

OVERVIEW OF GUARDIANSHIP PROCEEDINGS

Whether due to advanced age, infirmity or other difficulty, individuals may cease to be able to manage their own affairs or care for themselves. Family, friends or others may wish to apply to the court for the appointment of a person or persons to provide assistance to such individuals. The person appointed is called a Guardian. The procedure by which such an application may be made is a proceeding for the appointment of a Guardian. Mental Hygiene Law Article 81 governs these cases.

Article 81 of the Mental Hygiene Law provides for the appointment by the court, upon a proper showing, of a Guardian or Guardians to meet the personal needs of an incapacitated person and/or manage his or her property.

Any interested person (as defined by Section 81.06 of the Mental Hygiene Law) over the age of 18 has the right to petition the court for a judicial directive appointing an adult Guardian for a person who, because of illness or disability, is unable to manage his or her affairs (this Guardian is called a Guardian of the property) or properly take care of himself or herself (Guardian of the person). At the application stage the person in need of assistance is known as an “alleged incapacitated person” or (“AIP”). The alleged incapacitated person has various rights and may request the court to appoint legal counsel to represent him or her; the court may make such an appointment on its own initiative. Proof must be presented to the court at a hearing establishing that the AIP is unable to manage his or her affairs or take care of himself or herself properly (that is why the subject of the proceeding is called an alleged incapacitated person). In acting on any such application, the court must also take into account the personal wishes, preferences and desires of the AIP, and afford that person the greatest possible amount of independence and self-determination and participation in all the decisions affecting the person’s life.

A. Making The Application

An application for Guardianship is made to the court by filing a verified petition in the office of the County Clerk (Room 141B at 60 Centre Street, Manhattan) and then presenting an order to show cause and a copy of the verified petition and supporting papers to the court’s Guardianship and Fiduciary Support Office (Room 158 at 60 Centre Street, Manhattan). Article 81 of the Mental Hygiene Law defines the procedures to be followed, including providing notice of the application and the hearing to all interested persons.

B. Court Evaluator

In the order to show cause, the court will appoint an individual to serve as a Court Evaluator. The Court Evaluator must communicate with the alleged incapacitated person,

investigate the person's circumstances, and report in a writing to the court. The Court Evaluator may be an attorney, a physician, a psychologist, an accountant, a social worker, a nurse or any other person properly trained to perform this task. Under certain circumstances, the court may decide to appoint counsel in addition to the Court Evaluator to protect the interests of the alleged incapacitated person.

C. The Hearing

In the order to show cause, a hearing on the application will be scheduled for no later than 28 days from the signing of the order to show cause. At the hearing, evidence will be presented to the court on the questions of whether or not the person is incapacitated and, if so, what may be the best and least restrictive solution to safeguard the alleged incapacitated person and his or her interests. Questions or objections may be raised at the hearing by the AIP, the AIP's attorney, family members, or other interested persons. The burden of proof rests on the petitioner to establish that a person is incapacitated within the meaning of Article 81. The court will decide the issues often at the conclusion of the hearing and in any event within seven days after the hearing.

D. Order And Judgment

After the hearing the court will issue a decision on the questions presented. If the court denies the application, it may cast the decision as an Order and Judgment, which would resolve the case. If it decides to grant the application, it will issue a decision setting out its findings and conclusions (that a Guardian has been found to be necessary; whether more than one Guardian is required; who the Guardian is to be; what role the Guardian or Guardians will have; any limitations on the authority thereof; and the like); the Guardianship may be unlimited in time or for a definite period and the court will make clear which. Sometimes only a Guardian of the person is needed and sometimes a Guardian of the property is required. And the court may find that the circumstances make appropriate appointment of one person in both roles or two persons, one in either role. As noted above, the court will seek the least restrictive form of intervention possible given the circumstances.

