
MHL ARTICLE 81

and related matters

COLLECTED CASES
(Current through January 31, 2007)

Mental Hygiene Legal Service

Second Judicial Department

Sidney Hirschfeld, Director

Lesley Magaril De Lia, Deputy Director

TABLE OF CONTENTS

I.	RELATIONSHIP BETWEEN ARTICLE 81 & OTHER PROVISIONS OF LAW	1
	1
A.	MHL Article 78	1
B.	SCPA 17-A and SCPA 17 (and other matters involving minors)	2
C.	Guardian <i>ad litem</i>	3
	(i) Generally	3
	(ii) Does not have authority to consent to settlement of behalf of Ward	5
	5
	(iii) Does have authority to consent to settlement on behalf of Ward	6
D.	Powers of attorney/health care agents/trustees	7
E.	Testamentary capacity/Revocation of Wills	12
F.	Matrimonial law	14
G.	Habeas corpus	14
H.	MHL Art 79 (Guardianship for Veterans)	14
I.	Collections Matters	15
II.	FUNCTIONAL LIMITATIONS/ALTERNATIVE RESOURCES/BEST INTERESTS OF IP	16
III.	EFFECT OF GUARDIANSHIP ON RIGHTS OF AIP	24
	24
A.	Transfer to nursing home	25
B.	Consent to psychiatric hospitalization and treatment	26
C.	Withholding of life-sustaining treatment	27
D.	Voiding questionable marriages and other contracts	28

E.	Use of AIP’s funds	30
F.	AIP’s right to sue or be sued	31
G.	Limitations on Guardian’s powers	35
H.	Power to do Estate and Medicaid planning	36
	(i) Substituted judgment	36
	(ii) Medicaid Planning trusts: Supplemental Needs/Pooled Trusts	42
	a. Funds that can be placed into trust	42
	(i) Personal injury awards/own funds	42
	(ii) Inheritances	45
	(iii) Income and benefits	46
	b. Proper trustees	47
	c. Pooled trusts	49
	d. Notice to and Involvement of local DSS	50
	e. Creation of SNT/Proper petitions and petitioners	51
	f. Proper Court	52
	g. Reformation of Trusts to SNTs	52
	h. Trustee Compensation/Legal Fees	53
	i. Court supervision of trusts	53
	j. Termination of trust	54
I.	Voiding previously executed legal instruments including Wills, Conveyances, Contracts, Health Care Proxies and Powers of Attorney	55
J.	Guardian may waive professional privileges on behalf of ward	56
K.	Guardian's power to protect ward's assets	57
L.	Least restrictive alternative/Deprivation of liberty	57

M.	Major medical decisions	58
N.	AIP As Incapacitated Fiduciary	59
O.	Change of IP's domicile	59
P.	Right/Obligation to Testify	60
IV.	GUARDIANS	60
A.	Proper guardians	60
(i)	Preference for Family Members Unless Unfit or Conflict	60
(ii)	Public agencies	67
(iii)	Out of State/Foreign guardians	69
(iv)	Counsel or court evaluator as guardian	69
B.	Temporary guardians	70
C.	Special Guardians	71
D.	Nomination of guardians	72
E.	Breach of fiduciary duty/removal /sanctions	73
F.	Discharge/Termination	76
G.	Multiple wards	77
H.	Compensation	78
I.	Co-Guardians	83
J.	Defacto Guardians	84
K.	Whether a Power is a Personal or Property Power	84
V.	PROCEDURAL MATTERS	85
A.	Petitions and petitioners	85
B.	Service and Returns of Petitions and Orders to Show Cause	87

(i)	Proper and timely Service	87
(ii)	Notice of Petition	88
a.	Validity of Constitutionality and statutory arguments	88
b.	Who is entitled to the Petition?	89
C.	Jurisdiction and Venue	89
D.	Counsel	94
(i)	Appointment and disqualification	94
(ii)	Counsel fees	95
a.	Responsibility for payment of counsel fees	95
(i)	AIP's funds	96
(ii)	Petitioner	97
(iii)	Payment of fees pursuant to County Law 18-B	99
(iv)	Public agencies	100
(v)	Non-petitioning Nursing home	100
(vi)	Non-party intervenor	101
(vii)	"The bar in general "	102
b.	To whom fees paid	102
(i)	Retained counsel	102
(ii)	Counsel for Cross - petitioners	104
(iii)	Counsel for Public agencies and MHLS	104
(iv)	Counsel for guardians/conservators	104
(v)	Counsel for Guardian's surety	104
(vi)	Counsel for non - party	105
c.	Reasonableness of fee requested	105

