

THE NEW YORK STATE
LAW REVISION COMMISSION

2003

**RECOMMENDATION RELATING TO AMENDING ARTICLE 81
OF THE MENTAL HYGIENE LAW
IN RELATION TO THE APPOINTMENT OF GUARDIANS
FOR PERSONAL NEEDS AND/OR PROPERTY MANAGEMENT**

NEW YORK STATE
LAW REVISION COMMISSION

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The purpose of this recommendation by the New York State Law Revision Commission is to clarify certain provisions of Article 81 of the Mental Hygiene Law taking into account issues that have come to the Commission's attention with respect to the statute.¹ The proposed amendments are described in the order in which the affected provisions appear in the statute.

The first set of amendments addresses several concerns regarding the definition section, section 81.03. The definition of "available resources" is not intended to be exclusive so the proposal clarifies that available resources include "health care proxies". Subdivision (e) of section 81.03 is amended to read as follows:

"available resources" means resources such as, but not limited to, visiting nurses, homemakers, home health aides, adult day care and multipurpose senior citizen centers, powers of attorney, health care proxies, trusts, representative and protective payees, and residential care facilities.

The definition of "life-sustaining treatment" which currently appears at section 81.29(e) is added as a new subdivision to section 81.03. The suggestion has been made that the absence of any reference to life sustaining treatment or subdivision (e) of section 81.29 in the definition section could mislead the a reader not familiar with section 81.29(e) into thinking that a guardian may exercise power to make life

¹ Over the past ten years since the statute's enactment at the recommendation of the Commission, the Commission has followed the implementation and judicial interpretation of the statute and has met regularly with organizations who regularly work with article 81 proceedings, including representatives from the Office of Court Administration (OCA), the Office of Guardianship Services, the New York State Bar Association (Elder Law and Trusts and Estates Sections, and the Committee on Issues Affecting People With Disabilities), Mental Hygiene Legal Service (MHLS), Brookdale Institute on Law & Rights of Older Adults, the local Departments of Social Services (DSS), the Human Resources Administration of the City of New York (HRA), members of the Association of the Bar of the City of New York and New York County Lawyers Association, and several private practitioners.

sustaining treatment decisions.² Section 81.29(e) defines “life sustaining treatment” and makes clear that article 81 is neutral on the subject of life sustaining treatment decisions. There is no statutory authority to permit the exercise of that authority nor to prohibit its exercise. The courts and the parties must be guided by the common law. This amendment to section 81.03 eliminates the potential for confusion. Subdivision (j) of section 81.03 is added to read as follows:

(j) “life sustaining treatment” means medical treatment which is sustaining life functions and without which, according to reasonable medical judgment, the patient will die within a relatively short time period.³

Definitions for “facility” and “mental hygiene facility,” two terms that are used frequently throughout the statute⁴, are added to section 81.03. Defining these terms at the beginning of the statute will streamline later sections and make reading the statute easier. Section 81.03 is amended to read as follows:

(k) facility means a facility, hospital, or school, or an alcoholism facility in this state as such terms are defined in section 1.03 of this chapter, a substance abuse program as such term is defined in section 19.03 of this chapter, an adult care facility as such term is defined in section two of the social services law, or a residential health care facility or a general hospital as such terms are defined in section two thousand eight hundred one of the public health law.

(l) mental hygiene facility means an alcoholism community residence, an alcoholism facility, a facility, a hospital, a residential care centers for adult, a school, or a substance abuse program as such terms are defined in section 1.03 of this chapter.

² See, e.g., Robert Abrams, *Guardians and Decisions Regarding Life Sustaining Treatment*, N.Y.L.J., Nov. 9, 1994 at 1.

³ This language is taken verbatim from section 81.29(e) of the mental hygiene law. The language as it appears in section 81.29(e) will be deleted as part of these amendments. See *Recommendation* at page 29.

⁴ The language regarding facilities appears in: section 81.05 (venue); section 81.06(7) (who can petition, the CEO of a facility); section 81.07 (notice to the facility); section 81.09 (court evaluator can be MHLS if the patient is in a facility); section 81.31 (service of a copy of the annual report on the CEO of the facility and the MHLS) and section 81.33 (service of final report on the CEO of the facility and the MHLS).

Amending section 81.04(b) clarifies the jurisdiction of the surrogate's court over article 81 proceedings by conforming the venue provision for surrogate's court to that of the other courts which have jurisdiction over guardianship proceedings.⁵ The venue of surrogate's court in guardianship proceedings is limited to persons who reside or are physically present in the county where the surrogate's court proceeding is pending. Section 81.04(b), as currently written, has been interpreted to require that a petitioner for an alleged incapacitated person residing out of state who is the beneficiary of a New York estate first commence a guardianship proceeding in supreme court and then appear in surrogate's court with the order of appointment.⁶ To correct this interpretation, section 81.04 is amended to read as follows:

(b) Notwithstanding the provisions of subdivision (a) of this section, when it appears in any proceeding in the surrogate's court that a person interested in an estate is entitled to money or property as a beneficiary of the estate, or entitled to the proceeds of any action as provided in section 5-4.1 of the estates, powers and trusts law, or to the proceeds of a settlement of a cause of action brought on behalf of an infant for personal injuries, and that the interested person is a resident of,[or] is physically present, or has any property in, the county in which the proceeding is pending and is allegedly incapacitated with respect to property management under the provisions of this article, and the surrogate's court is satisfied after a hearing or trial in accordance with the provisions of this article that the interested person is incapacitated with respect to property management, the surrogate's court shall have the power to order relief for that person with respect to property management in accordance with the provisions of this article.

Consistent with the amendment defining a "facility" in section 81.03 of the statute, section 81.05 is amended to eliminate repetitious language from the statute and correct an oversight in the original statute which inadvertently omitted the word "guardian" from subdivision b of section 81.05. Section 81.05

⁵ See N.Y. Mental Hygiene Law §81.05(a).

⁶ See *Matter of Bowers*, 164 Misc.2d 298, 624 N.Y.S.2d 750 (Surr. Ct. N.Y. Co. 1995).

is amended to read as follows:

(a) A proceeding under this article shall be brought in the supreme court within the judicial district, or in the county court of the county in which the person alleged to be incapacitated resides, or is physically present, or in the surrogate's court having jurisdiction pursuant to subdivision (b) of section 81.04 of this article. If the person alleged to be incapacitated is being cared for as a resident in a facility [, hospital, or school, or an alcoholism facility in this state as those terms are defined in section 1.03 of this chapter, a substance abuse program as that term is defined in section 19.03 of this chapter, an adult care facility as that term is defined in section two of the social services law, or a residential health care facility or a general hospital as those terms are defined in section two thousand eight hundred one of the public health law], the residence of that person shall be deemed to be in the county where the facility is located and the proceeding shall be brought in that county, subject to application by an interested party for a change in venue to another county because of the inconvenience of the parties or witnesses or the condition of the person alleged to be incapacitated. If the person alleged to be incapacitated is not present in the state, or the residence of such person cannot be ascertained, the residence shall be deemed to be in the county in which all or some of such person's property is situated.

(b) After the appointment of a guardian, temporary guardian, special guardian, standby guardian, or alternate standby guardians, any proceeding to modify a prior order shall be brought in the supreme court, county court, or surrogate's court which granted the prior order. If, at the time of the application to modify a prior order, the incapacitated person is being cared for as a resident in a facility [,hospital, or school, or an alcoholism facility in this state as those terms are defined in section 1.03 of this chapter, a substance abuse program as that term is defined in section 19.03 of this chapter, an adult care facility as that term is defined in section two of the social services law, or a residential health care facility or a general hospital as those terms are defined in section two thousand eight hundred one of the public health law], the proceeding shall be brought in the county where the facility is located, subject to application by an interested party for a change in venue to the court which granted the prior order because of the inconvenience of the parties or witnesses or the condition of the incapacitated person.

Amending section 81.06 which provides that the CEO of an institution may initiate a guardianship proceeding addresses a practical concern. The CEO often is not the institution's representative who initiates these proceedings. The amendment reflects actual practice and allows flexibility to institutions in identifying the person who acts on behalf of the institution in commencing the guardianship proceeding. Language regarding facilities made unnecessary by the inclusion of a definition for "facility" in section 81.03 is omitted by this amendment. Paragraph (7) of subdivision (a) of section 81.06 is amended to read as

follows:

the chief executive officer, or the designee of the chief executive officer, of a facility [,hospital, school, or an alcoholism facility in this state as those terms are defined in section 1.03 of this chapter, a substance abuse program as that term is defined in section 19.03 of this chapter, an adult care facility as that term is defined in section two of the social services law, or a residential health care facility or a general hospital as those terms are defined in section two thousand eight hundred one of the public health law,] in which the person alleged to be incapacitated is a patient or resident.

