paragraph directing the guardian to send copies of the initial report and the annual report to the examiner in addition to having the original filed in the County Clerk's office.

3. You may contact the Supreme Court Clerk to determine if their database can give you a list of the existing Article 81 cases which list may be updated annually.

4. If you are a new examiner you should have a list of the existing Article 81 cases from the previous examiner. You may notify the guardians and attorneys listed in the Article 81 cases of your appointment as examiner. Most Article 81 orders do not have the examiner's name listed, nor do they include any direction to file a copy of the initial and annual report with the examiner. It may be helpful to write a letter to the guardian or counsel in all existing Article 81 cases to identify yourself and your address and to direct that a copy of the reports be sent to you.

## II. RECEIVING REPORTS AND REVIEW

Mental Hygiene Law § 81.32 (a) states that both the initial and annual reports shall be reviewed by the examiner within 30 days of filing. However, Rule 22 NYCRR 806.17 (b) (2) directs that, in the Third Department, the examiner shall file a report on the guardian's initial report within 60 days and shall file his report on the guardian's annual report by September 15<sup>th</sup>, if the report is filed in May or otherwise within 90 days of filing.

The best policy is to not delay - review the guardian report as soon as possible and file your report listing that all is satisfactory or listing the deficiencies. Thereafter you may address these deficiencies.

### 1. Scope of review by Examiner.

A. Determine if IP has been provided proper medical care, mental health care, physical care given his existing limitations and conditions.

B. Determine if the place of residence and living conditions are appropriate for the IP while keeping in mind that Mental Hygiene Law § 81.03 states the purpose of this article is to have the least restrictive form of intervention and grant the IP the greatest amount of independence.

C. Determine if the IP's finances have been handled properly.

i. use of the principal funds.

- ii. investment of the principal funds.
- iii. use of the income for the benefit of IP.
- iv. expenditures made for IP.
- v. disposition of assets for the benefit of other people than the IP. This review should be undertaken to determine if there was compliance with Mental Hygiene Law § 81.21.
- vi. determine the amount and propriety of compensation paid to the guardian, to any trustees and to attorneys.

D. Determine that the guardian made at least 4 visits with the IP in the last calendar year.

E. Determine if the guardian used ultimate care and upmost degree of trust in handling the affairs of the IP?

## 2. Guardian Compensation

Guardian compensation is set forth in Mental Hygiene Law § 81.28. Prior to December 13, 2004, the statute required reasonable compensation "similar to the compensation of a trustee pursuant to SCPA 2309. After December 13, 2004, the compensation is established by the court adopting a plan for reasonable compensation taking into account the authority of the guardian to provide for personal needs and/or property management and the services actually provided. Mental Hygiene Law § 81.28

authorizes the court to reduce or deny compensation for guardians who have not discharged their duties.

### 3. Guardian Limitations

The Rules of the Chief Judge (22 NYCRR 36.2 [c]) set forth certain limitations on the activities of guardianship. 22 NYCRR 36.2 (c) (8) states that no guardian shall be appointed as his or her own counsel and no person associated with a law firm of that guardian shall be appointed as counsel to that guardian unless there are compelling reasons to do so. 22 NYCRR 36.2 (c) (9) states that no attorney for an alleged incapacitated person shall be appointed as guardian to that person or as counsel to the guardian of that person. 22 NYCRR 36.2 (c) (10) states that no person serving as court evaluator shall be appointed as guardian for the incapacitated person except under extenuating circumstances that are set forth in writing at the time of the employment. These sections are recently adopted in order to prevent attorneys from receiving fees as evaluators and guardian, or as attorney and guardian. This was adopted for the integrity of the system and to allow independent individuals to hold these several different positions.

Question: Can a guardian hire his own firm as the attorney for the IP and be paid a guardian fee and attorney fee?

In theory, the answer would be no, however, I refer you to Matter of Ress, 8 AD3rd 114 (1<sup>st</sup> Dept. June 2004). (reproduced as Attachment II) In that case the court

held that the "guardian was confronted with unique circumstances and had a compelling reason to justify his acting as his own attorney". The facts involved a lawsuit to reinstate the IP's insurance policy for home nursing care and the guardian attorney was unable to find another attorney to handle the matter that was perceived unlikely to succeed.

However, in that same case the court denied legal fees requested by the guardian as an attorney to handle a simple bank matter which did not necessarily involve legal expertise.

Question: Can a guardian be appointed trustee of a special needs trust (or inter vivos trust ) and be paid both a guardian commission and a trustee commission?

Your attention is drawn to Matter of Arnold O, 279 AD2d 774 (3d Dept. 2001) (reproduced as Attachment III) where the court held that a trustee is entitled to trustee fees under SCPA 23.09 and the guardian is entitled to guardian fees under Mental Hygiene Law § 81.28. The court only limited the guardian fees to time spent outside of handling the trusts assets. In that matter the attorney\guardian\trustee received guardian compensation of \$9,940 and trustee commissions in the amount of \$9,557. He also received attorney's fees for \$6,700 for legal work which was done prior to the enactment of 22 NYCRR 36.2 (c) (8).

Examiners should review any attorney's fees being paid by the guardian of the IP. The same should be reasonable and may need to be reviewed and approved by a court.

### III. FILING EXAMINER'S REPORT

The examiner's report is filed with the Clerk of the Court which appointed the guardian, with a copy filed in the Appellate Division, and the guardian or his attorney ( 22 NYCRR 806.17 [b] [3]). The report is filed on 5 days notice to the guardian. The rule does not require that the report be filed with the judge who issued the initial order; however, it is recommended that a copy also be filed with the judge. This is especially true if there is a deficiency found in the report so that the judge is made aware of the deficiency. In many instances a judge may call a conference if the judge feels that the deficiency warrants that action. By filing the examiner's report with the judge, the judge is made aware that there has been compliance with the Article 81 order issued by the court. If there is a deficiency, the judge is aware of the same and therefore has a better understanding of any future motion that may be filed by the examiner in that Article 81 proceeding.

#### IV. GUARDIAN'S FAILURE TO REPORT

##### 1. Failure to file guardian's report.

The failure of the guardian to report is addressed in Mental Hygiene Law § 81.32 (c). The first requirement is for the examiner to send a demand letter by certified mail for the guardian to report within 15 days. If the guardian still fails to report, the examiner may file a motion requesting an order from the court for compliance with the demand to

perform the duty required of the guardian, and/or reduce or deny any compensation to the guardian, and/or remove the guardian.

## 2. Removal of Guardian.

A. Removal of the guardian is outlined in Mental Hygiene Law § 81.35. The court must be shown that the guardian has failed to comply with the order, or is guilty of misconduct, or the guardian may be removed for any other cause which to the court shall appear just.

B. Notice of this motion must be served on the guardian and all other persons entitled to notice under section 81.16 (c) (3). In the court's determination of this motion it will fix the compensation for the legal fees incurred by the examiner.

C. The guardian may appear pro se or with counsel. Courts have generally been receptive to granting additional time for the guardian to comply with whatever the alleged deficiency may be. If the guardian fails to appear or there is no good faith shown on the part of the guardian, the court may remove him for his failure to comply with the court order or misconduct.

## 3. Incomplete reporting by guardian

If a report has been filed by a guardian but the report has deficiencies and is incomplete, the examiner shall demand that the guardian revise the report and submit the appropriate proof necessary. This demand should also be served by certified mail

(Mental Hygiene Law § 81.32 [d][1]). If the guardian continues in his default to provide the necessary documents, then the examiner may make a motion to require the compliance and request the court to also deny or reduce the compensation of the guardian or remove the guardian in the absence of showing that the guardian has acted in good faith (Mental Hygiene Law § 81.32 [d] [2]).

#### 4. Discovery by Examiners.

Mental Hygiene Law § 81.32 (e) allows examiners to have oral examination of guardians or other witnesses under oath and reduce the testimony to writing. This is in the nature of an examination before trial in a civil proceeding. The examiner should file the demand notice of oral examination on the guardian giving at least five days notice. The expense of the examination shall be paid out of the estate of the IP.

Reproduced as attachment IV are a notice of motion (Attachment IV A), affidavit (IV B), and proposed order in the nature of enforcement for guardian's failure to report (IV C). Also reproduced is an affidavit for attorney's fees by the examiner for bringing the motion and proposed order (IV D).

## V. PROBLEM AREAS

There are three problem areas which need to be brought to your attention:

1. Transfer of assets out of the estate for the benefit of others other than the

IP.

