

RE:

Submitted by: New York State Law Revision Commission

MEMORANDUM IN SUPPORT

TITLE OF BILL: An act to amend Article 81 of the Mental Hygiene Law in relation to the appointment of guardians for personal needs and/or property management

PURPOSE: This bill clarifies a number of questions that have been raised through the implementation of the guardianship law codified at article eighty-one of the mental hygiene law, to eliminate redundant language, and to correct few grammatical errors.

SUMMARY OF MAJOR SPECIFIC PROVISIONS:

The definition of “available resources” is amended to include health care proxies and definitions are added for “life-sustaining treatment” which currently appears at section 81.29(e) of the statute, and definitions for “facility” and “mental hygiene facility,” two terms that are used frequently throughout the statute.

The venue provision regarding the surrogate’s court over article 81 proceedings is conformed to that of the other courts which have jurisdiction over guardianship proceedings to stream line guardianship proceedings that arise in the context of a probate proceeding.

The bill clarifies the authority of a Chief Executive Officer of an institution, or the CEO’s designee, to commence a guardianship proceeding

The provision relating to the order to show cause and notice are clarified with respect to when an article 81 proceeding is commenced, the time frame for signing and hearing an order to show. Service of the petition and accompanying papers containing medical and financial information is limited to the alleged incapacitated person, his or her appointed or retained counsel, and the court evaluator. All other persons entitled to be informed of the proceeding will receive notice of the proceeding which 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 and information regarding the hearing. Medical evidence in the form of affidavits from health care practitioners is not required in support of the petition.

The petition must identify the persons who are entitled to receive notice of the proceeding and must include 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.

The court may appoint mental hygiene legal services (MHLS) or a not-for-profit corporation as a court evaluator.

The court may appoint MHLS as counsel in any case. If the alleged incapacitated person retains counsel after counsel has been appointed, the appointed counsel shall continue his or duties until the court has determined that retained counsel has been chosen freely and independently by the alleged incapacitated person.

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

The court may decide whether the incapacitated person should receive copies of the initial and annual report after it has had an opportunity to consider the limitations of the incapacitated person.

A copy of the order and judgment must be personally served upon and 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.

Additional powers that will facilitate the guardian's management of the person's estate, including immediately after the person's death, are added to the statute, including power to 3. marshal assets, pay such bills as may be reasonably necessary to maintain the person, invest funds as permitted by section 11-2.3 of the estates, powers and trusts law, lease the primary residence for up to three years, retain an accountant, pay funeral expenses, pay bills after the death of the incapacitated person until a temporary administrator or executor is appointed, 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.

Trustees appointed pursuant to this article would have the same bond and reporting requirements as guardians. The proposal 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.

This proposal eliminates the language regarding SCPA 2309 to clarify that the courts are not bound by that scheme in devising compensation for the guardian. and addresses the need to compensate a guardian for his or her services that fall into the category of case management or personal care services.

The court can revoke previously executed appointments by the incapacitated person if it finds 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.

The proposal permits the court to require MHLS to monitor the cases in which it has acted as counsel or court evaluator and clarifies which court should receive the initial report.

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 limits the right to seek a jury trial on a request for modification to the alleged incapacitated person and his or her counsel.

STATEMENT IN SUPPORT:

This bill has been introduced at the request of the New York State Law Revision Commission. 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 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.

Based on its continuing study of the statute, the Commission believes that guardianship proceedings are working as the statute intended. However, the Commission also believes that certain parts of the statute could benefit from clarification to address confusion, practicalities and inconsistent practices across the state. The Commission's proposal addresses confusion regarding the definition of available resources, the guardian's authority to withdraw or withhold life sustaining treatment, revoking an abusive agent's authority. The Commission's proposal addresses practicalities regarding what individuals should be entitled to receive the detailed medical, financial and personal information contained in the petition and who should receive notice of the proceedings, the authority of a CEO's designee to institute a guardianship proceeding, venue in Surrogate's Court, the discretion of the Court to appoint MHLS as court evaluator or counsel in any case to provide some relief where the alleged incapacitated person is indigent, the right to a jury trial, the power of the guardian to act, particularly immediately after the death of the incapacitated person, whether the limitations of the incapacitated person render unnecessary his or her receipt of the initial and annual reports. The Commission's proposal addresses inconsistent practices regarding requiring medical affidavits in support of the petition and compensation.

The Commission recommends, therefore, that article 81 of the Mental Hygiene Law be amended to accomplish these goals.

FISCAL IMPLICATIONS: None

EFFECTIVE DATE: This act shall take effect on the first day of January next succeeding the date on which it shall have become law.