Several concerns regarding the order to show cause and the notice provisions are addressed by amending section 81.07:

1) the commencement of a proceeding.

The proposed amendment provides that an article 81 proceeding is commenced with the filing of the petition, to clarify the statute.

2) the timing of the signing of the order to show cause.

Currently, an order to show cause commencing a guardianship proceeding is returnable 28 days after the filing of the petition. However, an order to show cause may not be signed for several days after the filing of the petition. If that happens, it reduces the period of time available for serving notice on the required persons and the period of time available for the court evaluator to conduct an investigation into the case. The 28 day time period should run from the date of the signing of the order to show cause rather than the filing of the petition. The proposal also encourages more uniformity in the proceedings because everyone will have twenty-eight days before the return date no matter how long it takes the court to sign the order to show cause.

3) Service of the petition and accompanying papers containing medical and financial information.

The requirement that the petition and all supporting papers be served on the large number of

persons identified in section 81.07 has raised concerns regarding unnecessarily disclosing intimate information regarding a person's health and financial status to people who would not otherwise have access to such information and causing undue humiliation and embarrassment to the alleged incapacitated person. This amendment limits service of the petition and supporting affidavits to the alleged incapacitated person, the person's counsel, and the court evaluator. All other persons entitled to be informed of the proceeding will receive notice of the proceeding. This notice will contain the names and addresses of the person alleged to be incapacitated, persons to be served with the notice of the proceeding, and the name, address and telephone number of the petitioner's attorney. The notice will also contain the time and place for the hearing and the relief sought.

The subparagraphs listing the persons entitled to service of the order to show cause and petition with supporting affidavits or notice of the proceeding are reordered. This proposal also makes clear the availability of service by facsimile on the court evaluator and the attorney for the alleged incapacitated person, whether appointed by the court or retained by the person alleged to be incapacitated; it also sets the time limit for service on the court evaluator and counsel for the alleged incapacitated person to within three (3) business days of the appointment of the court evaluator and/or counsel or the appearance of an attorney retained by the alleged incapacitated person.

4. Requirement for translations

The requirement for translations is important; however, the term "necessary" used in the current statute may not provide sufficient direction to the petitioner regarding when the translation should be done.

5. Medical Affidavits

The practice of requiring the petition to be accompanied by medical affidavits, a practice carried

over from former articles 77 and 78 of the mental hygiene law, has raised serious concerns. Although the patient-physician privilege in guardianship proceedings pursuant to article 81 of the mental hygiene law has been an area of some debate,⁷ case law indicates that the privilege should not be lightly treated as waived and has made clear that medical affidavits are not necessary and, in fact, improper in some cases.⁸

In *England*, the court held that “absent consent, inclusion of medical affidavits with the petition seeking the appointment of a Guardian is a violation of patient-physician privilege”⁹ In *Goldfarb*, the alleged incapacitated person challenged the right of the physician retained by the petitioner to testify as to her medical condition. Although the court noted that “in most instances . . . it is probably improper for a petitioner to rely upon an examining or treating physician's affidavit in support of an order to show cause

⁷ See *In re Tara X.*, (Sup. Ct., Suff. Co.), N.Y.L.J., Sept. 18, 1996, p.27 (“Since neither the CPLR nor Article 81 provide particulars for the existence, waiver or judicial extinguishment of the physician/patient privilege, the legal discourse regarding its application to Article 81 proceedings continues.”) The debate over the role of the patient-physician privilege in guardianship proceedings is not unique to article 81. Compare *Matter of Allen (Mauceli)*, 24 Misc. 2d 763, 204 N.Y.S.2d 876 (Sup. Ct. N.Y.Co. 1960 (“use of competent and expert medical testimony [in a commission to determine competency] is not only proper but highly desirable, if not essential, as an aid to the court.”) and *Matter of Benson*, 16 N.Y.S. 111 (Co. Ct., Monroe Co. 1891) (“No physician can be better qualified to testify to the sanity or insanity of a person than he who has for some time attended such person in a professional capacity. Indeed, the cases are not rare where none but an attending physician could intelligently testify to a person's mental condition.”) with *Matter of Gates*, 170 App. Div. 921, 154 N.Y.S.2d 782 (3d Dept. 1915) (“It was error to permit the defendant's personal physician to testify as to the competency of his patient. Clearly it was indelicate for a physician in attendance upon a patient to permit himself to be heard by another and go and make an examination of the patient for the purpose of testifying against him. In our judgment it was not only indelicate, but in violation of the privilege given to the patient”) and *Matter of J. D.* , 107 Misc. 2d 288, 289, 433 N.Y.S.2d 717 (Sup .Ct., N.Y.Co. 1980) (“If the law were to be that there was no privilege in this type of case, a chill would be cast over all medical treatment of persons who might consider themselves as potential subjects of an attempt by relatives or by others, to take control of their property. Public policy is clearly in favor of complete freedom of medical treatment and openness in communications between patient and doctor.”).

⁸ See, e.g., *In re England*, (Sup. Ct., N.Y. Co.), N.Y.L.J., Oct. 6, 1995, p. 27; *Matter of Goldfarb*, 160 Misc.2d 1036 (Sup. Ct. Suffolk Co. 1994)

⁹ N.Y.L.J., Oct. 6, 1995, p. 27.

and petition commencing a guardianship proceeding," the court permitted the petitioner's physician to testify because the alleged incapacitated person submitted her own physician's report in opposition to the petitioner's case.¹⁰ Although the views expressed in these decisions are very clear, some courts still require that medical affidavits accompany the petition and practitioners are struggling with how to treat the patient-physician privilege.¹¹ The purpose of this amendment is to clarify that medical evidence is not required in support of the petition and that information included in the petition that is obtained in violation of the privilege will be struck by the court.

Section 81.07 is amended to read as follows:

a) A proceeding under this article shall be commenced upon the filing of the petition.

(b) Order to show cause. Upon the filing of the petition, the court shall:

1. set [a] the date on which the order to show cause is heard no more than twenty-eight days from the date of the [filing] signing of the [petition] order to show cause [on which the order to show cause is returnable]. The court may for good cause shown set a date less than twenty-eight days from the date of the [filing of the petition] signing of the order to show cause. [The order to show cause shall fix the hearing date pursuant to section 81.11 of this article as the same date on which the order to show cause is returnable;] [t] The date of the hearing may be adjourned only for good cause shown;
2. include in the order to show cause the name, address, and telephone number of the person appointed as court evaluator in accordance with section 81.09 of this article; [and]
3. require the order to show cause to be served together with a copy of the petition and any supporting papers upon the alleged incapacitated person, the court evaluator, and counsel for the alleged incapacitated in the form and manner prescribed herein; the court shall not require that supporting papers contain medical information; and
4. require notice of the proceeding together with a copy of the order to show cause to be given to the persons identified in paragraph one of subdivision [d] g of this section and in the form and manner prescribed herein.

[(b)](c) Form of the Order to Show Cause.

¹⁰ 160 Misc.2d 1036 (Sup. Ct. Suffolk Co. 1994)

¹¹ See Transcript, New York State Bar Association - The Dilemma of Patient Privilege in Guardianship Proceedings, January 29, 1998; Michael Miller, "Guardianship Proceeding and the Patient-Physician Privilege," GUARDIANSHIP PRACTICE IN NEW YORK (Robert Abrams, Esq., editor-in-chief, New York State Bar Association, 1997)

. The order to show cause shall be written in large type, in plain language, and in a language other than English if necessary to inform the person alleged to be incapacitated of his or her rights, and shall include the following information:

1. date, time, and place of the hearing of the petition;
2. a clear and easily readable statement of the rights of the person alleged to be incapacitated that are set forth in section 81.11 of this article;
3. the name, address, and telephone number of the person appointed as court evaluator pursuant to section 81.09 of this article;
4. the name, address, and telephone number of the attorney if one has been appointed for the person alleged to be incapacitated pursuant to section 81.10 of this article; and
5. a list of the powers which the guardian would have the authority to exercise on behalf of the person alleged to be incapacitated if the relief sought in the petition is granted.