If the application is granted, the court will usually issue a relatively brief directive (called a "short form order") that will state generally the court's findings and rulings, which may also be given orally and included in the record of the proceedings. The court will normally require that a separate document, an Order and Judgment or Findings of Fact and Order and Judgment, be signed by it setting out in extensive detail the court's findings with regard to the condition of the AIP, the need for a Guardian or Guardians, the nature of the Guardianship appropriate to the situation, including a definition of the powers the Guardian(s) will have and any restrictions thereon, who the Guardian or Guardians are to be,

etc. It is possible that a proposed Order and Judgment may be submitted by the petitioning party with the supporting papers and may be signed by the court, or the court may issue an Order and Judgment along with or shortly after the decision using a form prepared by it, modified as required by the circumstances of the case. The court has a standard form Order and Judgment. The court in its decision may instead require that an Order and Judgment be “settled.” This means that the petitioner must prepare a draft Order and Judgment in conformity with the court’s directions in its decision and, after service on all parties involved, must submit it to the court. The “settlement” procedure may be used because it ensures that the parties served will have an opportunity to object to any aspects of the draft they find deficient. At the end of this process, the court may sign the draft, perhaps after making changes the court feels to be necessary.

If the draft Order and Judgment must be settled, the petitioner or proposed Guardian or the attorney for either must do so promptly.

The Guardian may exercise only those powers that the Guardian is authorized to exercise by the court’s Order and Judgment. The duties of the Guardian are set out in Section 81.20 and will be detailed in the Order and Judgment.

Guardians must not take any compensation for themselves nor pay any legal or accounting fees without first having obtained from the assigned Justice authorization to do so.

E. Qualification Of Guardian

After the Order and Judgment appointing one or more Guardians is issued, each Guardian must complete a process called qualification. This step is necessary, but not particularly complicated. The Guardian must complete the qualification process immediately after receiving the Order and Judgment.

After the Justice signs the Order and Judgment appointing the Guardian, the Guardian must take certain steps to qualify fully as Guardian, that is, to become fully and formally empowered to exercise the authority and fulfill the duties set out by the Justice in the Order and Judgment. First, the Guardian is required to file a bond (unless a bond is dispensed with (“waived”) by order of the court); that is, in essence, an insurance policy protecting the incapacitated person against any possible errors by the Guardian. The Guardian must also sign an oath and designation of Clerk. Here, the Guardian formally undertakes to carry out the duties of Guardian. The designation of the Clerk is a document that designates the Clerk of the court to receive service of legal process on behalf of the Guardian should the incapacitated person be served when the Guardian is unavailable. These papers must be filed

with the County Clerk. Within five days thereafter, a commission must be issued by the County Clerk.

The commission is a legal form that formally identifies the appointed Guardian as such and as having been appointed pursuant to law and authorizes the Guardian to carry out the responsibilities required by the Order and Judgment. The commission constitutes proof of the legal authority of the Guardian to act as such, for example, in dealing with a bank in safeguarding funds belonging to the incapacitated person. Absent adequate legal proof of authority, a bank or other entity will not allow a stranger to exercise power over a bank account or other property of the incapacitated person. The commission is typically prepared by the Guardian or his/her attorney or the petitioner's attorney. If the commission is in proper form, it will be signed by the County Clerk. The papers necessary to receive the commission, in addition, of course, to the Order and Judgment of the court, are the bond and the oath and designation of Clerk for service of process.

F. Marshalling The Assets

One of the first tasks of a Guardian of the property is to engage in the marshalling of the assets of the incapacitated person. This means to identify and locate the assets and to take the steps needed to safeguard them. The Guardian of the property must make a list of ALL assets and properties belonging to the incapacitated person and find where they are. In order to do this, the Guardian should do such things as the following:

- Review bank statements;
- Inventory the contents of any safe deposit boxes (in the presence of a bank officer);
- Collect all assets;
- Inspect the incapacitated person's home and files;
- Determine the status of the incapacitated person's housing arrangements (rental apartment, cooperative apartment, home, etc.);
- Identify all sources of income (fixed, investment, interest, etc.) and contact former employer, government agency, bank, brokerage house, etc., as necessary;
- Review all investment records;
- Review all bills;
- Identify and review the status of all credit cards and any outstanding credit card bills;
- Seek appraisals of any real property, as needed;
- Inventory all personal valuables (e.g., fur coats, jewelry, art objects);
- Locate the incapacitated person's will.