2. Department of Social Services acting as guardian.
3. Equitable compensation for guardians.

1. TRANSFER OF ASSETS OF ESTATE

A. Reference is made to Mental Hygiene Law § 81.21. This section allows the court to grant the power to make gifts (Mental Hygiene Law § 81.21 [a] [1]). The usual court order authorizes the making of gifts. The examiner should insist that the guardian petition the court whenever there is a transfer of any substantial asset of the IP for other than the IP's direct benefit. The making of gifts should be considered normal gifts made by the IP during his lifetime or normal gifts of an individual, to wit: Christmas presents, church donations, birthday gifts, etc.

B. In order to transfer substantial assets of the incapacitated person there must be compliance with Mental Hygiene Law § 81.21 (b), which requires a petition to set forth the factors to be reviewed by the court. Information required in the petition include: 1) description of the proceeding and whether any prior proceedings have been made, 2) the financial obligations of the IP for his own maintenance, support and well being, 3) property proposed to be conveyed, 4) disposition of such property, 5) whether the IP has sufficient capacity to make the disposition or consent to the same, 6) whether IP has executed a will or other written instrument making known his desires, 7) description of any significant gifts or pattern of giving by the IP, 8) names of all presumptive

distributees of the IP as defined in 103 (42) SCPA.

Proper service of notice of petition should be made on those entitled to notice under Mental Hygiene Law § 81.07 and presumptive distributees of IP and any person designated in the will as a beneficiary (see Mental Hygiene Law § 81.21 [c]).

C. Factors considered by the court are set forth in Mental Hygiene Law § 81.21 (d). These factors include: 1) whether the IP had sufficient capacity to make this disposition and consented to same, 2) whether the disability is of short duration so that the disposition should be delayed, 3) the needs and future needs of the IP and his dependents, whether the same can be met with the remaining assets, 4) whether the beneficiaries of the proposed disposition are the natural objects of the bounty of the IP and in his testamentary plan, 5) whether the disposition will produce a estate or gift tax, 6) any other factors deemed relevant.

D. Many lawyers and guardians unilaterally attempt to transfer the assets of the IP without first proceeding to obtain court approval, instead relying on their authority in the order or in the statute to make gifts. You may, for example, observe in reviewing an annual report disbursements of \$10,000 to several of the children or grandchildren of the IP without any court authority. It may be necessary to have the guardian describe and explain these transfers. In most instances the guardian, through his attorney, will apply for court approval of the prior transfer nunc pro tunc. If the guardian refuses to apply to the court, the examiner may be required to bring a motion before the court to set aside these conveyances and have them returned thereby causing the guardian to set forth a full

description of his activities and the basis for these activities so that the court may review the same in relation to section 81.21.

One of the leading cases authorizing the transfer of assets of an IP is Matter of John XX, 226 AD2d 79 (reproduced as Attachment V), where the court allowed the guardian of an IP to transfer the bulk of his assets to the IP's adult daughters in order to shield them from a potential medicaid lien for the cost of his nursing home care and medical services. Medicaid planning is approved by the courts for the benefit of the IP's family (Matter of Bipin Shah, 95 NY2d 148 ). It is also authorized by law (Mental Hygiene Law § 81.21). This case is interesting in light of the factor set forth in Mental Hygiene Law § 81.21 (d) (3) which considers the IP's history of gifting and whether the IP's need for support from the remainder of the assets can be met after the transfer is made (Matter of Forrester, 1 Misc3d 911 [reproduced as Attachment VI]).

## 2. DEPARTMENT OF SOCIAL SERVICES AS GUARDIAN.

A. There seems to be a built-in conflict of interest when the Department of Social Services (DSS) is also the guardian of the IP. While a guardian of an IP owes his duty to the IP to attempt to preserve his assets and do medicaid planing, DSS is under great financial strain due to the medicaid expenses that are incurred by the government for the nursing home care and medical expenses of the citizenry.

Therefore, it appears inconsistent for the County DSS to be the guardian of an IP especially if there are any assets involved.

B. A conflict could also exist in a no-asset case when the guardian needs to determine the amount of care or medical procedures to be performed on the IP. DSS may wish to consider, at the administrative level, taking the more conservative and fiscally frugal option where an independent guardian may want different living arrangements or certain medical procedures for the benefit of the IP in order to guarantee the greatest amount of independence and the least restrictive form of intervention (Mental Hygiene Law § 81.03) and to perform the guardian duties with the utmost care, diligence and degree of trust and loyalty to the IP (Mental Hygiene Law § 81.20).

One case experience was where a DSS as guardian allowed the IP's home to be foreclosed in a county tax foreclosure at a time when the IP was a resident of the county nursing home. It was necessary to bring a motion before Supreme Court for waste and obvious dereliction of the duty of a guardian in allowing the IP's property to be lost under these circumstances.

C. It may also be difficult to obtain the annual report filings as required by statute from DSS. Eventually courts may shy away from appointing local social services departments as guardians. In the interim, the examiner should be sensitive to these apparent conflicts of interest and be alert to possible problems in both the personal needs and property of the IP when DSS is guardian.

D. The Legislature enacted SCPA 1750-b, effective March 16, 2003, where a guardian appointed under SCPA 1750 could make any and all health care decisions for a mentally retarded person including withholding or withdrawing life sustaining treatment.

This authority may eventually be granted to Article 81 guardians. Presently, an Article 81 guardian may apply to court to terminate the life sustaining treatment for an IP (Mental Hygiene Law § 81.29 [e]). Presently, the right to decline treatment is a personal one and not one of substituted judgment (Matter of Barsky, 165 Misc 2d 175). An interesting conflict may arise when DSS is the guardian and the question of life sustaining treatment is confronted. In one instance DSS would have a concern to limit the medical expense which the county incurs on behalf of the individual. On the other hand, DSS guardian has a fiduciary duty to the IP regardless of the financial ramifications.

### 3. COMPENSATION OF GUARDIANS.

The Mental Hygiene Law § 81.28 was amended effective December 13, 2004 so that guardians are now granted reasonable compensation taking into account their authority and the services they provide for the personal needs and property management of the IP. Prior, the court and guardian had the criteria of SCPA 2309 as a guideline. Lawyer- guardians tend to demand a substantial hourly rate reflective of their profession, to wit: \$150 to \$200 per hour. Experience shows that the Courts have generally allowed \$100 per hour for lawyer guardians. Non lawyer guardians have been granted rates of pay from \$15 to \$40 per hour in Albany County by the several Supreme Court Justices.

There is no difference in the duties to be performed by a non lawyer or a lawyer guardian. In fact, the lawyer guardian would probably be doing less work and services

for the IP. The non lawyer guardian, in many instances, is a family member who is either caring for the IP at home or visiting the IP multiple times per week in the institutional setting. Yet the rate of pay has traditionally been substantially less for non-lawyer guardians. To some degree, this compensation differential will probably continue in the future, and the examiners will be bound by the court orders which are obtained by the guardians. As examiners you may wish to bring to the court's attention the difference in the rate of compensation and the services rendered. The rate of pay for guardians should be more uniform and equitable and based on the actual services rendered.

806.17 Examiners of Reports of Guardians, Committees and Conservators Pursuant to Article 81 of the Mental Hygiene Law.

(a) Appointment. Annually in the month of December, the presiding justice shall appoint examiners of the reports of guardians, as well as of committees and conservators appointed prior to April 1, 1993, in accordance with section 81.32(b) of the Mental Hygiene Law.

(b) Duties of examiners.

(1) The examiner appointed by the presiding justice shall examine initial and annual reports within the times and in the manner required by section 81.32(a) of the Mental Hygiene Law.

(2) The examiner shall file a report, with regard to an initial report of a guardian, within 60 days after the filing of such report. With respect to an annual report filed in the month of May, the examiner's report shall be filed on or before September 15<sup>th</sup> of the same year. When a court has authorized the filing of an annual report at any other time, the examiner's report shall be filed within 90 days thereafter. Examiner's reports shall be in the form prescribed by the order appointing the examiner.

(3) Examiner's reports shall, on five days notice to the guardian, committee or conservator, be filed in the office of the clerk of the court which appointed the guardian, committee or conservator. A copy of the examiner's report shall, within five days of the date of such filing, also be filed with the office of the Clerk of the Appellate Division, Third Department.

(4) If a guardian, committee or conservator shall fail to file a report within the time specified by law, or shall file an incomplete report, the examiner shall serve a demand and take the other steps necessary to insure compliance as set forth in section 81.32<sup>©</sup> and (d) of the Mental Hygiene Law.

(5) In his or her discretion, the examiner may examine the guardian, committee or conservator and other witnesses under oath and reduce their testimony to writing.

©) Compensation.

1) For examination of an initial report, an examiner shall be entitled to a fee of \$100 and to reimbursement for necessary and reasonable disbursements.