[(c)] (d) Legend. The order to show cause shall also include on its face the following legend in twelve point or larger bold face double spaced type:

IMPORTANT

An application has been filed in court by _____ who believes you may be unable to take care of your personal needs or financial affairs. _____ is asking that someone be appointed to make decisions for you. With this paper is a copy of the application to the court showing why _____ believes you may be unable to take care of your personal needs or financial affairs. Before the court makes the appointment of someone to make decisions for you the court holds a hearing at which you are entitled to be present and to tell the judge if you do not want anyone appointed. This paper tells you when the court hearing will take place. If you do not appear in court, your rights may be seriously affected.

You have the right to demand a trial by jury. You must tell the court if you wish to have a trial by jury. If you do not tell the court, the hearing will be conducted without a jury. The name and address, and telephone number of the clerk of the court are: _____ .

The court has appointed a court evaluator to explain this proceeding to you and to investigate the claims made in the application. The court may give the court evaluator permission to inspect your medical, psychological, or psychiatric records. You have the right to tell the judge if you do not want the court evaluator to be given that permission. The court evaluator's name, address, and telephone number are: _____ .

You are entitled to have a lawyer of your choice represent you. If you want the court to appoint a lawyer to help you and represent you, the court will appoint a lawyer for you. You will be required to pay that lawyer unless you do not have the money to do so.

[(d)] (e) Service of the Order to Show Cause .

1. [t] The persons entitled to service of the order to show cause shall include:
 - (i) the person alleged to be incapacitated; and
 - (ii) the attorney for the person alleged to be incapacitated, if known to the petitioner; and
 - (iii) the court evaluator.
2. Manner of service.

(i) the order to show cause and a copy of the petition shall be personally delivered to the person alleged to be incapacitated not less than fourteen days prior to the hearing date of the order to show cause. However, the court may direct that the order to show cause and a copy of the petition be served on the person alleged to be incapacitated in a manner other than personal delivery when the petitioner demonstrates to the court's satisfaction that the person alleged to be incapacitated has refused to accept service.

(ii) the order to show cause and a copy of the petition shall be served upon the court evaluator and the attorney for the alleged incapacitated person, if there is one, by electronic means provided that a telephone number or other station or other limitation, if any, is designated by the court evaluator and/or the attorney for that purpose, or by delivering the papers personally or by overnight delivery service to the office of the court evaluator and the attorney for the alleged incapacitated person, if there is one, within three business days following the appointment of the court evaluator and the appointment of the attorney or the appearance of an attorney retained by the alleged incapacitated person.

3. The court may direct that the order to show cause be served within a time period less than the period required in paragraph two of this subdivision for good cause shown.

(f) Form of the Notice of the Proceeding. The Notice of the Proceeding must substantially set forth:

1. The name and address of the alleged incapacitated person to whom the guardianship proceeding relates;
2. The name and address of the petitioner;
3. The names of all persons to be given notice of the proceeding;
4. The time when and the place where the order to show cause shall be heard;
5. The object of the proceeding and the relief sought in the petition;
6. The name, address and telephone number of the petitioner's attorney.

[(iii)] (g) Notice of the Proceeding

1. Persons entitled to Notice of the Proceeding shall include

(i) the following persons, other than the petitioner, who are known to the petitioner or whose existence and address can be ascertained by the petitioner with reasonably diligent efforts: the spouse of the person alleged to be incapacitated, if any; the parents of the person alleged to be incapacitated, if living; the adult children of the person alleged to be incapacitated, if any; the adult siblings of the person alleged to be incapacitated, if any; the person or persons with whom person alleged to be incapacitated resides; and

(ii) in the event no person listed in subparagraph [(ii)] (i) of this paragraph is given notice, then notice shall be given to at least one and not more than three of the living relatives of the person alleged to be incapacitated in the nearest degree of kinship who are known to the petitioner or whose existence and address can be ascertained by the petitioner with reasonably diligent efforts; and

[(iv)] (iii) any person or persons designated by the alleged incapacitated person with authority pursuant to sections 5-1501, [5-1601, and 5-1602] 5-1505, and 5-1506 of the general obligations law, or sections two thousand nine hundred five and two thousand nine hundred eighty-one of the public health law, if known to the petitioner; and

[(v)](iv) if known to the petitioner, any person, whether or not a relative of the person alleged to be incapacitated, or organization that as demonstrated a genuine interest in promoting the best interests of the person alleged to be incapacitated such as by having a personal relationship with the person, regularly visiting the person, or regularly communicating with the person; and
[(vi) the attorney for the person alleged to be incapacitated, if known to the petitioner; and
(vii) the court evaluator; and]
[(viii)] (v) if it is known to the petitioner that the person alleged to be incapacitated receives public assistance or protective services under article nine-B of the social services law, the local department of social services; and
[(ix)] (vi) if the person alleged to be incapacitated resides in a facility[,hospital, school, or an alcoholism facility in this state as those terms are defined in section 1.03 of this chapter, a substance abuse program as that term is defined in section 19.03 of this chapter, an adult care facility as that term is defined in section two of the social services law, a residential health care facility or a general hospital as those terms are defined in section two thousand eight hundred one of the public health law],the chief executive officer in charge of the facility[,] ; and
[(x)] (vii) if the person alleged to be incapacitated resides in a mental hygiene facility, the mental hygiene legal service of the judicial department in which the residence is located; and
[(x)] (viii) such other persons as the court may direct based on the recommendation of the court evaluator in accordance with subparagraph(xvii) of paragraph five of subdivision (c) of section 81.09 of this article.

2. Notice of the Proceeding together with a copy of the order to show cause shall be mailed to the persons identified in paragraph one of this subdivision not less than fourteen days prior to the hearing date in the order to show cause.

[2. manner of service.

(i) the order to show cause and a copy of the petition shall be personally delivered to the person alleged to be incapacitated not less than fourteen days prior to the return date of the order to show cause. However, the court may direct that the order to show cause and a copy of the petition be served on the person alleged to be incapacitated in a manner other than personal delivery when the petitioner demonstrates to the court's satisfaction that the person alleged to be incapacitated has refused to accept service. A copy of the order to show cause and the petition also shall be left with a person of suitable age and discretion at the residence of the person alleged to be incapacitated if he or she is not served there; and

(ii) the order to show cause and a copy of the petition shall be served by mail or by delivery to the office of the court evaluator and court appointed the attorney , if there is one, within seven days following the appointment of the court evaluator and the attorney; and]

(iii) the order to show cause and a copy of the petition shall be personally served or served by mail upon the other persons identified in paragraph one of this subdivision not less than fourteen days prior to the return date of the order to show cause;]

3. The court may direct that the notice of proceeding be mailed within a time period less than the period required in paragraph two of this subdivision for good cause shown.

[(e) Time period.

The court may direct that the order to show cause be served within a time period less than the period required in paragraph two of subdivision (d) of this section for good cause shown.]

The proposal amends section 81.08 in several respects. First, it include a requirement that the petition identify the persons who will be sent notice of the proceeding to facilitate the court evaluator's investigation. It also clarifies that section 81.08 requires that the petition include any the information required by section 81.21(b) when powers are sought to transfer a part of the alleged incapacitated person's property or assets. Identifying in one place all the information required in the petition eliminates confusion as to statutory requirements. Finally, it addresses the practice of requiring medical affidavits to support the petition.

Paragraph (2) of subdivision (a) of section 81.08 is amended to read as follows:

2. the name, address, and telephone number of the person or persons with whom the person alleged to be incapacitated resides, if any and the name, address and telephone number of any persons that the petitioner intends to serve with the order to show cause and the nature of their relationship to the alleged incapacitated person;

Paragraph (5) of subdivision (a) of section 81.08 is amended to read as follows:

5. if powers are sought with respect to property management for the alleged incapacitated person, specific factual allegations as to the financial transactions or other actual occurrences involving the person alleged to be incapacitated which are claimed to demonstrate that the person is likely to suffer harm because he or she cannot adequately understand and appreciate the nature and consequences of his or her inability to provide for property management; if powers are sought to transfer a part of the alleged incapacitated person's property or assets to or for the benefit of another person, including the petitioner or guardian, the petition shall include the information required by subdivision (b) of section 81.21.