G. Training And Education

Article 81 contains educational requirements for Guardians and Court Evaluators. Generally, each person appointed as Guardian must, within 90 days after issuance of the commission, complete a training course, approved by the court system, that covers the duties of the Guardian, the rights of the incapacitated person, the preparation of required reports on the Guardianship, and other matters. The Office of Court Administration periodically offers classes and generates a list of those who have completed the classes. Those who complete the class are certified by the court system.

H. Court Examiners

Guardians in Article 81 matters must submit to the court certain reports on their activities, described hereafter. Court Examiners are persons appointed by the court to review the Guardian's reports for accuracy and regularity. Each Guardianship matter has a Court Examiner assigned to it. Court Examiners are attorneys and accountants with expertise in Guardianship law and fiduciary accounting who have been appointed by the Appellate Division of the Supreme Court to review the work of the Guardians and to file a report for each.

Throughout the duration of the Guardianship the Guardian must cooperate with the Court Examiner at all times and the Guardian or his/her attorney must serve copies of reports and relief applications on the Examiner. The relationship between Guardian and Examiner is not intended to be adversarial, but collaborative and supportive. However, the Examiner, if confronted with non-compliance by the Guardian, can refer the Guardian for a compliance conference before the court, recommend a reduction in Guardian compensation (if any) or similar sanction, or seek the Guardian's removal when warranted.

The court's Guardianship and Fiduciary Support Office (Room 158, 60 Centre Street, Manhattan) monitors the filing of reports by Article 81 Guardians and the reports filed by the Court Examiners.

I. Initial Report

The Guardian is required to file an Initial Report within 90 days of the issuance of the commission (Section 81.30). A required standard form of this report is available on-line. The original of the completed report is filed with the Guardianship and Fiduciary Support Office, and a copy must be sent to the Court Examiner assigned to the case. The Initial Report must include proof that the Guardian has completed the required education course and must describe the steps the Guardian has taken to fulfill his/her responsibilities. If the Guardian

has been granted powers with respect to property management of the incapacitated person, the Guardian must include in the report a complete inventory of resources over which the Guardian has control, must name therein the location of a will (if any), and must set out the plan for management of the property. If the Guardian has been granted powers regarding personal needs, the Guardian must indicate the dates of visits to the incapacitated person, describe what the Guardian has done to provide for his/her ward's personal needs and set out a plan for meeting those needs. If the Guardian believes that changes are needed in the powers authorized by the court, this must be explained. If the Initial Report includes any recommendations for a change in any powers, the Guardian must apply to the court for those changes within 10 days of the filing of the report on notice to all persons entitled to notice. For further information, please see Section 81.30.

A Guardian of the property of an incapacitated person must keep meticulous records regarding all financial activity on behalf of that person and relating to the assets of that person. Such records will be necessary for the completion of the Initial Report and the Annual and Final Reports, described below.

J. Annual Report

The Guardian must also file an Annual Report (Section 81.31). This must be done by May 31st of each year covering the period ending December 31st of the previous year. The original shall be filed with the Guardianship and Fiduciary Support Office and a copy shall be sent to the Court Examiner assigned to the case, the incapacitated person, the surety (the company that issued the bond) and, if the incapacitated person is in a nursing home or other rehabilitative facility, to the director of such facility and Mental Hygiene Legal Services. The Court Examiner will review the report.