2) For examination of an annual report, an examiner shall be entitled to reimbursement for necessary and reasonable disbursements and to a fee fixed in accordance with the following schedule:

<u>Closing balance of estate examined:</u>	<u>Fee</u>
Under \$5,000	\$150
5,001 - 25,000	200
25,001 - 50,000	250
50,001 - 100,000	350
100,001 - 150,000	450
150,001 - 225,000	500
225,001 - 350,000	600
350,001 - 500,000	700
500,001 - 750,000	800
750,001 - 1,000,000	900
Over 1,000,000	1000

The fee shall be computed on the net value of the estate at the end of the calendar year for which the guardian's report has been submitted. A fee in excess of the amount set forth in the above schedule may be awarded upon a showing of extraordinary circumstances.

3) The fee for examination of annual reports filed for previous years shall be fixed on a quantum merit basis.

4) The examiner's claim for a fee and disbursements in estates of less than \$5,000 shall be made by standard state voucher and shall be approved by the Presiding Justice or his or her designee.

In estates of \$5,000 or more, the examiner's claim for a fee and disbursements shall be set forth in the examiner's report and shall be approved by order of the Presiding Justice for payment by the estate.

5) Within 15 days after receipt of an order directing payment by the estate of the examiner's fee and disbursements, the guardian, committee or conservator may, by written request, upon notice to the examiner, apply to the Presiding Justice for review and reconsideration of any allowance deemed excessive.

<b>Matter of Ress</b>
2004 NYSlipOp 05159
June 15, 2004
Appellate Division, First Department
Published by <u>New York State Law Reporting Bureau</u> pursuant to Judiciary Law § 431.
As corrected through Wednesday, August 25, 2004

<b>In the Matter of Esta Ress et al., Appellants, for the Appointment of a Guardian of the Person and Property of Ada Leventhal, Deceased, Respondent.</b>
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Appeal from order, Supreme Court, New York County (William J. Davis, J.), entered March 24, 2003, which, in a proceeding under Mental Hygiene Law article 81, inter alia, denied petitioner guardians' application for legal fees, deemed, pursuant to CPLR 5517 (b), to be taken from the subsequent order, same court and Justice, entered June 19, 2003, which granted petitioners' motion for reargument to the extent of permitting them to make an application, in the first instance, to the Court Examiner for additional compensation for their efforts in connection with the Equitable Life Insurance policy, and otherwise adhered to the prior order denying petitioners' application for a legal fee in connection with the Fleet Bank matter and for permission to pay a legal fee to outside counsel, and, so considered, the order of June 19, 2003 is unanimously affirmed, without costs.

Petitioner coguardian, an attorney, obtained reinstatement of the incapacitated person's insurance policy for home nursing care, and through substantial efforts, but prior to litigation, recovered very significant proceeds under that policy. Petitioner sought a legal fee for these efforts, but the IAS court denied the request on the ground that under recently promulgated 22 NYCRR 36.2 (c) (8), a guardian cannot be appointed his/her own attorney "unless there is a compelling reason to do so." That rule, which became effective June 1, 2003, after petitioners made their application in January 2003 and indeed after the IAS court decided the application in March 2003, appears to codify case law disfavoring the

appointment of a guardian as his/her own attorney except in "unique circumstances" (*see Matter of Arnold O.*, 279 AD2d 774, 778 [2001]). Here, it appears that the coguardian was confronted with unique circumstances, and had a compelling reason, justifying his acting as his own attorney, namely, his inability to find an attorney who would handle the matter on a contingency fee basis due to a perceived unlikelihood of success. Accordingly, upon reargument, the IAS court properly permitted petitioners to apply, in the first instance, to the Court Examiner for additional compensation for their efforts in connection with the insurance policy. However, coguardian's efforts with respect to the Fleet Bank matter did not require any special legal skills or training warranting payment of a separate legal fee. Nor do [\*2]petitioners show that their outside counsel rendered legal advice necessary to the administration of the estate. Concur—Mazzarelli, J.P., Andrias, Sullivan, Lerner and Gonzalez, JJ.

Supreme Court - Appellate Division  
Third Department

Decided and Entered: January 11, 2001

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87788B

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In the Matter of ARNOLD "O",<sup>1</sup>  
an Incapacitated Person.

JAMES T. TOWNE JR., as Guardian  
of ARNOLD "O",  
Appellant-Respondent;

MEMORANDUM AND ORDER

JOHN T. BISCONI,  
Respondent-Appellant.

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Calendar Date: November 17, 2000

Before: Crew III, J.P., Peters, Spain, Carpinello and  
Lahtinen, JJ.

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Thorn, Gershon, Towne, Tymann & Bonanni (James T. Towne Jr.  
of counsel), Albany, for appellant-respondent.

Biscone & Neri (John T. Biscone of counsel), Albany, for  
respondent-appellant.

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Carpinello, J.

(1) Cross appeals from an order of the Supreme Court  
(Teresi, J.), entered February 24, 2000 in Albany County, which,  
inter alia, granted petitioner's application, in a proceeding  
pursuant to Mental Hygiene Law article 81, for guardian

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<sup>1</sup> Fictitious

compensation and counsel fees, and (2) appeal from an order of said court, entered February 29, 2000 in Albany County, which granted respondent's request for examiner fees.

We are once again called upon to review judicial determinations involving the affairs of Arnold O., who was first declared an "incompetent" in a 1987 proceeding under Mental Hygiene Law former article 78. Now at issue is the proper compensation due to petitioner, who was appointed Arnold O.'s successor guardian in 1993, and the proper compensation due to respondent, examiner of guardianship accounts in Albany County (see, Mental Hygiene Law § 81.32 [b]). Petitioner appeals from an order of Supreme Court which reduced his application for guardian fees for calendar year 1998, reduced his application for legal fees for services performed for Arnold O.'s benefit in 1998 and denied in its entirety his application for trustee commissions, all in response to objections filed by respondent. Respondent cross-appeals, arguing that the fees actually awarded to petitioner are excessive. Petitioner also appeals from an order of Supreme Court awarding respondent legal fees for reviewing his reports.

A brief synopsis of the history of this matter is warranted. Arnold O. is a paranoid schizophrenic who was rendered a paraplegic as a result of a fall through a second-story window while a resident at Capital District Psychiatric Center in the City of Albany. Suffering as he does from severe physical and mental impairments, Arnold O. has presented petitioner with unique challenges. Now a permanent resident of an out-of-State skilled nursing facility, his continuing behavioral problems require considerable intervention by petitioner, including numerous telephone calls and personal visits to the facility for meetings with Arnold O. personally and the professionals who care for him. These problems include episodes of slashing his bed, throwing his television on the floor, pulling out various tubes and intravenous lines and assaulting staff. Indicative of the level of petitioner's dedication to Arnold O. is his acquisition of an "800" telephone number for Arnold O. to reach him any hour of the day or night. Arnold O. takes advantage of this arrangement and regularly

communicates with petitioner.

Further compounding the situation are certain members of Arnold O.'s family, namely, his brother and mother, who have each subjected petitioner and the health care professionals who care for Arnold O. to "a constant barrage of threats, insults and complaints" (Matter of Arnold O. [Mildred O.], 226 AD2d 866, 867, lv denied 88 NY2d 810). These family members have interfered with petitioner's performance of his duties as guardian and unsuccessfully sought his removal (see, id.). A 1998 report from the health care facility where Arnold O. then resided confirms that these familial problems continued as of that time. The report notes: "[Arnold O.'s] case presents as an extremely complicated one due to legal issues and inappropriate family intervention (threats, harassment towards staff). [Arnold O.'s] Legal Guardian maintains regular contact and visits on a frequent basis."

In addition to ensuring that Arnold O.'s medical, psychological and social needs were being adequately addressed, petitioner filed a personal injury lawsuit against the State to recover for the injuries Arnold O. suffered in his fall and for other injuries he sustained while under the State's care. These efforts resulted in a net recovery of \$1.8 million. Prior to this recovery, Arnold O. was virtually without assets. After additional litigation and an unsuccessful appeal on the question of whether a Department of Social Services lien in excess of \$500,000 had to be paid out of the recovery, an amount in excess of \$1.2 million was ultimately placed in a supplemental needs trust for Arnold O.'s benefit (see, Matter of Towne v County of Saratoga, 255 AD2d 650; see also, EPTL 7-1.12 [a] [5]). In addition to being Arnold O.'s guardian, petitioner is the court-appointed trustee of this trust.

Turning to the merits of the instant appeals, we begin first with the issue of whether petitioner is entitled to trustee's commissions in the amount of \$9,557.27 disallowed in their entirety by Supreme Court. Notably, on a prior appeal involving this guardianship, we held that care had to be taken in determining proper compensation when the guardianship involves "a

mix of both personal care to an incapacitated person and fiscal management of said person's assets" (Matter of Arnold O., 256 AD2d 764, 766). In disallowing these fees, Supreme Court adopted the arguments proffered by respondent to the effect that compensating petitioner for guardian services and permitting him to receive trustee's commissions would, in effect, amount to judicial approval of "double billing". We disagree.