	d.	Proper Court to award fees Surrogate's or Supreme	108
	e.	Fees set by other courts	109
		(i) Foreign courts not binding	109
		(ii) Other New York Courts	110
E.		Court Evaluators	110
	(i)	Role	110
	(ii)	Appointment	111
	(iii)	Compensation	111
	(iv)	Report as evidence	114
F.		Hearings	115
	(i)	Hearing required	115
		a. Presence of AIP at hearing / Bedside hearings	117
	(ii)	Medical Testimony not required	118
	(iii)	Applicability of rules of evidence	120
	(iv)	Clear and convincing evidence	121
	(v)	Confidentiality issues	121
		a. Physician-patient privilege	121
		b. Social Worker - Client Privilege	123
		c. Access to DSS records	123
		d. Sealing of Courtroom/Court records	124
		e. Fifth amendment	125
	(vi)	Jury trials	126
	(vii)	Court's consideration of best interest and wishes of AIP	126

(viii)	Burden of proof	126
(ix)	Appointment of Independent Psychiatrist	127
(x)	Findings	127
G.	Intervenors	127
H.	Sanctions	128
(i)	Frivolous Petitions	128
(ii)	Discovery	129
I.	Discontinuance	130
J.	Death of AIP	131
K.	Payment of Rent or hospital charges during pendency of Art. 81 proceeding - stay of evictions	134
L.	Appeals	135
M.	Part 36 Rules	137
N.	Secondary Appointments	138
(i)	Counsel	138
O.	Filing fees	139
P.	Parties / Non -parties	139
(i)	Court Evaluator	140
(ii)	Individuals entitled to notice under MHL 81.07(e)	140

Case Summaries

I. RELATIONSHIP BETWEEN ARTICLE 81 & OTHER PROVISIONS OF LAW

A. MHL Article 78

Matter of Dennis Diaz, NYLJ, 7/6/04, p. 21 (Sup. Ct, Queens Cty.)(Taylor, J.)

After an Article 81 hearing, a disabled man was found to be in need of a guardian of the person and property. He was found, among other things, to have the functional level of approximately a 5th grader and specifically to be in need of assistance in handling his own finances. Before a guardian could be bonded and qualified, he retained counsel and entered into a contract of sale to purchase a tavern with his own funds. Under pre-Art 81 law, contracts entered into by persons adjudicated incompetent and who have committees or conservators are presumptively void. Contracts with persons who do not have committees or conservators but are of unsound mind and unable to appreciate the consequences of their own actions were considered voidable. Article 81 does not result in a finding of incompetence but rather only findings of specific functional limitations and guardianship powers tailored to be the least restrictive form of intervention. This AIP was found to lack the ability to handle his own finances so here, the Court does void and revoke the contract.

Matter of D.S., NYLJ, 10/31/01, (Sup. Ct., Suff. Cty.) (Berler, J.)

Although CPLR 1201 refers to service of legal papers on incompetents and conservatees and it should also be construed to include incapacitated persons for whom Art. 81 guardians have been appointed.

Matter of Stephen D., 190 Misc2d 760, 739 N.Y.S.2d 913 (Surr. Ct., Bronx Cty. 2000) (Hotzman, Surr.)

Where MHL Art 77 conservator dies after date of repeal of MHL Art.77, court can fill the vacancy by appointing an Art. 81 guardian and it is at the discretion of the court whether to hold a hearing under MHL §81.38.

Matter of Lois "F" (Ruth "F"), 209 AD2d 856; 618 NYS2d 920 (3d Dept., 1994)

Where committee was properly appointed under MHL Art. 78, appointment survived repeal of Article 78 and enactment of MHL Article 81. Legislature plainly intended to give full force and effect to prior determinations.

Matter of Beritely (Luberoff), NYLJ, 12/8/95, p. 25 col. 1 (Sup. Ct., Suff. Cty.)(Luciano, J.)