The authority of the court to appoint a not-for-profit organization to act as court evaluator and the availability of Mental Hygiene Legal Service (MHLS) to act as court evaluator when the alleged incapacitated person resides in the community is clarified by amendments to section 81.09. Permitting the

appointment of MHLS as court evaluator in all cases, i.e., whether the alleged incapacitated person is living in the community or in a hospital, nursing home or other facility is appropriate for several reasons: the expertise of MHLS in working with persons alleged to have diminished or diminishing capacity, its reasonable fees, and the location of its offices throughout the state.

MHLS frequently has been appointed to act as court evaluator for persons residing in nursing home or other facilities and has broadened and deepened its expertise in handling such cases.

MHLS charges \$30 an hour for its services so that its fee for acting as court evaluator is generally not burdensome to the financial situation of the person alleged to be incapacitated.

Moreover, MHLS has been available to serve as the court evaluator in cases where the alleged incapacitated person is indigent. The agency's availability to serve in such cases provides a solution to courts which otherwise must search out a professional willing to serve *pro bono* in such cases. Relying on the goodwill and volunteerism of professionals to serve as court evaluators is an unsatisfactory method of appointing court evaluators and places both the court and the volunteer in an awkward situation.

Precisely because of MHLS's expertise and reasonable fees, the courts are already directing MHLS to serve as court evaluator for alleged incapacitated persons living in the community.

Since MHLS is already handling such matters, it remains to be seen whether the statutory amendments will increase MHLS' workload. Consequently, no additional resources are requested.

This proposal also clarifies that the court evaluator should determine whether English is a second language for the alleged incapacitated person and whether an interpreter is necessary. This amendment reinforces the requirement of section 81.10 that the person be represented by counsel of his or her choice. This proposal also makes clear that by permitting the disclosure of medical information to the court

evaluator, the court is acting notwithstanding privileges relating to psychologists and social workers as well as physicians. This proposal also requires the court evaluator to advise the court of the steps taken so that the need for a temporary guardian can be assessed and conforms the language of this section to section 81.10 referring to the term “compensation” rather than “allowance” for the court evaluator.

Section 81.09 is amended to read as follows:

(a) At the time of the issuance of the order to show cause, the court shall appoint a court evaluator.

(b) 1. the court may appoint as court evaluator or any person including, but not limited to, the Mental Hygiene Legal Service, a not-for profit corporation, an attorney-at-law, physician, psychologist, accountant, social worker, or nurse, with knowledge of property management, personal care skills, the problems associated with disabilities, and the private and public resources available for the type of limitations the person is alleged to have. The name of the court evaluator must be drawn from a list maintained by the office of court administration [with knowledge of property management, personal care skills, the problems associated with disabilities, and the private and public resources available for the type of limitations the person is alleged to have, including, but not limited to, an attorney-at-law, physician, psychologist, accountant, social worker, or nurse;]

2. [if the person alleged to be incapacitated resides in a facility, hospital, school, or an alcoholism facility as those terms are defined in section 1.03 of this chapter, or a substance abuse program as that term is defined in section 19.03 of this chapter, an adult care facility as that term is defined in section two of the social services law, a residential health care facility or a general hospital as those terms are defined in section two thousand eight hundred one of the public health law, the mental hygiene legal service in the judicial department where the person resides may be appointed court evaluator;

3.] if the court appoints the mental hygiene legal service as the evaluator and upon investigation in accordance with section 81.10 of this article it appears to the mental hygiene legal service that the mental hygiene legal service represents the person alleged to be incapacitated as counsel, or that counsel should otherwise be appointed in accordance with section 81.10 of this article for the person alleged to be incapacitated, the mental hygiene legal service shall so report to the court. The mental hygiene legal service shall be relieved of its appointment as court evaluator whenever the mental hygiene legal service represents as counsel, or is assigned to represent as counsel, the person alleged to be incapacitated.

(c) The duties of the court evaluator shall include the following:

1. meeting, interviewing, and consulting with the person alleged to be incapacitated regarding the proceeding.

2. determining whether the alleged incapacitated person understands English or only another language, and explaining to the person alleged to be incapacitated, in a manner which the person can reasonably be expected to understand, the nature and possible consequences of the proceeding, the general powers and duties of a guardian, available resources, and the rights to which the person is entitled, including the right to counsel.

3. determining whether the person alleged to be incapacitated wishes legal counsel of his or her own choice to be appointed and otherwise evaluating whether legal counsel should be appointed in accordance with section 81.10 of this article.

4. interviewing the petitioner, or, if the petitioner is a facility or government agency, a person within the facility or agency fully familiar with the person's condition, affairs and situation.

5. investigating and making a written report and recommendations to the court; the report and recommendations shall include the court evaluator's personal observations as to the person alleged to be incapacitated and his or her condition, affairs and situation, as well as information in response to the following questions:

(i) does the person alleged to be incapacitated agree to the appointment of the proposed guardian and to the powers proposed for the guardian;

(ii) does the person wish legal counsel of his or her own choice to be appointed or is the appointment of counsel in accordance with section 81.10 of this article otherwise appropriate;

(iii) can the person alleged to be incapacitated come to the courthouse for the hearing;

(iv) if the person alleged to be incapacitated cannot come to the courthouse, is the person completely unable to participate in the hearing;

(v) if the person alleged to be incapacitated cannot come to the courthouse, would any meaningful participation result from the person's presence at the hearing;

(vi) are available resources sufficient and reliable to provide for personal needs or property management without the appointment of a guardian;

(vii) how is the person alleged to be incapacitated functioning with respect to the activities of daily living and what is the prognosis and reversibility of any physical and mental disabilities, alcoholism or substance dependence? The response to this question shall be based on the evaluator's own assessment of the person alleged to be incapacitated to the extent possible, and where necessary, on the examination of assessments by third parties, including records of medical, psychological and/or psychiatric examinations obtained pursuant to subdivision (d) of this section. As part of this review, the court evaluator shall consider the diagnostic and assessment procedures used to determine the prognosis and reversibility of any disability and the necessity, efficacy, and dose of each prescribed medication;

(viii) what is the person's understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living;

(ix) what is the approximate value and nature of the financial resources of the person alleged to be incapacitated;

(x) what are the person's preferences, wishes, and values with regard to managing the activities of daily living;

(xi) has the person alleged to be incapacitated made any appointment or delegation pursuant to section 5-1501, [5-1601, or 5-1602] 5-1505, or 5-1506 of the general obligations law, section two thousand nine hundred sixty-five or two thousand nine hundred eighty-one of the public health law, or a living will;

(xii) what would be the least restrictive form of intervention consistent with the person's functional level and the powers proposed for the guardian;

(xiii) what assistance is necessary for those who are financially dependent upon the person alleged to be incapacitated;

(xiv) is the choice of proposed guardian appropriate, including a guardian nominated by the allegedly incapacitated person pursuant to section 81.17 or subdivision (c) of section 81.19 of this article; and what steps has the proposed guardian taken or does the proposed guardian intend to take to identify and meet the current and emerging needs of the person alleged to be incapacitated unless that information has been provided to the court by the local department of social services when the proposed guardian is a community guardian program operating pursuant to the provisions of title three of article nine-B of the social services law;

(xv) what potential conflicts of interest, if any, exist between or among family members and/or other interested parties regarding the proposed guardian or the proposed relief;

(xvi) what potential conflicts of interest, if any, exist involving the person alleged to be incapacitated, the petitioner, and the proposed guardian; and

(xvii) are there any additional persons who should be given notice and an opportunity to be heard.

In addition, the report and recommendations shall include any information required under subdivision (e) of this section, and any additional information required by the court.

6. interviewing or consulting with professionals having specialized knowledge in the area of the person's alleged incapacity including but not limited to mental retardation, developmental disabilities, alcohol and substance abuse, and geriatrics.

7. retaining an independent medical expert where the court finds it is appropriate, the cost of which is to be charged to the estate of the allegedly incapacitated person unless the person is indigent.

8. conducting any other investigations or making recommendations with respect to other subjects as the court deems appropriate.

9. attending all court proceedings and conferences.