Respondent's argument that payment of trustee's commissions would amount to a "double" recovery ignores the fact that in accounting to Supreme Court for each hour (or fraction thereof) that petitioner devoted to the supervision of Arnold O.'s personal care, he did not include time spent in fulfilling his fiduciary duties as trustee of the trust.<sup>2</sup> As long as petitioner is compensated on an hourly basis for guardianship duties relating to Arnold O.'s personal care and he is separately awarded his statutory trustee's commissions for any additional and separate time devoted to his fiduciary responsibilities as trustee of the trust, there will be no "double" recovery based on "double billing".

Also troublesome to Supreme Court on this particular issue was the fact that the trust is professionally managed by an investment firm. Petitioner's decision to select a professional investment firm to assist him in the management of the significant trust assets is entirely prudent (see, Matter of Axe, 132 Misc 2d 137). Merely because these financial advisors have been compensated out of trust assets does not mean that petitioner should be deprived of his statutory commissions, since in all events petitioner bears the ultimate responsibility for investment decisions and in no event could he delegate that legal responsibility to the investment firm (see, Matter of Newhoff, 107 AD2d 417, lv denied 66 NY2d 605). Surely, it cannot be

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<sup>2</sup> Petitioner acknowledges that any hours spent in the performance of his responsibilities as trustee mistakenly included in his accounting of time expended in furtherance of his guardianship responsibilities were properly disallowed by Supreme Court.

reasonably argued by anyone, including respondent, that petitioner would not be liable for any trust losses caused by a breach of his fiduciary duties. Finally, SCPA 2309 (2) provides that "a trustee shall be entitled to annual commissions" (emphasis supplied) at the statutory rates. Since Supreme Court has no discretion to deny trustee commissions under SCPA 2309 (see, Matter of Saxton, 274 AD2d 110, 121), we find that it erred in denying petitioner his trustee commissions.

We also find error in Supreme Court's reduction of petitioner's application for payment of legal services rendered on Arnold O.'s behalf. As with his trustee duties, petitioner never intended to include time spent in his professional capacity as an attorney in his accounting of time spent in the performance of his guardianship duties. Although the total bill for legal services rendered by petitioner's law firm for calendar year 1998 totaled \$12,943.75, petitioner unilaterally reduced his request for reimbursement to \$6,700. Supreme Court rejected even this reduced fee request, finding that much of petitioner's attorney time was unnecessarily devoted to what the court described as an "ill-advised" appeal involving the Department of Social Services lien (see, Matter of Towne v County of Saratoga, 255 AD2d 650, supra), and reduced the fee to \$3,650.10.

While Supreme Court would normally enjoy broad discretion in setting counsel fees in Mental Hygiene Law article 81 matters (see, Ricciuti v Lombardi, 256 AD2d 892; Matter of Arnold O., 256 AD2d 764, 765, supra), we do not feel compelled to defer to Supreme Court on this issue because the legal services involve a matter which was previously before this Court. Having decided the appeal itself, we are intimately familiar with "the nature and complexity of the litigation [and] the time, effort and skill required for its resolution" (Ricciuti v Lombardi, supra, at 893). Conducting our own review, we find the compromised legal bill of \$6,700 and related disbursements of \$940.25 (which Supreme Court also disallowed in their entirety) to be eminently reasonable. Indeed, with in excess of \$500,000 at issue, one could easily argue that a failure to have perfected the appeal would have constituted a breach of petitioner's fiduciary duty to protect Arnold O.'s financial resources (see, Mental Hygiene Law

§ 81.20 [a] [6] [ii])). Accordingly, the compromised legal bill in the amount of \$6,700 and the disbursements in the amount of \$940.25 should have been approved. In so holding, we are cognizant of the argument advanced by respondent that petitioner should not be serving both as Arnold O.'s guardian and his attorney. Because of the unique circumstances of this case and because all of petitioner's compensation, whether as attorney or as guardian, must be approved by Supreme Court, we find that Supreme Court did not abuse its discretion in appointing petitioner as Arnold O.'s attorney.

The last objection interposed by respondent includes a matter with which we have dealt previously (see, Matter of Arnold O., supra). In sum, respondent contends that petitioner should not be compensated at the rate of \$100 per hour for supervising Arnold O.'s personal needs. Respondent argues that petitioner should be paid at the rate of \$25 per hour. Countenancing respondent's argument would, in effect, deprive Supreme Court of the necessary discretion to set guardianship compensation based upon the particular needs of each individual case. It would also preclude attorneys who accept guardianship assignments from being compensated at rates even approaching those that they otherwise charge for professional services. As we previously held and again reiterate, the hourly rate of \$100 per hour for the guardianship services provided to this mentally ill paraplegic is reasonable (see, id., at 767).

We also find no basis to interfere with Supreme Court's discretion in reducing the total compensation sought for guardianship services from \$13,795 to \$9,440, with one minor exception. Supreme Court disallowed five hours of guardianship time for personal services rendered between July 9, 1998 and July 14, 1998 on the ground that these services constituted "legal work". However, petitioner never actually charged for these services and thus his total fee request did not include this \$500 increment. This being the case, Supreme Court erred in deducting \$500 from the total compensation due petitioner. Accordingly, the amount of guardian compensation should be increased by \$500 to the sum of \$9,940. Finally, we find no error in Supreme Court's acceptance of respondent's report or its approval of his

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

---

In the Matter of \_\_\_\_\_, IP,  
"John Lawyer", Guardian.

NOTICE OF MOTION  
FOR REMOVAL OF  
GUARDIAN

for Removal of "John Lawyer" as  
Guardian of the Person and Property  
of \_\_\_\_\_, an Incapacitated  
Person.

---

Index No.  
RJI No.

SIRS:

PLEASE TAKE NOTICE, that upon the annexed Affidavit of  
\_\_\_\_\_  
Esq., Examiner appointed by  
the Appellate Division, Third Department, for the County of  
Albany, New York, sworn to on the \_\_\_\_\_ day of \_\_\_\_\_,  
and upon the Order of this Court issued \_\_\_\_\_,  
the undersigned will move this Court at a term thereof to be  
held on the \_\_\_\_\_ day of \_\_\_\_\_, at 9 a.m. at  
the Albany County Courthouse, Albany, New York, for an Order  
pursuant to §81.35 of the Mental Hygiene Law, to impose  
sanctions upon the Guardian pursuant to the Mental Hygiene  
Law §81.32; to remove the existing Guardian, \_\_\_\_\_  
\_\_\_\_\_, and to appoint a  
new Guardian of the Person and Property of the Incapacitated  
Person in his place and stead; and for reasonable

compensation to the undersigned in an amount commensurate with the services rendered; and for such other and further relief as to this court may seem just and proper.

Answering Affidavits, if any, must be served at least seven (7) days before the hearing date.

Dated:

Yours, etc.

Firm Name  
Office and P.O. Address

TO: Guardian

Jeffrey L. Weyant, Assistant Deputy Clerk  
Appellate Division  
Third Judicial Department  
Box 7288, Capitol Station  
Albany, New York 12224

Mental Hygiene Legal Services  
Bruce S. Dix, Director  
40 Steuben Street, Suite 501  
Albany, New York 12207

Those to Whom Notice is Required  
under MHL 81.16 (c) (3)

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

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In the Matter of \_\_\_\_\_, IP,  
"John Lawyer", Guardian.

AFFIDAVIT IN  
SUPPORT OF MOTION

for Removal of "John Lawyer" as  
Guardian of the Person and Property  
of \_\_\_\_\_, an Incapacitated  
Person.

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Index No. \_\_\_\_\_  
RJI No. \_\_\_\_\_

STATE OF NEW YORK )

:SS.:

COUNTY OF ALBANY )

\_\_\_\_\_, being duly sworn, deposes and

says:

1. That I am an attorney admitted to practice in the  
State of New York, having offices at \_\_\_\_\_ Street,  
Albany, New York 12210.

2. That I have been appointed as the Examiner for  
Guardian Reports under Article 81 of the Mental Hygiene Law  
by the Appellate Division, Third Department, for the County  
of Albany, State of New York.

3. That attached hereto and made a part hereof as  
Schedule A is a copy of the Supreme Court order dated  
\_\_\_\_\_ wherein \_\_\_\_\_ was  
appointed the Guardian of the Person and Property of \_\_\_\_\_

\_\_\_\_\_, an Incapacitated Person.