Conservator sought to convert MHL Art. 78 conservatorship into guardianship. Court found petition deficient for not describing functional level of man, who had bi-polar disorder. Court evaluator's testimony and report, however, proved guardian was needed. Court named co-guardians for property and allowed AIP's elderly mother to resign as co-conservator and become co-guardian of personal needs.

Matter of Shea (Buckner), 157 Misc2d 23, 595 NYS 2d 862 (Surr. Ct., NY Cty., 1993)

Art. 81 empowers courts to grant broader powers to guardians than Art. 77 and 78 authorized for conservators and committees.

B. SCPA 17-A and SCPA 17 (and other matters involving minors)

Ianazzi v. Seckin, NYLJ, 12/9/02 (Sup. Ct., Kings Cty.)(Pesche,J)

Although not the issue in this case, this is an example of a case in which there is an Art 81 guardian for a minor.

Matter of Guardianship of B., 190 Misc2d 581,738 NYS2d 528 (Sup. Ct., Tompkins Cty. 2002)(Peckham, A.J.)

There would be no rational basis, and, therefore, a denial of equal protection of the laws for saying that the ability of a guardian for a mentally retarded person to consent to medical treatment of the ward should differ if the guardian is appointed under Article 81 rather than Art 17-A. Therefore an Art. 81 guardian can consent to a tubal ligation for an IP.

Matter of Forcella, 188 Misc2d 135, 726 NYS2d 243 (Sup. Ct., Suff Cty. 2001) (See also, NYLJ story concerning Matter of Forcella and Matter of Rooney, NYLJ, May 24, 2001, p.1)

"Article 81 does not expressly preclude its application to infants suffering from disabilities. Nevertheless, in its formulation there appears to have been a consensus that Article 81 was intended for proceedings involving adults, not infants." Court reasons that infants are provided for in SCPA 17 and disabled infants are provided for in SCPA 17-A.

Matter of Cruz, (Sup. Ct., NY Cty.) (Lebedeff, J.);2001 Slip Op. 400083U; See also, NYLJ 7/26/01 p. 1. col. 5 (NYLJ story). 2001 NY Misc LEXIS 546.

Where child, disabled by a birth trauma had profoundly disability expected to continue through adulthood, court find that Article 81 is appropriate for minors stating: "There is... language in the statute which supports its application to minors and no language that precludes such

application."

Matter of La Vecchia, 170 Misc. 2d 211; 650 NYS2d 955 (Sup. Ct., Rockland Cty., 1996)

Article 81 applies to disabled adults, not minors (SCPA Art. 17) or mentally retarded/developmentally disabled adults (SCPA 17-A).

Contrast

In re: DOE, 181 Misc2d 787; 696 NYS2d 384 (Sup. Ct., Nassau Cty., 1999)

Art. 81 applies to persons of any age, and does not necessarily exclude minors.

Matter of Marmol (Pineda), 168 Misc2d 845; 640 NYS2d 969 (Sup. Ct., NY Cty., 1996)

Art. 81 may be utilized in lieu of **CPLR Article 12** to authorize appointment of guardian for incapacitated infant to withdraw funds from infant's personal injury settlement. Funds may be used to pay for "unusual circumstances" necessitated by child's disability irrespective of parents' ability to pay for them, and for expenses reasonably necessary for infant's maintenance, if justified by financial circumstances of family.

Matter of Daniel K. Le and Young, 168 Misc2d 384; 637 NYS2d 614 (Sup. Ct., Queens Cty., 1995)

Court appoints guardian for 10 year old boy.

C. Guardian *ad litem*

(i) Generally

Estate of Murray, Misc3d; 2006 N.Y. Misc. LEXIS 3602 (Surr. Ct., Erie Cty. 2006)

Although many Surrogate's Courts in this State, as a policy, have been interpreting SCPA 401, 402 and 403 to mean that a validly appointed attorney-in-fact may not appear on behalf of a disabled individual in an estate administration proceeding because the statutes do not enumerate them in the list of parties who may appear, the court revisited, and changed that policy in light of the public policy behind Article 81 that there be liberal use and recognition of the efficacy of powers of attorney. The court stated that a formal plan for handling the incapacitated person's property interests validly established by her should not be lightly set aside or disregarded by the courts.