(d) The court evaluator may apply to the court for permission to inspect records of medical, psychological and/or psychiatric examinations of the person alleged to be incapacitated; except as otherwise provided by federal or state law, if the court determines that such records are likely to contain information which will assist the court evaluator in completing his or her report to the court, the court may order the disclosure of such records to the court evaluator, notwithstanding the physician/patient privilege, the psychologist/patient privilege, or the social worker/client privilege as set forth in sections four thousand five hundred four, four thousand five hundred seven, and four thousand five hundred eight of the civil practice law and rules; if the court orders that such records be disclosed to the court evaluator, the court may, upon the court's own motion, at the request of the court evaluator, or upon the application of counsel for the person alleged to be incapacitated, or the petitioner, also direct such further disclosure of such records as the court deems proper.

(e) The court evaluator shall have the authority to take the steps necessary to preserve the property of the person alleged to be incapacitated pending the hearing in the event the property is in danger of waste, misappropriation, or loss; if the court evaluator exercises authority under this subdivision, the court evaluator shall immediately advise the court of the actions taken and include in his or her report to the court an explanation of the actions the court evaluator has taken and the reasons for such actions.

(f) When judgment grants a petition, the court may award a reasonable [allowance] compensation to a court evaluator, including the mental hygiene legal service, payable by the estate of the allegedly incapacitated person. When a judgment denies or dismisses a petition, the court may award a reasonable allowance to a court evaluator, including the mental hygiene legal service, payable by the petitioner or by

the person alleged to be incapacitated, or both in such proportions as the court may deem just. When the person alleged to be incapacitated dies before the determination is made in the proceeding, the court may award a reasonable allowance to a court evaluator, payable by the petitioner or by the estate of the decedent, or by both in such proportions as the court may deem just.

Under the section 81.10, the court often will appoint counsel at the time of the signing of the order to show cause if the petition alleges facts that appear to warrant such appointment. This appointment occurs before the alleged incapacitated person is served and perhaps even aware that the guardianship proceeding is on the horizon. The proposal would make it clear that the alleged incapacitated person has the right to engage counsel even if the court has already appointed counsel but that the court has the authority to investigate whether retained counsel is truly independent.

The current statute requires the appointment of counsel in situations where the petitioner has a sought a restraining order that prevents third parties from causing harm to the alleged incapacitated person; the restraining order does not cause any harm to the alleged incapacitated person so the appointment of counsel is most likely unnecessary. However, it would seem appropriate to require counsel if the court is to appoint a temporary guardian -- this provision also has the effect of ensuring that the appointment of a temporary guardian is not done *ex parte*.

This proposal permits the court to appoint MHLS as counsel in any case. Giving the court this discretion may facilitate the appointment of counsel in cases of indigence.

Section 81.10 is amended to read as follows:

(a) Any person for whom relief under this article is sought shall have the right to [be represented by] choose and engage legal counsel of the person's choice. In such event, any attorney appointed pursuant to this section shall continue his or duties until the court has determined that retained counsel has been chosen freely and independently by the alleged incapacitated person.

(b) If the person alleged to be incapacitated is not represented by counsel at the time of the issuance of the order to show cause, the court evaluator shall assist the court in accordance with subdivision (c) of section 81.09 of this article in determining whether counsel should be appointed.

(c) The court shall appoint counsel in any of the following circumstances if the court has no reason to believe that the alleged incapacitated person is represented by counsel:¹²

1. the person alleged to be incapacitated requests counsel;
2. the person alleged to be incapacitated wishes to contest the petition;
3. the person alleged to be incapacitated does not consent to the authority requested in the petition to move the person alleged to be incapacitated from where that person presently resides to a nursing home or other residential facility as those terms are defined in section two thousand eight hundred one of the public health law, or other similar facility;
4. if the petition alleges that the person is in need of major medical or dental treatment and the person alleged to be incapacitated does not consent;
5. the petition requests [temporary powers] the appointment of a temporary guardian pursuant to section 81.23 of this article;
6. the court determines that a possible conflict may exist between the court evaluator's role and the advocacy needs of the person alleged to be incapacitated;
7. if at any time the court determines that appointment of counsel would be helpful to the resolution of the matter.

(d) If the person refuses the assistance of counsel, the court may, nevertheless, appoint counsel if the court is not satisfied that the person is capable of making an informed decision regarding the appointment of counsel.

(e) [If the person alleged to be incapacitated resides in a facility, hospital, school, or an alcoholism facility as those terms are defined in section 1.03 of this chapter, a substance abuse program as that term is defined in section 19.03 of this chapter, an adult care facility as that term is defined in section two of the social services law, or a residential health care facility or a general hospital as those terms are defined in

¹² The appointment of counsel in guardianship proceedings has constitutional dimensions as discussed in a recent decision in the New York State Court of Appeals. *Matter of St. Luke's Roosevelt Hospital Center (Marie H.)* (Sup. Ct. N.Y. Co.), N.Y.L.J. Dec. 8, 1992, p.22.col.2, modified and remanded on appeal, 215 A. D.2d 337, 627 N.Y.S.2d 357 (1st Dept. 1995), aff'd, 226 A. D.2d 106, 640 N.Y.S.2d 73 (1st Dept. 1996), aff'd, 89 N.Y.2d 88 (1996). In that case, the trial court held that an indigent woman alleged to be incapacitated was constitutionally entitled to the appointment of counsel and the cost of counsel should be paid by the New York County 18-B panel. New York City has appealed this ruling twice: The city first appealed on the grounds that it had not received notice and a chance to be heard before being held responsible for the fee. The case was remanded for an evidentiary hearing. On remand, the trial court found the city should bear the cost. The City appealed again and the second time raised the constitutional issue. The Appellate Division, First Department affirmed the trial court's holding (1st Dept. April 2, 1996). The New York Court of Appeals affirmed holding that appointment of counsel was required by the statute and was constitutionally mandated because the alleged incapacitated person's liberty interests were at stake when he or she was the subject of a guardianship proceeding seeking to transfer the person to a nursing home and to make major medical decisions without the person's consent.

section two thousand eight hundred one of the public health law, t] The court may appoint as counsel the mental hygiene legal service in the judicial department where [the residence] venue is located.

(f) The court shall determine the reasonable compensation for the mental hygiene legal service or any attorney appointed pursuant to this section. The person alleged to be incapacitated shall be liable for such compensation unless the court is satisfied that the person is indigent. If the petition is dismissed, the court may in its discretion direct that petitioner pay such compensation for the person alleged to be incapacitated. When the person alleged to be incapacitated dies before the determination is made in the proceeding, the court may award reasonable compensation to the mental hygiene legal service or any attorney appointed pursuant to this section, payable by the petitioner or the estate of the decedent or by both in such proportions as the court may deem just.

The proposal limits the right to request a jury trial to the alleged incapacitated person and or that person's counsel.

Subdivision (f) of section 81.11 is amended to read as follows:

(f) If [any party to the proceeding] on or before the return date designated in the order to show cause the alleged incapacitated person or counsel for the alleged incapacitated person raises issues of fact regarding the need for an appointment under this article and demands a jury trial of such issues, the court shall order a trial by jury thereof. Failure to make such a demand shall be deemed a waiver of the right to trial by jury

The proposal addresses a timing problem under section 81.13. Under the current statutory scheme, it is conceivable that the hearing will be held after the date on which the statute requires that the decision be rendered. The amendment sets a more realistic time frame and yet still imposes a time frame for these cases so there is no undue delay.

Section 81.13 is amended to read as follows:

Unless the court, for good cause shown, orders otherwise, a proceeding under this article is entitled to a preference over all other causes in the court. Unless the court, for good cause shown, orders otherwise, the hearing or trial shall be conducted within the time set forth in subdivision (a) of section 81.07 of this article. A decision shall be rendered within [forty-five days of the date of the signing of the order to show cause] seven days after the hearing, unless for good cause shown, the court extends the time period for rendering the decision. In the event the time period is extended, the court shall set forth the

factual basis for the extension. The commission shall be issued to the guardian within fifteen days after the decision is rendered.

The proposal addresses the requirement of section 81.15 to send copies of the initial and annual reports to an incapacitated person who is unable to comprehend written material. The difficulty here is balancing the right of the incapacitated person to know what the guardian is doing against the dissemination of private material that the person is unable to understand. This amendment permits the court to decide whether the incapacitated person should receive these papers after it has had an opportunity to consider the limitations of the incapacitated person. It is consistent with having the court decide who is to receive notice of further proceedings.