4. That the Guardian \_\_\_\_\_ has not filed the Annual Report for the year 1999.

5. That your Deponent wrote certified letters to the Guardian \_\_\_\_\_ on August 10, 2000, October 16, 2000 and February 9, 2001, copies of these letters are attached hereto as Schedule B.

6. That the Guardian responded by letter dated November 27, 2000 stating that the 1999 Annual Report would be filed by January 15, 2001; however, the 1999 Annual Report still has not been received by your Deponent.

7. That the Guardian has failed in the Court ordered duty to file the Annual Reports.

8. That it is herewith requested that the Guardian \_\_\_\_\_ have appropriate sanctions imposed for not complying with a court order; and/or that the Guardian be removed and that a new Guardian be appointed in his place and stead.

WHEREFORE, it is respectfully requested that:

(1) the Court impose sanctions upon the Guardian for noncompliance with previous court orders;

(2) \_\_\_\_\_ be removed as Guardian

of \_\_\_\_\_, an Incapacitated Person,  
and that this Court appoint a new Guardian as the Guardian  
of the Person and the property of the Incapacitated Person.

(3) the Guardian be directed to comply with the  
requests herein, and direct that the removed Guardian comply  
with the disclosure required to meet the court orders issued  
by this court;

(4) the present Guardian \_\_\_\_\_ file  
a final accounting and turn all records and assets over to  
the new guardian appointed herein;

(5) this Court grant legal fees to the Examiner for the  
enforcement of the previous order and the filing of this  
motion;

(6) and for such other and further relief as this Court  
may seem just and proper.

\_\_\_\_\_  
Sworn to before me this  
day of \_\_\_\_\_, 2005.

\_\_\_\_\_  
Notary Public

At a Term of the Supreme Court  
of the State of New York, held  
in and for the County of Albany,  
at the Courthouse, Albany, New  
York, on the \_\_\_\_\_ day of  
\_\_\_\_\_, 2005.

PRESENT: HONORABLE \_\_\_\_\_  
Supreme Court Justice

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

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In the Matter of \_\_\_\_\_, IP,  
"John Lawyer", Guardian.

ORDER  
Index No.  
RJI No.

for Removal of "John Lawyer" as Guardian of the  
Person and Property of \_\_\_\_\_, an  
Incapacitated Person.

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A motion having been duly made before this Court by Notice  
of Motion and Affidavit sworn to \_\_\_\_\_ by  
\_\_\_\_\_, Esq., the Examiner for Article 81 Guardianships for the  
County of Albany, pursuant to §§81.32 and 81.35 of the Mental  
Hygiene Law, to sanction and/or to remove that existing Guardian \_  
\_\_\_\_\_ and to appoint a new Guardian in his place  
and for reasonable compensation to the Examiner for said legal  
services, and this motion have been returnable on the \_\_\_\_\_ of

And the Court having received the Notice of Motion,  
Affidavit and attachments upon which it is based, and the motion  
having been duly and properly served.

NOW, THEREFORE, on the motion of \_\_\_\_\_, Esq.,  
Examiner, it is

ORDERED AND ADJUDGED, that \_\_\_\_\_, the  
Guardian of the Person and Property of \_\_\_\_\_, an  
Attachment IV C

Incapacitated Person, is hereby removed from said position effective immediately, and it is further

ORDERED AND ADJUDGED, that the said \_\_\_\_\_ shall take no action of a fiscal component that in any way effects the assets of the Incapacitated Person or to spend any of the funds or commit or encumber any of the funds of the Incapacitated Person, and it is further

ORDERED AND ADJUDGED, that the Court hereby appoints \_\_\_\_\_ of \_\_\_\_\_, as Guardian of the Person and Property of \_\_\_\_\_, an Incapacitated Person effective immediately, and it is further

ORDERED AND ADJUDGED, that the new Guardian shall/shall not obtain a Surety Bond in the amount of \$\_\_\_\_\_ for the faithful discharge of his/her duties herein, and it is further

ORDERED AND ADJUDGED, that the new Guardian shall/shall not, be required to attend any courses or educational programs for this guardianship, and it is further

ORDERED AND ADJUDGED, that this Guardianship shall continue indefinitely or until further Order of this Court, and it is further

ORDERED AND ADJUDGED, that the new Guardian is hereby required to faithfully discharge the duties of this guardianship and fiduciary duty imposed upon him/her herein and to follow all of the orders and directions of this Court in respect to this guardianship, and it is further

ORDERED AND ADJUDGED, that the Guardian shall designate the

Clerk of this Court to receive process as specified under Section 81.26 of the Mental Hygiene Law, and it is further

ORDERED AND ADJUDGED, that the Guardian shall obtain a commission by filing his/her Bond under Section 81.25 and his/her Designation under Section 81.26 of the Mental Hygiene Law and the Albany County Clerk shall issue a Commission to said Guardian, and it is further

ORDERED AND ADJUDGED, that \_\_\_\_\_ shall turn over all of the assets, resources, records and property of the Incapacitated Person including any bills, receipts, checks, expenditures, deposits, withdrawals or any other documentation for said assets or indebtedness of the Incapacitated Person to the said \_\_\_\_\_ as Guardian of the Person and Property of said Incapacitated Person, and it is further

ORDERED AND ADJUDGED, that all financial institutions, individuals or any entity holding any assets of the Incapacitated Person \_\_\_\_\_, shall forthwith transfer said assets pursuant to this Order to \_\_\_\_\_, Guardian of the Person and Property of the Incapacitated Person \_\_\_\_\_, and it is further

ORDERED AND ADJUDGED, that the authority of the new Guardian of the Person and Property, shall extend to any and all property of the Incapacitated Person, both real and personal, wheresoever situated and found and the said Guardian shall have all the power and authority necessary to manage the property and financial affairs of the Incapacitated Person as outlined in Section 81.21 of the Mental Hygiene Law and shall have all the authority to handle

the personal needs of the Incapacitated Person as outlined in Section 81.22 of the Mental Hygiene Law and such other authority as this Court may grant and order in the future, and it is further

ORDERED AND ADJUDGED, that the said \_\_\_\_\_

\_\_\_\_\_ shall not make any withdrawals or expend any monies of the Incapacitated Person in any manner whatsoever nor shall he encumber, lien or charge any account or otherwise cause the Incapacitated Person to become indebted in any manner whatsoever so that all authority concerning the finances of the Incapacitated Person shall rest solely with the newly appointed Guardian of the Person and Property, and it is further

ORDERED AND ADJUDGED, that all present and future bills and charges be submitted to \_\_\_\_\_ as the new Guardian of the Person and Property in order for him/her to determine whether the same shall be honored and paid on behalf of the Incapacitated Person, and it is further

ORDERED AND ADJUDGED, that the said \_\_\_\_\_ as the new Guardian of the Person and Property shall have the authority to pay for the care and maintenance of the Incapacitated Person and to make any financial decisions that he/she deems in the best interest of the Incapacitated Person, and it is further

ORDERED AND ADJUDGED, that the new Guardian of the Person and Property, shall be entitled to commissions pursuant to Section 81.28 of the Mental Hygiene Law, and it is further

ORDERED AND ADJUDGED, that the new Guardian of the Person and Property, shall have a copy of this Order and shall personally serve it upon the Incapacitated Person and read it to the

Incapacitated Person, and it is further

ORDERED AND ADJUDGED, that the new Guardian of the Person and Property shall file an Initial Report with this Court and a copy to the Examiner within 90 days of his/her appointment herein and an Annual Report for each and every calendar year ending December 31st of said year on or before May of the succeeding year, and it is further

ORDERED AND ADJUDGED, that this Court shall grant the sum of \$\_\_\_\_\_ as and for legal fees for the Examiner for the legal work provided herein.

DATED:

\_\_\_\_\_  
HONORABLE

ENTERED:



5. That I am respectfully requesting this Court to award additional legal fees in the amount of \$650.00 in relation to my services on this matter.

---

Sworn to before me this

day of

---

Notary Public

SCHEDULE A

8/10/00 Letter to Guardian requesting 1999  
Annual Report (20 min.)

10/16/00 Letter to Guardian regarding 1999 Annual  
Report and notice of intent to commence  
removal procedure (30 min.)

11/30/00 Review letter from Guardian (20 min.)

2/9/01 Letter to Guardian requesting 1999 Annual  
Report (20 min.)

4/19/01 Draft motion for removal of Guardian;  
letter to Guardian with copy of motion  
letter to Supreme Court Clerk (1 hour 30 min.)

5/24/01 Review letter from Court; Draft Order  
appointing new Guardian; letter to Court  
(1 hour 20 min.)

4 hours 20 min. @ \$150.00 per hour

Total Amount Requested.....\$650.00

*Supreme Court - Appellate Division  
Third Judicial Department*

Decided and Entered: December 26, 1996

75697

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In the Matter of JOHN "XX",<sup>1</sup>  
an Incapacitated Person.