Estate of Lucy Lovito, NYLJ, October 11, 2006, (Surr Ct, Westchester Cty), (Surr. Scarpino)

When seeking appointment of a Guardian Ad Litem (“GAL”) the issue to be adjudicated is not whether the proposed ward is mentally incompetent, but whether he is a 'person under disability' within the meaning of SCPA 103(40) for whom a GAL must be appointed under SCPA 403[2]. A 'person under disability' includes an 'incapacitated person', which is defined as '[a]ny person who for any cause is incapable adequately to protect his or her rights ... (SCPA 103[25]). The fact that a party has appeared by an attorney-in-fact or retained counsel is not dispositive of this issue. Appointment of a GAL is not governed by either CPLR Article 12 or MHL Article 81. Instead, the issue is governed by SCPA 403(2), which provides that any 'person under disability' who does not appear by his guardian, committee or conservator pursuant to SCPA 402 shall appear by a GAL, unless certain circumstances set forth in SCPA 403(3) are present.

Beach Haven Apartments, Assoc. LLC v. Riggs, NYLJ, July 20, 2005, p.20 col. 1 (Civ Ct, Kings Cty) (Finkelstein, J.)

Motion to appoint GAL in eviction proceeding denied because there was no proof of proper service upon the proposed respondent. The Court states in the context of this decision that lack of service would be especially serious because the appointment of a GAL carries with it a loss of liberty merely “by the imposition of a stranger in the proposed ward’s life.”

Taylor v. Martorella, 745 NYS2d 901, 2002 N.Y. Misc. LEXIS 846 (Sup. Ct., Kings Cty. 2002)

An Article 81 was found not to be equivalent to a guardian ad litem for the purposes of establishing venue pursuant to CPLR 503 (b). Court holds that under CPLR Art. 12, a GAL’s only function is to protect the interests of the party in a particular action or proceeding. where as an Art 81 guardian acts in an array of legal proceedings as fiduciaries who can sue and be sued in their respective representative capacities and made parties to a case. Since a Guardian ad Litem is not a real party in interest, his or her residence can not control the choice of venue.

124 MacDougal St. Assoc. v. Hurd, NYLJ, 2/2/00, p. 25 (Civ. Ct., NYCL/T)(Scheckowitz, J.)

Default judgment was entered against mentally ill tenant, who had no Art. 81 guardian and no GAL. Balancing needs of her neighbors to be free of nuisance against need to protect her civil rights, default judgment and warrant of eviction were vacated due to respondent’s inability to defend herself in the earlier proceedings.

Matter of Saks, NYLJ, 9/15/97, p. 25, col.1 (Sup. Ct., Nassau Cty.)(Rossetti, J.)

While marshaling his mother’s assets, guardian (son) discovered that most were in out-of-state banks and that his estranged brother, a Michigan resident, had access to them under power-of-attorney. Because of bad relationship between guardian and his brother, court appointed an independent guardian *ad litem* to investigate funds and any possible wrongdoing. Once guardian *ad litem* found potential misappropriation of over \$400,000 of the funds, court issued order authorizing Article 81 guardian to commence proceedings in Michigan to set address invalid transfers by his brother. Court also ordered Article 81 guardian to pay guardian *ad litem* with

funds from guardianship account.

T.W. by Enk v. Brophy, 124 F.3d 893 (7th Cir., 1997)

FRCP Rule 17(c) distinguishes between guardian or other "duly-appointed representative," on the one hand--in short, a general representative--and a guardian ad litem or a next friend, on the other hand--a special representative. If general representative has conflict of interest (for example because he is named as the defendant in the child's suit), or fails without reason to sue or defend (as the case may be), child may, with court's permission, sue by another next friend, or court may appoint a guardian ad litem for child.

Querubin Parras v. Anna Ricciardi, 185 Misc2d 209; 710 NYS2d 792 (City Court, City of NY 2000)

Plaintiff landlord did not have to commence Art. 81 proceeding before suing elderly, possibly incapacitated woman, so long as she was properly served at nursing home. Court can appoint GAL if needed.

Kings 28 Assoc. v. Raff, 167 Misc2d 351, 636 NYS 2d 257 (Civ. Ct., Cty. of NY, 1995)

Housing court judge can appoint GAL to protect tenants rights without going through full Art. 81 proceeding.

(ii) Does not have authority to consent to settlement of behalf of Ward

Matter of Latanza, NYS2d ; 2006 N.Y. Misc. LEXIS 3423 (Sup. Ct., Nassau Cty 2006)(O'Connell, J.)