Section 81.15 (b) is amended to read as follows:

(b) Where the petition requests the appointment of a guardian to provide for the personal needs for a person alleged to be incapacitated and the court determines that such person is incapacitated and that the appointment is necessary, the court shall make the following findings on the record:

1. the person's functional limitations which impair the person's ability to provide for personal needs;
2. the person's lack of understanding and appreciation of the nature and consequences of his or her functional limitations;
3. the likelihood that the person will suffer harm because of the person's functional limitations and inability to adequately understand and appreciate the nature and consequences of such functional limitations;
4. the necessity of the appointment of a guardian 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; [and]
6. the duration of the appointment[.];
7. whether the incapacitated person should receive copies of the initial and annual report.

Section 81.15 (c) is amended to read as follows:

(c) Where the petition requests the appointment of a guardian for property management for the person alleged to be incapacitated, and the court determines that the person is incapacitated and that the appointment of a guardian is necessary, the court shall make the following findings on the record:

1. the type and amount of the property and financial resources of the person alleged to be incapacitated;

2. the person's functional limitations which impair the person's ability with respect to property management;
3. the person's lack of understanding and appreciation of the nature and consequences of his or her functional limitations;
4. the likelihood that the person will suffer harm because of the person's functional limitations and inability to adequately understand and appreciate the nature and consequences of such functional limitations;
5. any additional findings that are required under section 81.21 of this article;
6. the necessity of the appointment of a guardian to prevent such harm;
7. if so, the specific powers of the guardian which constitute the least restrictive form of intervention consistent with the person's functional limitations and the likelihood of harm because of the person's inability to adequately understand and appreciate the nature and consequences of such functional limitations; [and]
8. the duration of the appointment[.];
9. whether the incapacitated person should receive copies of the initial and annual report.

An issue has been raised regarding the futility of reading of the order of appointment to the incapacitated person. That requirement should not be eliminated. Not every person found to be incapacitated is unable to understand information communicated to him or her. To the extent that the concern is that reading the order will not convey to the person the outcome of the proceeding, the requirement of notifying the person of the outcome of the case could be done in the same language used to require the court evaluator to tell the alleged incapacitated person about the commencement of the guardianship proceeding, i.e., "explaining to the person alleged to be incapacitated, in a manner which the person can reasonably be expected to understand, the nature and possible consequences of the proceeding" ¹³.

Subdivision (e) of section 81.16 is amended to read as follows:

(e) The order and judgment must be entered and served within ten days of the signing of the order. A copy of the order and judgment shall be personally served upon and [read to] explained to the person who is the subject of the proceedings in a manner which the person can reasonably be expected to understand by the court evaluator, or by counsel for the person, or by the guardian.

¹³ See Section 81.09(c)(2).

The proposal corrects an oversight in section 81.18. The word “in” was omitted in chapter 698 of the 1992 laws of New York. Section 81.18 is amended to read as follows:

Where the person alleged to be incapacitated is not present in the state and a guardian, by whatever name designated, has been duly appointed pursuant to the laws of any other state, territory, or country where the person alleged to be incapacitated resides to assist such person in property management, the court in its discretion, may make an order appointing the foreign guardian as a guardian under this article with powers with respect to property management within this state on the foreign guardian's giving such security as the court deems proper.¹⁴

Concern has been raised that the statute clarify that in addition to all the powers granted by the court, the guardian, by operation of law, should have all other powers formerly granted to guardians, committee or conservators of other statutes. New York's statutory law contains references to conservators, committees and guardians that were included in those laws before the enactment of Article 81. Any provision which automatically granted an Article 81 guardian all the powers contained in those laws would dilute the concept of a limited tailored guardianship. However, a reference to the ability of the court to grant specific powers would provide notice to the parties that powers in other statutes should be considered. The section is also amended to provide additional powers that will facilitate the guardian's management of the person's estate, including immediately after the person's death.

Subdivision (a) of section 81.21 is amended to read as follows:

¹⁴ It has been proposed that this section be amended to give the court the discretion to waive the appointment of a court evaluator or counsel. The section already gives the court that discretion and the issue has been addressed by case law. *See In re Sulzberger (Berry)*, 159 Misc.2d 236, 603 N.Y.S.2d 656 (Sup. Ct. N.Y. Co. 1993)(an ancillary guardianship proceeding for a person residing in France where the court appointed counsel rather than a court evaluator as otherwise required by statute using the discretion permitted it under section 81.18).

(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 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.

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.

Those powers which may be granted include, but are not limited to, the power to:

1. make gifts;
2. provide support for persons dependent upon the incapacitated person for support, whether or not the incapacitated person is legally obligated to provide that support;
3. convey or release contingent and expectant interests in property, including marital property rights and any right of survivorship incidental to joint tenancy or tenancy by the entirety;
4. exercise or release powers held by the incapacitated person as trustee, personal representative, guardian for minor, guardian, or donee of a power of appointment;
5. enter into contracts;
6. create revocable or irrevocable trusts of property of the estate which may extend beyond the incapacity or life of the incapacitated person;
7. exercise options of the incapacitated person to purchase securities or other property;
8. exercise rights to elect options and change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value;
9. exercise any right to an elective share in the estate of the incapacitated person's deceased spouse;
10. renounce or disclaim any interest by testate or intestate succession or by inter vivos transfer consistent with paragraph (c) of section 2-1.11 of the estates, powers and trusts law;
11. authorize access to or release of confidential records; and
12. apply for government and private benefits[.];
13. marshal assets;
14. pay the funeral expenses of the incapacitated person;
15. pay such bills as may be reasonably necessary to maintain the incapacitated person;
16. invest funds of the incapacitated person as permitted by section 11-2.3 of the estates, powers and trusts law;
17. lease the primary residence for up to three years;
18. retain an accountant
19. pay bills after the death of the incapacitated person provided the authority existed to pay such bills prior to death until a temporary administrator or executor is appointed;
20. defend or maintain any judicial action or proceeding to a conclusion until an executor or administrator is appointed.

The guardian may also be granted any power heretofore granted to committees and conservators and guardians by other statutes subject to the limitations, conditions, and responsibilities of the exercise thereof unless the granting of such power is inconsistent with the provisions of this article.

The proposal cross references section 81.22 regarding the guardian's authority to make life-sustaining treatment decisions to the provisions on life-sustaining treatment contained in section 81.29 to ensure that the statute's neutrality on that subject is clear. Paragraph (8) of subdivision (a) of section 81.22 is amended to read as follows:

8. consent to or refuse generally accepted routine or major medical or dental treatment subject to the provisions of subdivision (e) of section 81.29 of this article dealing with life sustaining treatment; the guardian shall make treatment decisions consistent with the findings under section 81.15 of this article and in accordance with the patient's wishes, including the patient's religious and moral beliefs, or if the patient's wishes are not known and cannot be ascertained with reasonable diligence, in accordance with the person's best interests, including a consideration of the dignity and uniqueness of every person, the possibility and extent of preserving the person's life, the preservation, improvement or restoration of the person's health or functioning, the relief of the person's suffering, the adverse side effects associated with the treatment, any less intrusive alternative treatments, and such other concerns and values as a reasonable person in the incapacitated person's circumstances would wish to consider;

The proposal addresses concerns regarding bond requirements. Trustees appointed pursuant to this article should have the same bond and reporting requirements as guardians. Trustees often will be appointed in lieu of a guardian to exercise powers of financial management over the corpus of the trust. The estate that the trustee controls should have the same protections against mismanagement and abuse as the estate controlled by a guardian. This amendment also includes language virtually identical to that in section 803 of the Surrogate's Court Procedure Act allowing the court to restrict some or all of the funds without further court order and to require a bond in the reduced amount. The assets so deposited may not be withdrawn without a further order of the court. The requirements regarding bonds should apply to all

persons who may be ordered by the court to post bond. This amendment clarifies the applicability of section 81.25 to all such persons.

Section 81.25 is amended to read as follows:

(a) Before the guardian, or special guardian appointed under this article, or a trustee of a trust created pursuant to this article, enters upon the execution of [the guardian's] his or her duties, the court may require or dispense with the filing of a bond.

(b) The court may require or dispense with the filing of a bond by the temporary guardian. If the temporary guardian is required to file a bond, such bond must be filed within ten days after the issuance of the temporary guardian's commission.