IRENE "XX" as Guardian  
of JOHN "XX",

Respondent;

OPINION AND ORDER

BROOME COUNTY DEPARTMENT  
OF SOCIAL SERVICES,  
Appellant,  
and

ELIZABETH M. ROSE et al.,  
Respondents.

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Calendar Date: October 7, 1996

Before: Cardona, P.J., Mercure, White, Casey and Carpinello, JJ.

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Howard Schultz, Department of Social Services, Binghamton,  
for appellant.

Levene, Gouldin & Thompson (Kathryn Grant Madigan of  
counsel), Binghamton, for Irene "XX", respondent.

Robert E. Leamer (Donald P. Carlin of counsel), Binghamton,  
for Ideal Senior Center, respondent.

Robert R. Clobridge, Binghamton, for Katherine A.  
Clobridge, respondent.

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Mercure, J.

Appeal from an order of the Supreme Court (Monserrate, J.),  
entered September 15, 1995 in Broome County, which granted

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<sup>1</sup> Fictitious

petitioner's application, in a proceeding pursuant to Mental Hygiene Law article 81, for court approval to distribute certain assets of John "XX".

By order and judgment entered July 6, 1994, petitioner was appointed guardian of the person and property of her cousin, John "XX" (hereinafter John), an elderly man (born in 1915) who suffered a stroke in March 1994. Following the stroke, John was hospitalized and transferred first to a rehabilitation center and then to a nursing home, Ideal Senior Living Center, where he has resided since September 1994. Based upon the medical opinion of John's treating neurologist that John has significant and permanent cognitive dysfunction, Supreme Court found that John "is likely to suffer harm because of his inability to provide for his personal needs and property management and that he is unable to adequately understand and appreciate the nature and consequences of such inability". Supreme Court's enumeration of petitioner's powers included the power "to make reasonable family gifts".

In June 1995, petitioner made application pursuant to Mental Hygiene Law § 81.21 (b) for Supreme Court's approval of her outright transfer of approximately \$640,000 of John's assets to his adult daughters, respondents Elizabeth M. Rose and Katherine A. Clobridge. The transfers, intended as a Medicaid and estate planning device to shield the bulk of John's assets from a potential Medicaid lien for the cost of nursing facility services and other medical services, were designed to leave John with approximately \$150,000 in assets. Those assets, together with John's annual income from a pension and Social Security (approximately \$33,000), were allegedly sufficient for John's reasonable needs during the 36-month Medicaid look-back period (see, 42 USC § 1396p [c] [1] [B]), at the conclusion of which John would rely on Medicaid for the cost of medical care in excess of his income.

The petition was supported by (1) petitioner's statement that, based on her 70-year association with John, she knew that if competent he would choose to make the transfers so as to be eligible to apply for Medicaid while preserving a portion of his estate for his daughters, and (2) John's October 22, 1992 will wherein he provided for distribution of his entire distributable estate to his daughters. Supreme Court's order to show cause provided for service upon respondent Broome County Department of Social Services (hereinafter the Department). The Department and Ideal Senior Living Center opposed the application; the court evaluator indicated that "[i]t does not seem to be in [John's]

personal best interest for him to be put in a position where he might end up on welfare" and recommended the appointment of counsel to represent him. Finally, Clobridge submitted an affidavit stating that in her frequent visits she has seen little or no improvement in John's mental capabilities over the time span of his disability. Supreme Court granted the petition without a hearing and the Department appeals.

As a threshold matter, we reject Clobridge's present contention that the appeal should be dismissed because the Department is not an aggrieved party within the meaning of CPLR 5511. Supreme Court made specific provision for service upon the Department, presumably pursuant to Mental Hygiene Law § 81.07 (d) (1) (x), which applied to this proceeding by virtue of Mental Hygiene Law § 81.21 (c) (i), and no party raised any issue before Supreme Court concerning the Department's interest in the application. Under the circumstances, the contention has not been preserved for our review.

Turning now to the merits, we disagree with the Department's contention that Supreme Court erred in determining the petition without a hearing. First, in view of the fact that the present application came less than one year following petitioner's appointment on unchallenged medical evidence of John's significant and permanent cognitive dysfunction and the submission of competent evidence that John's mental disability had not diminished, we conclude that Supreme Court was presented with legally sufficient evidence that John lacked the requisite mental capacity to effect the transfer of funds and was unlikely to regain such capacity within a reasonable period of time (see, Mental Hygiene Law § 81.21 [e] [1]). Second, there being little question that, barring death, John will require continued nursing home care, the cost of which will exhaust his assets, it cannot be reasonably contended that a competent, reasonable individual in his position would not engage in the estate and Medicaid planning proposed in the petition (see, Mental Hygiene Law § 81.21 [e] [2]). Finally, although the record contains no evidence of any prior pattern of gift giving, John appears not to have manifested any intention inconsistent with the proposed transfer, and there can be no question that John's daughters are the natural and (as expressed in his will) the actual objects of his bounty (see, Mental Hygiene Law § 81.21 [e] [3]).

Nor are we persuaded that the proposed transfer constitutes a fraud on the Department, as a potential future creditor. Under Federal law, which controls on the issue of penalties to be imposed for a transfer of resources for less than fair market value (see, 42 USC § 1396p [c] [4]), a State Medicaid plan must

provide for a period of ineligibility for medical assistance when any institutionalized individual makes such a transfer on or after the look-back date (see, 42 USC § 1396p [c] [1] [A]). John is an institutionalized individual, and the applicable look-back date is 36 months prior to his application for medical assistance (see, 42 USC § 1396p [c] [1] [B] [i], [ii] [I]; accord, Social Services Law § 366 [5] [d] [1] [vi]; [3]). During the relevant period, Federal law made no provision for the imposition of any penalty for transfers made prior to the look-back date (but see, 42 USC § 1320a-7b [a] [6] [eff Jan. 1, 1997]), with the result that New York may not impose a penalty for John's transfer of resources for less than fair market value if made more than 36 months prior to his application for medical assistance. Although we agree with the Department's central contention that the Medicaid program was not designed to provide medical benefits to those who render themselves "needy" through the use of plans such as that proposed here, the simple fact is that current law rewards prudent "Medicaid planning".

Furthermore, in enacting Mental Hygiene Law article 81, the Legislature gave statutory recognition to the common-law doctrine of "substituted judgment" (see, Law Rev Commn Comments, McKinney's Cons Law of NY, Book 34A, Mental Hygiene Law § 81.21, at 376; Matter of Florence, 140 Misc 2d 393) by expressly authorizing the transfer of "a part of an 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" (Mental Hygiene Law § 81.21 [a]). Thus, guardians may be granted the power to make gifts (see, Mental Hygiene Law § 81.21 [a] [1]), to convey or release contingent and expectant interests in property or powers held by the incapacitated person (see, Mental Hygiene Law § 81.21 [a] [3], [4]), or to renounce or disclaim interests in estates (see, Mental Hygiene Law § 81.21 [a] [10]).

In view of the Legislature's express grant of these powers, we agree with the conclusion of a number of lower courts that, subject to the provisions of Mental Hygiene Law § 81.21, guardians have the authority to effect transfers of assets for the purpose of rendering incapacitated persons Medicaid eligible (see, e.g., Matter of Baird, 167 Misc 2d 526, 529-530; Matter of Daniels, 162 Misc 2d 840; Matter of Klapper, Sup Ct, Kings County, Leone, J. [NYLJ, Aug. 9, 1994, at 26, col 1]). As correctly reasoned by those courts, a contrary conclusion would have the effect of depriving incapacitated persons of the range of options available to competent individuals (see, id.).

The Department's remaining contentions have been considered

and found to also be unavailing.

Cardona, P.J., White, Casey and Carpinello, JJ., concur.

ORDERED that the order is affirmed, without costs.

ENTER:

Michael J. Novack  
Clerk of the Court

1 Misc.3d 911(A), 781 N.Y.S.2d 624, 2004 WL 224557 (N.Y.Sup.), 2004 N.Y. Slip Op. 50035(U) (Table)  
Unpublished Disposition

(Cite as: 781 N.Y.S.2d 624, 2004 WL 224557, 2004 N.Y. Slip Op. 50035(U))

**C**

\*\*\*1 This opinion is uncorrected and will not be published in the printed Official Reports.

In the Matter of the Application of Mark  
FORRESTER, Petitioner, for the  
Appointment of a Guardian for the Person and  
Property of Carl Forrester,  
Respondent.  
Index No. GRD81.

Supreme Court, St. Lawrence County

Jan. 29, 2004.