In this NON-Article 81 proceeding, a daughter petitioned to be appointed Guardian ad Litem for her mother to prosecute a tort claim on her mother's behalf and to protect her interests in that litigation. The mother, who had no property other than the subject matter of a tort claim suit, had previously executed a Health Care Proxy, Living Will and valid durable power of attorney appointing her daughter with full powers. Acknowledging that a Guardian ad Litem lacks authority to both apply for court approval of a settlement and receive and disperse the settlement proceeds, the court nevertheless held that the appointment of a guardian ad litem, at least where the person alleged to be incapacitated has no appreciable assets other than the pending or potential lawsuit, was appropriate. The court reasoned that a proceeding under Article 81 involves expenses that would likely be imposed upon a petitioner when they cannot be recouped from an AIP who has no assets. Thus, requiring a proceeding under MHL Article 81 where there were no assets would have the potential to act as a disincentive and thus deny an incapacitated person the protection the court is obligated to provide.

Matter of Sills, 32 A.D.3d 1157; 821 N.Y.S.2d 313 (4th Dept. 2006)

The Appellate Division describes as "well settled" the principle that "a guardian ad litem is not

authorized to apply to the court for approval of a proposed settlement of [the claim of an adult adjudicated incompetent] ... Instead the right to apply for court approval of a proposed settlement and to receive the settlement proceeds is granted to a guardian appointed in accordance with Mental Hygiene Law Article 81.”

Matter of Lainez, 2006 NY Slip OP 50822u; 2006 N.Y. Misc. LEXIS 1078 (Sup. Ct. Kings Cty.)(Johnson, J.)(2006)

An incapacitated person was in a permanent vegetative state allegedly as a result of medical malpractice. The attorney prosecuting the medical malpractice case sought to have a GAL appointed instead of seeking an Article 81 guardian, asserting that appointment of a GAL was more efficient in that it was more quickly accomplished and consumed fewer judicial and legal resources. The court found that appointment of a GAL in lieu of an Article 81 Guardian was not in the best interests of the incapacitated person because, due to her total disability she was in need of a plenary guardian for all of her affairs and further, because the GAL would not, by law, have the power to settle the lawsuit. The court opined that the GAL’s limitations would discourage settlement, drag the resolution of the case on for years and deprive the incapacitated person of a potential financial settlement that could allow for her to be placed in a facility that would provide better care for her. The court stated: “ The simpler procedure for obtaining a [GAL] was not created for the purpose of testing the waters first to determine the feasibility of a monetary recovery and then, if a recovery is achieved, commencing proceedings for an Article 81 guardian. The type of guardians sought should be based on the best interests of the incompetent, not the convenience , economy or ease of the appointment.

Matter of Bernice B., 176 Misc2d 550; 672 NYS2d 994 (Surr. Ct., NY Cty., 1998)

GAL cannot bind ward to settlement against her wishes in absence of formal adjudication under Article 81. See also, Matter of Bernice B., 179 Misc2d 149; 683 NYS2d 713 (Surr. Ct., NY Cty., 1998).

Estate of Wilcox, NYLJ, 12/2/99, p. 37 (Surr. Ct., Nassau Cty.)(Radigan J.)

Court directs GAL in probate proceeding to consider commencing proceeding for Article 81 guardian who can establish SNT or pooled trust with inherited funds.

Tuderov v. Collazo, 215 AD2d 750, 627 NYS2d 419 (2nd Dept., 1995)

GAL can be appointed without finding of overall incapacity under Art 81, but GAL cannot agree to settlement or receive proceeds of settlement.

(iii) Does have authority to consent to settlement on behalf of Ward

Neilson v. Colgate Palmolive Co., 993 F. Supp. 225 (SDNY 1998)

Federal court rejects NY rule that GAL cannot approve terms of settlement and that only Art.

81 guardians can do that- Federal court approves settlement endorsed by GAL alone, even though Art. 81 was still pending.