(c) If the value of the estate of the person for whom a guardian, special guardian, temporary guardian, or trustee is appointed is so great or for other sufficient reasons the court deems it inexpedient to require security in the full amount prescribed by law it may direct that all or part of the assets of the estate be delivered subject to the further order of the court to the county treasurer, or other proper fiscal officer, the clerk of the court or a trust company, bank or safe deposit company or otherwise restrict the authority of the guardian or trustee. The court may thereupon fix the amount of the bond taking into consideration the value of the remainder only of the estate. The assets so deposited shall not be withdrawn from the custody of the depository and no person other than the proper fiscal officer of such county or depository receive or collect any principal or income or other benefits derived from such assets without order of the court.

[(c)](d) Notwithstanding any other provision of this section, any community guardian program operating pursuant to the provisions of title three of article nine-B of the social services law, appointed as guardian pursuant to subdivision (a) of section 81.19 of this article, may file with the clerk of the court before the thirty-first day of January of each year, a consolidated undertaking up to the amount of one million five hundred thousand dollars, in lieu of filing individual undertakings for each incapacitated person for whom it serves as guardian, as required by subdivision (a) of this section. To the extent of the aggregate value of such consolidated undertaking, the community guardian program will certify to the clerk of the court faithful discharge of the trust imposed upon it, obey all directions of the court in regard to the trust, and make and render a true account of all properties received by it and the application thereof and of its acts in the administration of its trust whenever so required to do by the court. At such time as the aggregate amount of the individual bonds, fixed by the court pursuant to subdivision (a) of this section for persons for whom the community guardian program is appointed guardian, shall exceed the consolidated bond filed by such program, the program shall before entering upon the execution of its duties, file with the clerk of the court individual undertakings, in the amounts fixed by the court, that it will faithfully discharge the trust imposed upon it.

[(d)](e) If the court requires the filing of a bond, the guardian or special or temporary guardian, or trustee, appointed under this article shall file with the clerk of the court by which such guardian was appointed a bond that he or she will faithfully discharge the powers granted by the court to the guardian or special or temporary guardian, or trustee, obey all directions of the court in regard to the powers, and make and render a true account of all properties received by him or her and the application thereof and a

true report of his or her acts in the administration of his or her powers, whenever so required to do by the court. The amount of the bond shall be fixed by the court. If the guardian, special or temporary guardian, or trustee, receives after-acquired property not covered by the bond, such guardian, special or temporary guardian, or trustee, shall immediately have such acquisition approved by the court and file a further bond.

The language regarding how the compensation of a guardian is to be calculated has been a concern for many persons since its enactment. The scheme for compensating trustees cited in section 81.28 is based on the fact that the flow of money in and out of the guardianship estate is similar to that of a trust. While section 81.28 does not require the court to follow SCPA 2309, some have argued that the court must follow that scheme and, that if court does, the guardian will be paid less than if the court were to follow the scheme for executors. Compensating guardians in the same manner as executors was the practice under Article 77 (conservators) even though Article 77 was silent regarding any formula for calculating compensation.

One alternative would be to remove any reference to the SCPA; another would be to develop a specific payment scheme for guardians. Guardianship statutes in other states generally do not have such schemes; they usually discuss compensation only in terms of a "reasonable compensation." A statutory schedule for compensating guardians requires additional study so it is not proposed at this time. This amendment eliminates the language regarding SCPA 2309 to clarify that the courts are not bound by that scheme in devising compensation for the guardian.

The current statute does not specifically address compensating a guardian for services that fall into the category of case management or personal care services, such as visiting once a week, buying clothes, calling the physician - essentially becoming personally involved so the amendment clarifies that these services can be compensated.

Section 81.28 is amended to read as follows:

(a) The court shall establish, and may from time to time modify, a plan for the reasonable compensation of the guardian or guardians. The plan for compensation of the guardian [may be similar to the compensation of a trustee pursuant to section two thousand three hundred nine of the surrogate's court procedure act; however, the plan] must take into account the specific authority of the guardian or guardians to provide for the personal needs and/or property management for the incapacitated person, and the services provided to the incapacitated person by the guardian.

(b) If the court finds that the guardian has failed to discharge his or her duties satisfactorily in any respect, the court may deny or reduce the compensation which would otherwise be allowed.

Currently, section 81.29 restricts the statutory authority of the court to revoke durable powers of attorney to cases where the power was executed while the person was incapacitated. This limitations on revoking durable powers of attorney reflected several concerns. It recognized that New York's public policy favors self-determination through the use of powers of attorney and other advance directives. Even in an Article 81 proceeding, the wishes of an incapacitated person are given great weight. It was also intended to ensure that in determining the appropriate relief for the individual's needs the court consider less restrictive alternatives to guardianship. In fact, in several cases decided under Article 81, an already existing power of attorney has been found to be a reliable appropriate alternative. Finally, the statutory limitations on the guardian and the court reflected a determination that guardianship proceedings not be viewed as a weapon in the arsenal of warring siblings and others who wish to undo powers of attorney for selfish motives.

Notwithstanding these concerns, there has been anecdotal evidence as well as several reported cases under Article 81 which indicate that guardianship proceedings often expose wrongdoing by attorneys-in-fact. Frequently, the power of attorney or health care proxy was executed prior to the person's loss of capacity and the attorney-in-fact is now failing to carry out the responsibilities of her

position at a critical time when she is most needed or worse yet is taking advantage of the person's incapacity to abuse the principal physically and/or exploit her financially. Faced with these scenarios, an interested party such as a relative, hospital, or social services official will often seek relief in court.¹⁵

At present, article 81 does not provide statutory relief in those situations; the court or guardian must look to the law governing the particular instrument of the agent's authority.

The Public Health Law outlines a special proceeding that can be brought in cases involving a health care proxy to override the agent's decision or remove an agent where the agent is "not reasonably available, willing and competent to fulfill his or her obligations."¹⁶ The General Obligations Law which governs powers of attorney does not provide a similar procedure for challenging a power of attorney. Consequently, the courts have relied on their inherent power to provide appropriate relief. The proposal provides statutory authority to address such situations

Consistent with amending section 81.03 to include the definition of life sustaining treatment that is contained in section 81.29(e), section 81.29(e) is amended to delete the definition for the sake of clarity and to avoid unnecessary confusion.

Subdivision (d) of section 81.29 is amended to read as follows:

(d) If the court determines that the person is incapacitated and appoints a guardian, the court may modify, amend, or revoke any previously executed appointment, power, or delegation under section 5-1501, [5-1601, or 5-1602] 5-1505, or 5-1506 of the general obligations law or section two thousand nine hundred sixty-five of the public health law, or section two thousand nine hundred eighty-one of the public health law notwithstanding section two thousand nine hundred ninety-two of the public health law, or any contract, conveyance, or disposition during lifetime or to take effect upon death, made by the incapacitated person prior to the appointment of the guardian if the court finds that the previously executed

¹⁵ See, e.g., *In re Wingate*, 169 Misc.2d 701, 647 N.Y.S.2d 433 (Sup. Ct., Queens Co. 1996); *In re Rochester General Hospital (Levin)*, 158 Misc. 2d 522, 601 N.Y.S.2d 375 (Sup. Ct., Monroe Co. 1993).

¹⁶ N.Y. Pub. Health Law §2992.

appointment, power, delegation, contract, conveyance, or disposition during lifetime or to take effect upon death, was made while the person was incapacitated[.] or if the court finds that there has been a breach of fiduciary duty by the previously appointed agent. In such event, the court shall require that the agent account to the guardian.

Subdivision (e) of section 81.29 is amended to read as follows:

(e) Nothing in this article shall be construed either to prohibit a court from granting, or to authorize a court to grant, to any person the power to give consent for the withholding or withdrawal of life sustaining treatment, including artificial nutrition and hydration. [When used in this article, life sustaining treatment means medical treatment which is sustaining life functions and without which, according to reasonable medical judgment, that patient will die within a relatively short time period.]

The proposal amends section 81.30 to permit MHLS to monitor the cases in which it has acted as counsel or court evaluator and clarifies which court should receive the initial report. Section 81.30 is amended to read as follows:

(a) No later than ninety days after the issuance of the commission to the guardian, the guardian shall file with the court that appointed the guardian a report in a form prescribed by the court stating what steps the guardian has taken to fulfill his or her responsibilities. Proof of completion of the guardian education requirements under section 81.39 of this article must be filed with the initial report.