CITE TITLE AS: Matter of Forrester

**ABSTRACT**

Incapacitated and Mentally Disabled Persons

Appointment of Guardian for Personal Needs or  
Property Management.

Social Services

Transfer of Property to Qualify for Assistance.

*Forrester, Matter of*, 2004 NY SLIP OP 50035(U).  
Incapacitated and Mentally Disabled  
Persons—Appointment of Guardian for Personal  
Needs or Property Management. Social  
Services—Transfer of Property to Qualify for  
Assistance. (Sup Ct, St. Lawrence County, Jan. 29,  
2004, Demarest, J.)

**APPEARANCES OF COUNSEL**

Law Office of A. Michael Gebo (Brian K.  
Goolden, Esq., of counsel), attorneys for petitioner.

William F. Maginn, Jr., Esq., County Attorney.

William R. Small, Esq., Court Evaluator.

**OPINION OF THE COURT**

DAVID DEMAREST, J.

Before the Court is an application, pursuant to New York Mental Health Law, Article 81, of Mark Forrester ("Petitioner"), seeking appointment of a guardian for Carl Forrester ("Forrester") and

"... in conjunction with said appointment, the authority to protect as much of his uncle's remaining assets through medicaid planning by transferring some of this assets in accordance with a plan ..." [developed by Brian K. Goolden, Esq., counsel for petitioner] "... while ensuring that sufficient assets are retained to private pay for his uncle's nursing home care during periods of ineligibility for medicaid nursing home benefits ("penalty periods") that would be created by such transfers." Memorandum of Law, counsel for petitioner, September 23, 2003.

Petitioner has previously been appointed temporary Co-Guardian with his cousin, Betty Riggs. A hearing on the application was held on October 8, 2003, at the St. Joseph's Nursing Home in Ogdensburg, New York, the place of residence of Forrester. [FN1]

\*\*\*2 William R. Small, Esq., Betty Riggs, and Forrester testified. Forrester's impairment and functional limitations affected the extent to which he was able to participate. [FN2] Nonetheless, the Court made personal observations of Forrester, his functional limitations, and heard his responses to questions, permitting it to make its own inquiry. He was unable to independently establish his relationship to the Co-Guardians (a nephew and a niece) or his other niece. Forrester was incapable of discussing his family tree beyond his brother, Elwood (Petitioner's father).

From the pleadings, the report of the Court Evaluator, [FN3] and the testimony at the hearing,

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**Attachment VI**

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1 Misc.3d 911(A), 781 N.Y.S.2d 624, 2004 WL 224557 (N.Y.Sup.), 2004 N.Y. Slip Op. 50035(U) (Table)  
 Unpublished Disposition

(Cite as: 781 N.Y.S.2d 624, 2004 WL 224557, 2004 N.Y. Slip Op. 50035(U))

the Court makes the following findings:

- 1) Forrester, an 86-year-old-man, born April 18, 1917, suffers from high blood pressure/hypertension; dementia (according to the report of Dr. Dunn, in consultation with Dr. Kotha, the dementia is not such that Forrester is a danger to himself or others); osteopenia; and had previously suffered a hip fracture.
- 2) Forrester entered a nursing home for rehabilitation in early 2003, following a hip fracture. For several years prior, Forrester resided with Deborah Miller in a family care home situation arranged by the St. Lawrence Psychiatric Center ("SLPC"), where he had previously been an in-patient. According to Forrester, he was cared for by his brother Elwood during this time. Before his hospitalization, he lived on his own property and worked on his family's farm. No evidence was presented that Forrester would be able to leave the nursing home facility and/or return to a family care home in the near future. His prognosis is "poor" according to the affidavit of Dr. Dunn, his treating physician, dated May 27, 2003.
- 3) Forrester has no power of attorney, no living will, and no Last Will and Testament. He does have a health care proxy naming Petitioner as health care agent.
- 4) Forrester's assets include real estate in the Town of Louisville consisting of three (3) parcels: 43.74 acres assessed for \$12,400.00; 21.8 acres assessed for \$5,500.00; and a third parcel, held on the tax rolls in the name of Myrtle Forrester Estate (apparently the mother of AIP) consisting of approximately .25 acres assessed at \$2,300.00, but included in Forrester's assets; [FN4] an unencumbered cash account at Community Bank, NA which at the time of the petition verified June 27, 2003 and the report of the Court Evaluator dated July 24, 2003, was valued in the amount of \$220,211.04. Forrester is in receipt of Social Security benefits of \$518.00 per month, and VA benefits of \$2,193.00 per month.

The Court finds Forrester is incapacitated and the appointment of a guardian of the person and his property is necessary pursuant to Section 81.15(b)

and (c) of the Mental Hygiene Law (MHL) upon the following findings:

- 1) \*\*\*3 Functional limitations impair his ability to provide for his own personal needs and impairs his ability to manage his property;
- 2) He has exhibited a lack of understanding and appreciation of the nature and consequences of his functional limitations;
- 3) There is a likelihood he will suffer harm because of his functional limitations and inability to adequately understand and appreciate the nature and consequences of such functional limitations;
- 4) It is necessary to appoint a guardian of his person and his property 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 are set forth herein; and
- 6) The duration of the appointment will be for an indefinite period.

The second part of the application is the request by Petitioner for approval to engage in Medicaid planning, which involves transfer of Forrester's assets by the Co-Guardians to themselves and a second niece. The proposed plan and the powers sought to effectuate the plan, are set out at paragraphs 12 through 15(A)-(W) of the Petition dated June 27, 2003. To this end, Petitioner notes that Medicaid planning has been found to be an acceptable and authorized disposition of an incapacitated person's property. See *In the Matter of Shah*, 95 N.Y.2d 148 (2000) [FN5]; see also *In the Matter of John XX*, 226 A.D.2d 79 (3d Dep't 1996); and, *In the Matter of Kenneth Daniels*, 162 Misc. 2d 840 (Supreme Court, Suffolk County, 1994), citing *Matter of Klapper*, NYLJ, 8/9/94 at p.26, col. 1,2. There is, however, no requirement the guardian engage in Medicaid planning. See MHL § 81.21(f).

A guardian of the property is entrusted with the applicable standard of substituted judgment when making property management decisions. [See *Matter of Marion Burns*, 287 A.D.2d 862 (3d Dep't 2001); and *Matter of John XX*, 226 A.D.2d 79, 83, *lv denied* 89 N.Y.2d 814, in which the Court found

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that the "[L]egislature gave statutory recognition to the common-law doctrine of 'substituted judgment' [citations omitted]"; see also *In re the Matter of Shah*, 95 N.Y.2d 148 (2000) where the Court added "... the only limitation is that of the doctrine of substituted judgment—the guardian's actions must take in account the personal wishes, preferences, and desires of the [incapacitated] person ... citations omitted".

In reviewing the request to approve the transfer of assets as proposed by Petitioner, the Court is governed by the provisions of MHL § 81.21 which state: 7F(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 \*\*\*4 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." [FN6] [emphases added]

The Court has to consider certain statutory factors, found at MHL § 81.21(d):

"(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 \*\*\*5 for whom the incapacitated person would be concerned; and

6. such other factors as the court deems relevant." [emphases added]

No one is dependent upon Forrester for support. He has no wife nor any children. At this time, Forrester does not have sufficient capacity to make the proposed disposition and his disability is not expected to be of short duration such that he could make the disposition of his assets personally at the end of his disability. He has not previously executed a Will or similar instrument, nor made any significant gifts or established a pattern of gifting. The proposed plan cannot be said to be consistent with any known testamentary plan of Forrester or any pattern of gifting, since neither exist. The proposed plan is not consistent with any earlier acts of Forrester since the proposed beneficiaries never previously received anything of any value from Forrester nor were they promised anything of value from their uncle. The singular proof at the hearing was Co-Guardian Riggs' testimony that, as a young girl, she accompanied her mother to Forrester's farm. She testified that her mother, Forrester's sister Marion, took care of him by visiting regularly, giving things to him, and doing things of value for her Uncle without remuneration [FN7]. Co-Guardian Riggs also testified that while Forrester resided in the SLPC, that entity took care of his financial affairs. There was no proof presented at the hearing with regard to the estate, gift, income, or other tax savings benefits to

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Forrester or his dependents. Medicaid planning will neither assist Forrester in his personal care at the nursing home nor financially. The plan will serve to divest him of assets to the direct financial benefit of his nephew and two nieces, enabling him to become prematurely Medicaid eligible. The assets, although partially preserved, will not be preserved for his future use, but rather his nieces' and nephew's use.

Petitioner, Co-Guardian Riggs, and Riggs' sister, Bonnie Thomas, are the presumptive distributees of Forrester's estate, as that term is defined in § 103(42) Surrogate's Court Procedure Act (SCPA), by virtue of being the surviving children of Forrester's deceased brother and deceased sister.