D. Powers of attorney/health care agents/trustees

Matter of Estate of Raymond A. Teufel, Misc3d; 2006 N.Y. Misc LEXIS 3898 (Surr. Ct., Erie Cty.) (Surr. Howe)

SCPA 220(1) provides that any bequest to an incapacitated individual be paid to the guardian of such person. A bequest was made to a woman who, at the time of the probate proceeding, was 90 years old and suffering from severe Alzheimer's disease. She did not have a guardian, having years earlier executed a valid power of attorney thereby obviating the need for a guardian. Citing to Matter of Murray which she had recently authored, this Surrogate reiterated that there was no need to appoint a guardian in light of the public policy behind Article 81 that there be liberal use and recognition of the efficacy of powers of attorney. The court stated that a formal plan for handling the incapacitated person's property interests validly established by her should not be lightly set aside or disregarded by the courts.

Estate of Murray, Misc3d; 2006 N.Y. Misc. LEXIS 3602 (Surr. Ct., Erie Cty. 2006)

Although many Surrogate's Courts in this State, as a policy, have been interpreting SCPA 401, 402 and 403 to mean that a validly appointed attorney-in-fact may not appear on behalf of a disabled individual in an estate administration proceeding because the statutes do not enumerate them in the list of parties who may appear, the court revisited, and changed that policy in light of the public policy behind Article 81 that there be liberal use and recognition of the efficacy of powers of attorney. The court stated that a formal plan for handling the incapacitated person's property interests validly established by her should not be lightly set aside or disregarded by the courts.

Matter of Lando, 11 Misc. 3d 866; 809 N.Y.S.2d 901 (Surr Ct , Rockland Cty 2006) (Surr. Berliner). 2006 N.Y. Misc..LEXIS 302 (Surr. Ct., Rockland Cty. 2006)

Attorney in fact was permitted to exercise right of election and there was no need to wait for appointment of an Article 81 guardian to accomplish same.

In the Matter of The Application of Joseph Meisels (Grand Rebbi Moses Teitlebum), 10 Misc. 3d 659; 807 N.Y.S. 2d 268; 2005 N.Y. Misc. LEXIS 2515 (Sup. Ct. Kings Cty.) (Leventhal, J.)

An Article 81 petition was brought for guardianship over the Grand Rabbi of The Satmar sect. He had previously appointed one of his sons and his longtime personal secretary as HCP and POA and indicated in the HCP and POA that if there ever should be a guardianship proceeding, that these would be the individuals whom he would want to be appointed. The initial pleadings

did not allege that there was anything defective about his previous appointments made several years earlier. After respondent moved to dismiss the petition on the grounds that the existence of the HCP and POA negated the need for a guardianship, petitioners only then alleged that the Rabbi has been incompetent at the time he granted the HCP and POA. The court, after reviewing the affirmations in support of this allegation found insufficient proof that he lacked capacity to grant the HCP and POA at the time he made the appointments.

Borenstein v. Simonson, 8 Misc3d 481: 797 NYS2d 818 (Sup. Ct. Queens Cty) (Ritholtz, J.)

Health Care Proxy executed while AIP was competent did not provide instructions to agent for dealing with artificial nutrition and hydration as required by PHL 2981(4) and 2982. AIP was on an NG tube when her physicians sought authorization to insert a PEG. The Health Care Agent refused to authorize the PEG and AIP's sister petitioned for a special guardian to make the hydration/nutrition decisions. Petitioner also sought to void the HCP on the grounds that the agent was not acting in the AIP's best interest or alternatively to declare that the agent was without power to make decisions about hydration/nutrition and to enjoin the Health care agent from interfering with health care decisions about hydration and nutrition. Court declares that agent is without power to make hydration/nutrition decisions but finds no basis for voiding the HCP. Case has excellent discussion of the law of health care proxies and also on the Jewish Law on the subject of withdrawing or withholding life sustaining treatment.

Matter of Mougiannis v. North Shore - Long Island Jewish Health Systems, Inc., NYLJ, 5/19/04, p. 19, (Sup. Ct., Nassau Cty., LaMarca, J.), 25 AD3d 230; 806 NYS2d 623; 2005 N.Y. App. Div. LEXIS 13296 (2nd Dept)

Health Care Agent is entitled under Public Health Law §2982(3) to medical information necessary to make a decision about the principal's health and providing such records to the Health Care agent does not violate HIPAA. *An unarticulated conclusion that may be drawn from this decision is that to obtain these records, one need not be an Art 81 guardian with the specific authority to obtain the records.*

Matter of Julia C.; NYLJ, Vol 49, pg. 20, 3/15/04 (County Ct., Nassau Cty) (Asarch, J.)