(b) To the extent that the guardian has been granted powers with respect to property management, the initial report shall contain a verified and complete inventory of the property and financial resources over which the guardian has control, the location of any will executed by the incapacitated person, the guardian's plan, consistent with the court's order of appointment, for the management of such property and financial resources, and any need for any change in the powers authorized by the court.

(c) To the extent that the guardian has been granted powers regarding personal needs, the initial report shall contain a report of the guardian's personal visits with the incapacitated person, and the steps the guardian has taken, consistent with the court's order, to provide for the personal needs of that person, the guardian's plan, consistent with the court's order of appointment, for providing for the personal needs of the incapacitated person, a copy of any directives in accordance with sections two thousand nine hundred sixty-five and two thousand nine hundred eighty-one of the public health law, any living will, and any other advance directive, and any necessary change in the powers authorized by the court. The plan for providing for the personal needs of the incapacitated person shall include the following information:

1. the medical, dental, mental health, or related services that are to be provided for the welfare of the incapacitated person;

2. the social and personal services that are to be provided for the welfare of the incapacitated person;

3. any physical, dental, and mental health examinations necessary to determine the medical, dental, and mental health treatment needs; and

4. the application of health and accident insurance and any other private or government benefits to which the incapacitated person may be entitled to meet any part of the costs of medical, dental, mental health, or related services provided to the incapacitated person.

(d) If the initial report sets forth any reasons for a change in the powers authorized by the court, the guardian shall make an application within ten days of the filing of the report on notice to the persons entitled to such notice in accordance with paragraph one of subdivision (d) of section 81.07 of this article for such relief. If the initial report sets forth any reasons for a change in the powers authorized by the court and the guardian fails to act under this subdivision, any person entitled to commence a proceeding under this article may petition the court for a change in such powers on notice to the guardian and the persons entitled to such notice in accordance with paragraph one of subdivision (d) of section 81.07 of this article for such relief.

(e) The guardian shall send a copy of the initial report to the incapacitated person by mail unless the court orders otherwise pursuant to subdivisions (b)(7) and (c)(8) of section 81.15.

(f) The guardian shall send a copy of the initial report to the court evaluator and counsel for the incapacitated person at the time of the guardianship proceeding unless the court orders otherwise pursuant to subdivisions (b)(7) and (c)(8) of section 81.15.

(g) The guardian shall send a copy of the initial report to the court examiner.

(h) If the incapacitated person resides in a facility, the guardian shall send a duplicate of such report to the chief executive officer of that facility.

(i) If the incapacitated person resides in a mental hygiene facility, the guardian shall send a duplicate of such report to the mental hygiene legal service of the judicial department in which the residence is located.

The proposal makes the requirements of section 81.31 consistent with the requirement added by an amendment to section 81.15 that the court determine whether the incapacitated person will receive a copy of the initial and thereafter the annual report. This amendment also permits MHLS to monitor the cases where it acted as court evaluator or counsel. This amendment makes the filing requirements for the annual reports uniform throughout New York. Subdivision (c) of section 81.31 is amended to read as follows:

(c) The guardian shall send a copy of the annual report to the incapacitated person by mail unless the court orders otherwise pursuant to subdivisions (b)(7) and (c)(8) of section 81.15, shall send

a copy of the annual report the court examiner, and shall file a copy of the annual report as provided herein. If the incapacitated person resides in a facility,[hospital, school, or an alcoholism facility in this state as those terms are defined in section 1.03 of this chapter, a substance abuse program as that term is defined in section 19.03 of this chapter, an adult care facility as that term is defined in section two of the social services law, a residential health care facility or a general hospital as those terms are defined in section two thousand eight hundred one of the public health law,] the guardian shall send a duplicate of such report to the chief executive officer of that facility [and] .If the incapacitated person resides in a mental hygiene facility, the guardian shall send a duplicate of such report to the mental hygiene legal service of the judicial department in which the residence is located. If mental hygiene legal service was appointed as court evaluator or as counsel for the incapacitated person at the time of the guardianship proceeding, the guardian shall send a duplicate of such report to the mental hygiene legal service of the judicial department where venue of the guardianship proceeding was located if so ordered by the court.

(d) The report shall be filed in the office of the clerk of the [county in which the incapacitated person last resided before the appointment of the guardian if he or she was at such time a resident of the city of New York. If the incapacitated person was not then a resident of the city of New York, it shall be filed in the office of the clerk of the] court which appointed the guardian.

(e) If the annual report sets forth any reasons for a change in the powers authorized by the court, the guardian shall make an application within ten days of the filing of the report on notice to the persons entitled to such notice in accordance with paragraph three of subdivision (c) of section 81.16 of this article for such relief. If the annual report sets forth any reasons for a change in the powers authorized by the court, and the guardian fails to act in accordance with this subdivision, any person entitled to commence a proceeding under this article may petition the court for a change in such powers on notice to the guardian and the persons entitled to such notice in accordance with paragraph three of subdivision (c) of section 81.16 of this article for such relief.

The proposal clarifies that intermediate and final reports filed because the incapacitated person has died are not required to include information concerning the functional abilities and treatment of the incapacitated person and also conforms this section in a manner consistent with the third amendment which defines “facility” and removes the repetitious language from the statute.

Subdivisions (a) and (b) and (f) of section 81.33 are amended to read as follows:

(a) A guardian may move in the court of his or her appointment for an order permitting him or her to render an intermediate report to the date of the filing thereof in a form prescribed by the court which shall include the same information as is required under section 81.31 of this article provided, however, that if the incapacitated person has died the report need not include information otherwise required in paragraphs 5 and 6 of subdivision (b). The court may order the report to be filed with the clerk of the court on or before a fixed date.

(b) When a guardian dies or is removed, suspended, discharged pursuant to the provisions of this article, or allowed to resign, the court shall order a final report in a form prescribed by the court which shall include the same information as is required under section 81.31 of this article provided, however, that if the incapacitated person has died the report need not include information otherwise required in paragraphs 5 and 6 of subdivision (b). When such a report has been made in the course of a proceeding to remove a guardian, the court may dispense with a further report.

(c) Notice of the filing of a report under this section shall be served upon the persons entitled to notice pursuant to paragraph three of subdivision (c) of section 81.16 of this article. If the incapacitated person is deceased, notice shall also be served upon his or her executor or administrator, if any.

(d) The court may appoint counsel for the incapacitated person, if living, for the protection of such person's rights and interests with regard to such report. The court may appoint a referee to hear the matter and report to the court.

(e) Upon the motion for a confirmation of the report of the referee, or if the report is made before the court, upon the court's determination, the report shall be judicially approved and filed. The compensation of the referee and of counsel shall be fixed by the court and shall be payable out of the estate of the incapacitated person unless it is determined that the incapacitated person is indigent.

(f) If the incapacitated person resides in a facility[, hospital, school or an alcoholism facility, as those terms are defined in section 1.03 of this chapter, a substance abuse program as that term is defined in section 19.03 of this chapter, an adult care facility as that term is defined in section two of the social services law, or a residential health care facility or a general hospital as those terms are defined in section two thousand eight hundred one of the public health law], a copy of a report under this section shall be served upon the chief executive officer in charge of that facility and upon the mental hygiene legal service of the judicial department in which the residence is located.

The proposal incorporates a grammatical correction into section 81.36.

Paragraph (3) of subdivision (a) of section 81.36 is amended to read as follows:

3. the incapacitated person [dies] has died; or

The proposal permits an expedited proceeding in cases where the need of for the guardian to exercise additional powers is clear and no objections are raised and makes subdivision of section 81.36 consistent with section 81.11(f) which limits the right to seek a jury trial to the alleged incapacitated person and his or her counsel.

Subdivision(c) of section 81.36 is amended to read as follows:

(c) There shall be a hearing on notice to the persons entitled to notice pursuant to paragraph three of subdivision (c) of section 81.16 of this article. The court may for good cause shown dispense with the hearing provided that an order of modification increasing the powers of the guardian shall set forth the factual basis for dispensing with the hearing. If [any party to the proceeding] the incapacitated person or his or her counsel raises an issue of fact as to the ability of the incapacitated person to provide for his or her personal needs or property management and demands a jury trial of such issue, the court shall order a trial by jury thereof.

Finally, the proposal corrects the numbering of section 81.44.

Section 81.44 of the mental hygiene law as amended by chapter 32 of the laws of 1993 is amended to read as follows:

Section 81.4[4]3 Proceedings to discover property withheld.