The Annual Report provides information about the status and well-being of the incapacitated person and the activities of the Guardian. The Annual Report must include a financial accounting, a social and medical summary of the condition of the incapacitated person, and a current medical report from a qualified professional who has evaluated the incapacitated person within the three months prior to the filing of the Annual Report. The Guardian should seek assistance in the preparation of the accounting schedules if needed. The Court Examiner will reject the account if it is not in proper form.

The Guardian will be examined under oath by the Examiner concerning financial and personal matters relevant to the Guardianship. The Court Examiner will reject the accounting if it is not in the proper form. The Court Examiner will require back-up documentation from the Guardian supporting the account and transactions regarding it, such as cancelled checks, brokerage statements, bank statements, bills, invoices, receipts etc., in order to complete the

audit of the account. It is thus very important for the Guardian to maintain accurate records of all financial activity. In addition, the Court Examiner will request a copy of any order regarding Guardian compensation, attorney and accounting fees, the purchase or sale of any real property, or any other order pertinent to the Guardianship.

Again, Guardians must not take compensation or pay legal or accounting fees without prior court authorization. The Court Examiner will need to see a copy of any order awarding compensation or authorizing payment of professional fees, authorizing purchase or sale of real property, or otherwise involving the Guardianship.

K. Intermediate Report

Another form of report is an intermediate report. A Guardian may petition the court by notice of motion or by order to show cause for permission to submit an intermediate report. Alternatively, a court may also order a Guardian to submit such an report. A required form of such report is available on-line.

L. Final Report

When, for one of a variety of reasons, the Guardian ceases to function as such, the Guardian must file a Final Report. Section 81.33. A Guardian must submit a final account when:

- the incapacitated person dies;
- the Guardian is removed, suspended, discharged or allowed to resign;
- the Guardian dies (in which case the Final Report shall be submitted by the legal representative of the estate);
- the assets of the incapacitated person are depleted;
- the incapacitated person is placed in a nursing home by a community Guardian.

The report must be submitted in a form prescribed by the court. The required form is available on-line.

The Final Report includes a final accounting, showing in detailed schedules all income received by, and expenses incurred on behalf of, the incapacitated person, assets, and their disposition. The Final Report must cover the entire Guardianship period, from the date of appointment to the date of death or other termination. Notice must be given to all persons who would have an interest in the estate of the incapacitated person, such as heirs, creditors, the surety and any other person who should receive notice. The Guardian should bring on a motion before the court requesting that the report be approved by the Justice and filed. The court will require that a proposed order of approval be settled, that is, served upon all parties

and submitted to the court. Notice procedures provide all interested persons an opportunity to raise objections if any aspect of the report and the order cause concern. The report, the accounting and the proposed settled order are closely reviewed by the Guardianship and Fiduciary Support Office. When necessary, the staff will request corrections or supplemental information before sending those documents to the Justice's Chambers.

M. Informal Final Report

In lieu of the formal report just discussed, an informal Final Report may at times be used. As the name suggests, this report is shorter and less complicated than the formal one. It can be used instead of a formal report if it has been served upon all persons interested in the proceeding and each of them has signed a form consenting to and approving the report and releasing and discharging the Guardian. Section 81.34. The informal report must be filed with the court together with the executed forms of consent. An informal Final Report on consent of all parties shall be filed with the Guardianship and Fiduciary Support Office (Room 158, 60 Centre Street, Manhattan). The informal report is reviewed by the Guardianship Clerk and then sent directly to the Justice assigned.

N. Assistance To Guardians

The court's Guardianship and Fiduciary Support Office (646-386-3328, Room 158, 60 Centre Street, Manhattan) tries to answer inquiries about procedures in Guardianship cases. However, because of its many responsibilities keeping track of cases, monitoring and reviewing filings, and assisting the Justices, the Office is not in a position to answer all of the questions an individual Guardian may have. In some cases, the Guardian can consult counsel. In others, however, it may be less practical to do so because of the modest size of the assets of the incapacitated person. The Guardianship Office may be able to provide information on programs outside the court that offer some level of assistance to lay Guardians.

