

New York State Law Revision Commission

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

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN THE SENATE AND THE ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Subdivision (e) of section 81.03, as added by chapter 698 of the laws of 1992, is amended to read as follows:

(e) "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.

§ 2. Section 81.03 is amended by adding a new subdivision (j) 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. Section 81.03 is amended by adding a new subdivision (k) 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.

§ 4. Section 81.03 is amended by adding a new subdivision (l) to read as follows :

(l) mental hygiene 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,

§ 5 Subdivision (b) of section 81.04, as added by chapter 698 of the laws of 1992, 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.

§ 6 Section 81.05, as added by chapter 698 of the laws of 1992, 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.

§ 7 Paragraph (7) of subdivision (a) of section 81.06, as added by chapter 698 of the laws of 1992, is amended to read as follows:

(7) 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.

§ 8 Section 81.07, as added by chapter 698 of the laws of 1992, 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.

. 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.]

§ 9 Paragraph (2) of subdivision (a) of section 81.08, as added by chapter 698 of the laws of 1992, 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;

§ 10 Paragraph (5) of subdivision (a) of section 81.08, as added by chapter 698 of the laws of 1992, 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.

§ 11 Section 81.09, as added by chapter 698 of the laws of 1992, 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.

§ 12 Section 81.10, as added by chapter 698 of the laws of 1992, 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 her 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:

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 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.

§ 13 Subdivision (f) of section 81.11, as added by chapter 698 of the laws of 1992, 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

§ 14 Section 81.13, as added by chapter 698 of the laws of 1992, 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.

§ 15 Subdivision (b) of section 81.15, as added by chapter 698 of the laws of 1992, 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.

§ 16 Subdivision (c) of section 81.15, as added by chapter 698 of the laws of 1992, 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.

§ 17 Subdivision (e) of section 81.16, as added by chapter 698 of the laws of 1992, 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.

§ 18 Section 81.18, as added by chapter 698 of the laws of 1992, 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.

§ 19 Subdivision (a) of section 81.21, as added by chapter 698 of the laws of 1992, is amended to read as follows

(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. marshall 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.

§ 20 Paragraph (8) of subdivision (a) of section 81.22, as added by chapter 698 of the laws of 1992, 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;

§ 21 Section 81.25, as added by chapter 698 of the laws of 1992, 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.

§ 22 Section 81.28, as added by chapter 698 of the laws of 1992, 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.

§ 23 Subdivision (d) of section 81.29, as added by chapter 698 of the laws of 1992, 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 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 determines 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.

§ 24 Section 81.30, as added by chapter 698 of the laws of 1992 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.

§25 Subdivision (c) of section 81.31, as added by chapter 698 of the laws of 1992, 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.

§ 26 Section 81.33, as added by chapter 698 of the laws of 1992, is 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.

§ 27 Paragraph (3) of subdivision (a) of section 81.36, as added by chapter 698 of the laws of 1992, is amended to read as follows:

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

§ 28 Subdivision(c) of section 81.36, as added by chapter 698 of the laws of 1992, 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.

§ 29 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.