The Court is required to make a finding, by clear and convincing evidence, that a competent and reasonable person in the same position as Forrester finds himself, would be likely to engage in these transfers as a method of Medicaid planning. Mental Hygiene Law § 81.21 (e) requires the Court to find

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;

\*\*\*6 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.

The Court must look to whether or not these three relatives are the natural objects of Forrester's bounty. *In the Matter of Shah* 95 N.Y.2d 148 (2000); *In the Matter of Marion Burns*, 287 A.D.2d 862 (3d Dep't 2001). By their own statements,

confirmed by the report of the Court Evaluator and the testimony at the hearing, all three had little, if any, contact with their Uncle for many, many years. Co-Guardian Riggs recalled last seeing Forrester at Uncle Elwood's funeral, approximately fifteen years ago. She indicated she began visiting Forrester most recently after his placement in the nursing home facility. She advised the Court Evaluator that her Uncle did not know who she was on those visits. Forrester himself asked Riggs at the hearing "... are you a relative of mine?" and then after having been prompted with his deceased sister Marion's name, said that he "... probably did [remember]" Co-Guardian Riggs was his niece because he knew "... she [Marion] had two daughters." Although the Petitioner indicates his father, Forrester's brother Elwood, asked him to take care of Forrester, by his own admission he had no contact with Forrester for at least ten years, despite his own father's death. When interviewed by the Court Evaluator, Forrester did not know where his nephew was, did not mention his late sister's name, nor did he mention his two nieces. The Court is satisfied after listening to and observing Forrester that he does not know Petitioner, Riggs or Thomas, except when prompted to recall his predeceased siblings. It is only then he recalls his sister's and brother's children. There is an absence of proof that Petitioner, Riggs, or Thomas received anything of value from Forrester during their lifetimes. Forrester never indicated to Petitioner, Riggs, or Thomas that he intended to give them anything of value in the future or by way of bequests.

While Forrester affirmatively responded that he did not want the "government" to get his money and his land, there is no clear intention that he intended his nephew and nieces get them either. To be sure, Forrester stated he could take care of himself and his land. Although he testified that he didn't want to give his land away and wanted to keep it for himself, he also testified that gifting it to his nephew and two nieces would "probably be all right I suppose, don't know." He also testified that he would use the money "for what everybody uses it for." When asked if this meant he would use it for his care, he responded "yes." There was no clear

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and convincing evidence of donative intent. To the contrary, he wanted the land and his assets preserved, stating they belonged to him. It was likewise not clear his nephew and nieces were the natural objects of Forrester's bounty. It has not been established to the satisfaction of this Court that Forrester intended to give his assets away rather than have them available to provide for his ~~own~~2004 NYSLPOP 7~~known~~ care, well-being and welfare. The proof presented has not established Forrester ever intended to impoverish himself for the benefit of his nieces and his nephew. Medicaid planning is a permissible function of a guardian, but there is no evidence that Forrester prior to this incapacitation intended to either engage in Medicaid planning or make bequests to his nephew and two nieces.

Subparagraph 2 of 81.21(b) of the Mental Hygiene Law states that the application must set forth ... "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." While Petitioner does include a plan for the penalty/transfer period, there is no proof Forrester did not intend to husband the entirety of his assets to provide for his own maintenance, support and well-being in times of sickness and/or old age.

This Court will not read into a guardian's authority the power to use substituted judgment as a blanket presumption to engage in Medicaid planning. This appears to be the position advocated by Petitioner's counsel: every one would rather have his or her money go to family, regardless of who that family member is and what degree of relationship, rather than be used for their own personal care. There is no such presumption in existing law. Nor is one appropriate.

In *Matter of Marion Burns*, 287 A.D.2d 862 (3d Dep't 2001), an heir, a nephew of the incapacitated person Ms. Burns, appealed Supreme Court's approval of proposed charitable donations. There was no dispute this nephew was Ms. Burns' closest living relative and the presumptive beneficiary of

her Will. The Third Department found Ms. Burns wanted to make the donations; she never, at any time, repudiated her plan to make the charitable gifts; she was opposed to having her assets used to pay her expenses at the nursing home but at the same time, she did not necessarily want her assets to go wholly to her nephew upon her death. [FN8] When the guardian moved to confirm the proposed distribution of charitable donations, a hearing was held and the Court found, that although Ms. Burns did not have a full appreciation of her assets, she did affirm her intent to make gifts to the listed charities. The Court said:

"In enacting Mental Hygiene Law Article 81, the Legislature gave statutory recognition to the common-law doctrine of 'substituted judgment' [*Matter of John XX*, 226 A.D.2d 79, 83, *lv denied* 89 N.Y.2d 814 (1996)] by expressly authorizing transfers of this kind if it can be shown, by clear and convincing evidence, that these transfers would have been made by Burns during her lifetime if she had the requisite capacity". The Court employed a "standard of reasonableness" in reaching the conclusion that the record of the hearing in Supreme Court established that a "competent and \*\*\*8 reasonable individual in Burns' position would likely have performed the same act". The Court also found the record supported its finding:

- 1) Ms. Burns had not "manifested an intention inconsistent with ..." the giving of the charitable donations at a time when she did have the requisite capacity;
- 2) the gifts were "within her means, would not endanger her ability to be self-supporting"; and
- 3) the nephew who sought to set aside approval of the charitable donations, while her sole surviving heir, "was not the natural object of her bounty." (emphases added)

This Court adopts similar reasoning as *Burns*, to reach a different conclusion. Forrester lacks the "requisite mental capacity" to engage in the proposed transfer to effectuate Medicaid planning for which Petitioner seeks approval. He is "not likely to regain such capacity within a reasonable period of time". There is no clear and convincing evidence that "a competent, reasonable individual in

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the position" of Forrester, "would be likely to perform the act or acts under the same circumstances." There is no clear and convincing evidence that Petitioner, Co-Guardian Riggs, and Thomas were the natural objects of Forrester's bounty. There was no evidence of any kind of donative intent. The evidence presented was that the actions of Forrester (specifically *not* making any gifts nor indicating to the relatives his intention to make gifts of value) "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."

The relief sought in the Petition for approval of Co-Guardians for the person and property of Carl Forrester is GRANTED and Mark Forrester and Betty Riggs are appointed Co-Guardians of the person and property of Carl Forrester. The relief sought seeking approval of the proposed transfer of assets of Carl Forrester as outlined by Petitioner, for Medicaid planning, is DENIED. The powers granted the Co-Guardians are those set forth in the Amended Order Appointing Temporary Co-Guardians of the Person and Property, dated September 26th, 2003. Counsel for Petitioner shall submit a proposed Order in accordance with this Decision, on notice to the Court Evaluator and the Co-Guardians.

#### SO ORDERED

FN1. All persons required to have notice of the Petition in accordance with paragraph one of subdivision (d) of section 81.07 of the MHL received notice of the hearing. In addition, the Court directed notice be given to St. Lawrence County. It participated in the hearing through the County Attorney.

FN2. In the original Petition, the Petitioner alleged at paragraph # 25, that "... no meaningful participation will result from Carl Forrester's presence due to his medical infirmities." The Court Evaluator, however, did suggest that he might be able

to participate.

FN3. The factual statements made in the report of Court Evaluator were either undisputed or unchallenged at the hearing.

FN4. The ownership of this parcel needs to be confirmed prior to any transfer.

FN5. The *Shah* Decision states "various sources of authority have described transfers for Medicaid planning as being within the scope of the article (see, Matter of John XX, 226 A.D.2d 79, *lv. denied* 89 N.Y.2d 814, Bailly, Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 34A, Mental Hygiene Law § 81.21, 2000 Supp Pamp, at 84; see also Russo and Rachlin, New York Elder Law Practice, § 5.42, at 229 [1998 ed]. We now confirm a guardian spouse is permitted to effectuate this kind of Medicaid planning on behalf of an incapacitated individual pursuant to MHL 81.21." [emphasis added].

FN6. 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. The powers which may be granted are broad.

FN7. Co-Guardian Riggs testified without any specificity that Forrester may have gifted money at Christmas to herself and her two cousins when he was managing his own financial affairs.

FN8. Ms. Burns consented to appointment of a guardian of her property. She had previously executed a Last Will and Testament, leaving her estate to her brother, who subsequently pre-deceased her, leaving his son, her nephew, the appellant, who became her sole beneficiary as a result of the anti-lapse provisions.

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The nephew was entitled to notice of the hearing seeking approval of the gifts, but no notice was given him, and the first appeal resulted in a remand. See *Matter of Burns*, 267 AD2d 755 (3rd Dept., 1999).

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In re Forrester

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