Court denies motion for summary judgment made by health care agent/attorney-in-fact (AIP's daughter) seeking dismissal of an Article 81 petition brought by the son. The motion for SJ was made on the theory that the AIP made her own prior arrangements for the management of her care when she was competent by appointing the POA and HCP to make all decisions for her thus obviating the need for a guardian. Court denied motion for SJ finds that issues of fact exist because (1) there were issues as to the validity of the signature on the HCP; (2) neither the HCP or POA, either alone or combined, authorized the agent carte blanche to select place of abode for the AIP; even where the AIP had checked Box "O" on the POA form indicating "all other matters" (3) the son and daughter, as co- POA's, could not agree as to the place of abode and (4) The extent of the AIP's actual limitations was not known. The court states:

The fact that a health care proxy exists does not, in itself, always obviate the

need for a guardianship. Public Health Law 2992. The scope of Article 81 of Mental Hygiene Law and Article 29-c of the Public Health Law do not overlap with respect to making decisions regarding the social environment and other such aspects of the life of the incapacitated person and choosing her place of abode....

In the Matter of Isadora R., 5 AD3d 494; 773 NYS2d 96 (2nd Dept., 2004)

The nonparty, attorney-in-fact and health care proxy for AIP appealed from an order and judgment appointing a guardian which also vacated the POA and HCP. Appellate Division reverses finding that the evidence established that the AIP had “effectuated a plan for the management of her affairs and possessed sufficient resources to protect her well being” and that there was no evidence that the appellant, a longtime friend of the AIP’s and the AIP’s chosen attorney-in-fact and health care proxy had mishandled the AIP’s property or that the AIP’s health and well-being were harmed by any actions taken by the appellant sufficient to justify revoking the power of attorney and health care proxy in favor of a court-appointed guardian.

Matter of Nora McL.C., 308 AD2d 445, 764 NYS2d 128 (2nd Dept., 2003)

App. Div. affirms trial court’s appointment of third party guardian of the person and property where niece who held POA and HCP evidenced “self dealing” by transferring AIP’s stock and other assets into her own name.

Article: “Beware the Abuses of Powers of Attorney “by Leona Beane -NYLJ Aug 23, 2002

In the Matter of Rose S. (Anonymous). Martin G. S. (Anonymous), etc., appellant-respondent; Ellyn J. S. (Anonymous), et al., respondents-appellants., 741 NYS2d 84 (2nd Dept., 2002)

Supreme Court hearing Article 81 petition found to have erred in declaring that a health care proxy executed by AIP was valid. Appellate Division. Second Department reasons that although every adult is presumed competent to appoint a health care agent and thus the burden of proving mental incompetence is generally upon the party asserting it, where there is medical evidence of mental illness or a mental defect, such as Alzheimer’s disease, the burden shifts to the opposing party to prove by clear and convincing evidence that the person executing the document in question possessed the requisite mental capacity. **But see, Matter of Richard Rosenberg, NYLJ 8/18/03, p. 25 (Surr. Riordan)** interpreting and seemingly contradicting Rose S.

Matter of Mary “J.”, 290 AD2d 847; 736 NYS2d 542 (3rd Dept., 2001)

Appellate Division held that where hearing court found that AIP had executed durable power of attorney and health care proxy while she suffered from dementia, it had properly voided the instruments and appointed a guardian.

Matter of Ruby Slater, 305 AD2d 690; 759 NYS2d 885, NYLJ, 2/1//02, p.17, col. 3 ;*appeal dismissed*

Court vacates power of attorney and will where AIP, who was totally dependant upon home health aides, executed these documents in favor of them and court finds that they were executed as a result of undue influence. Subsequently, App. Div. dismissed appeal brought by the nominated executrix because they said that the executrix is not aggrieved by the order and lacks standing to appeal.

Matter of Stein, NYLJ, p. 25, 9/4/01 (Sup. Ct., NY Cty.); 2001 NY Misc LEXIS 573

IP had both a guardian of the person and a Health Care agent. Each role was fulfilled by a different person. The Health Care agent asserted that all decision involving the care of the elderly IP were "health related", including whether the IP should live at home with a home health aide or surrender her apartment and enter a nursing home. Court finds that such decision was within the realm of the personal needs guardian and not the Health care agent, stating..."the guardian would be limited to inconsequential actions and finding so would completely eviscerate the responsibility of the personal needs guardian.