O. Avoiding Guardianship

Persons who retain the capacity to manage their own affairs may take steps to avoid a Guardianship proceeding at a later time. An attorney can provide detailed information about these steps and about estate planning in general. Two important devices are the durable power of attorney and the health care proxy. In combination, these devices allow a person to designate someone else to look after the personal well-being of the person and to safeguard and administer his or her assets in the event that the person should thereafter become unable to do so; these documents can accomplish what the appointment of a Guardian does, but without any need to come to court.

1) Durable Power Of Attorney

The durable power of attorney is a document which allows a person to grant to someone else the authority to perform legal transactions on his/her behalf without having to go to court for approval. The durable power of attorney is especially beneficial since it allows the holder to perform estate planning without delay, thereby preserving assets as well as, where applicable, maximizing benefits under the Medicaid Law. The durable power of attorney can be issued prior to any disability and remains valid even if the grantor becomes disabled or incapacitated.

2) Health Care Proxy

A health care proxy, which also can be issued prior to any disability, is a document which allows a person to give someone else the legal authority to make health care decisions for that person should he or she become physically or mentally unable to do so.

SOME KEY TERMS DEFINED

Settle Order/Judgment

This is a directive from the Justice requiring that an order or judgment be drafted by a party to a proceeding, that it be served on all parties, and that it be filed with the court for judicial consideration and possible execution. When a settlement is directed by the court, the file is retained by the court and the proposed order or judgment and any proposed counter-order or counter-judgment (that is a competing proposal offered, served and filed by another party) should be submitted to the Guardianship and Fiduciary Support Office unless otherwise directed.

Motion

A motion is a written request for a court order. The motion should briefly state the relief sought, the supporting documents attached, and why the Justice should grant the type of relief requested.

Service and Notice

Legal papers, e.g. motions, orders, proposed orders, judgments, are served on all parties involved in the case, thus putting these persons “on notice.” These papers must be served by someone over the age of 18, who is NOT a party in the case. Typically, service may be accomplished by mail or by personal delivery. Afterwards, the person who performed the service must fill out an affidavit of service and sign it before a notary as proof of service. That proof must be annexed to or submitted with papers presented to the court.

Order To Show Cause

An order to show cause is an order (that is, it is signed by a judge) directing a party to come forward with reasons (“show cause”) why some stated relief should not be granted to the applicant. The proposed order to show cause is prepared by the applicant or his/her counsel. It should briefly state the relief sought, and be accompanied by an affidavit or affidavits explaining in detail the nature of the relief sought and why it should be granted. The proposed order to show cause in a guardianship case is submitted to and reviewed for form by the Guardianship and Fiduciary Support Office (Room 158, 60 Centre Street, Manhattan). An application to appoint a Guardian is always made by order to show cause. Once signed, the order is served on the parties to the case by an appropriate person on behalf of the applicant in the manner directed by the court in the order.

Verified Petition

A petition is a formal legal document in which the party seeking the appointment of a Guardian (the petitioner) sets out his or her claims, or requests for legal relief. A verified petition is one that includes a declaration under oath or upon penalty of perjury that the contents and statements included in the petition are true. The verification is typically located

at the end of the document.

Bond

A bond is a sort of insurance policy used to protect the incapacitated person by ensuring responsible performance by the Guardian, as well as security of the person's assets. The amount of the bond is set by the Justice assigned to the case. The Guardian obtains the bond through a bonding company or surety. The bond may be referred to as a surety bond.

Community Guardian

A community Guardian is a not-for-profit corporation or a local governmental agency that has contracted with a local social services agency to provide services to incapacitated persons or other eligible individuals. For more information, please see Social Services Law § 473-c.

Mental Hygiene Legal Service

This is a State Agency that advocates for the rights of individuals who reside in treatment facilities licensed to provide services for the mentally ill, developmentally disabled or chemically dependant, as well as any other persons who might become subject to substituted decision-making either by having been made a ward of the court or by Guardianship proceeding.