Matter of Lauro, 2001 N.Y. Misc. LEXIS 491, NYLJ, 9/7/01, p. 17, Sup. Ct., (Onondaga Cty.)(Wells, J.)

Court denies a petition for guardianship where there was already an SNT in existence serving the same function stating: "Article 81 is designed to promote the use of the "least restrictive form of intervention" (MHL 81.01) ...Guardianship.. no matter how noble, is still a deprivation of a person rights."

Matter of Albert S., 286 AD2d 684; 730 NYS2d 128 (2nd Dept., 2001)

Where AIP had living will, durable Power of Attorney, and where trust fund was being established for his benefit, Appellate Division found that there was no need for a guardian of the person or property, which should be only a "last resort" when there are not other resources and that it was particularly improper for Supreme Court to have appointed guardian of person with powers that modified the terms of the "living will" by prohibiting the health care agents from acting under the healthcare proxy to hasten his death by withholding life support.

Haymes v. Brookdale Hospital, 287 AD2d 486; 731 NYS2d 215 (2nd Dept., 2001)

There is no such thing in New York as a "living will."

Matter of Kunkis, 162 Misc2d 672; 618 NYS2d 488 (Surr. Ct., NY Cty., 1994)

Where son holding power of attorney renounces inheritance on behalf of mother, grantor of the

power, and son stood to benefit from renunciation in that his share would become larger, son may not renounce without court approval and appointment of GAL. This, in effect, placed burdens upon holder of power that make his role more similar to guardian, and provide better protection for IP.

Matter of Crump, 230 AD2d 850; 646 NYS2d 825 (2nd Dept., 1996)

Where AIP had effectuated plan for management of her affairs by appointing power-of-attorney on her own, and she possessed sufficient resources to protect her well being, appointment of guardian of her property was improper.

Matter of Lowe, 180 Misc2d 404, 688 NYS2d 389 (Sup. Ct., Queens Cty., 1990)

Petition brought by wife of AIP seeking her appointment as temporary guardian where she was already her husband's attorney-in-fact and health care agent. Petitioner sought authority to appoint successor health care agent under health care proxy. Petition is dismissed, since it has not been shown that there is present need for appointment; rather, what has been shown is that there may be need for guardian to make health care decisions for husband in event that his wife is for some reason unable to act under health care proxy, and absence of any evidence which would give court reason to believe that the wife's inability to act under proxy is imminent, or even likely to occur at any point in time, underscores speculative nature of petition. Accordingly, and in furtherance of policy of only appointing a guardian as a last resort, court did not appoint a guardian since there has been no evidence that petitioner's husband is likely to suffer harm because of his inability to select an alternate health care agent.

Matter of Maher (Maher), 207 AD2d 133; 621 NYS2d 617 (2nd Dept., 1994), lv to app denied 86 NY2d 703, 631 NYS2d 607 (1995), reconsid denied, 86 NY2d 886; 635 NYS2d 951 (1995)

No guardian needed where AIP had granted power-of-attorney to his colleague, an attorney, and had added his wife as a signatory on certain of his bank accounts.

Matter of O' Hear (Rodriguez), 219 AD2d 720; 631 NYS2d 743 (2nd Dept., 1995)

No guardian was required where AIP had granted power-of-attorney, health care proxy and will to relative and hearing court found that person holding power had not engaged in any impropriety with respect to his care of AIP or her assets.

Matter of Anonymous, R.A., NYLJ, 9/ 28/93, p. 27, col. 2 (Surrogate's Ct., Nassau Cty., 1993)

Elderly and infirm AIP residing with granddaughter who was attorney-in-fact and who managed individual's affairs under power of attorney did not require a guardian.

Matter of Presbyterian Hospital in the City of New York (Helen Early), NYLJ, 7/2/93, p.

22, col. 2 (Sup. Ct., NY Cty.)(Sax, J.)

Despite blindness and other physical infirmities, individual had prepared an efficient system to assist her personally and financially and did not require guardian.

Matter of Rochester General Hospital (Levin), 158 Misc2d 522; 601 NYS2d 375 (Sup. Ct., Monroe Cty., 1993)

Guardian appointed where individual's son was "either unable or unwilling to exercise the authority granted to him under the power-of-attorney," and hearing court "entertained serious doubts as to his ability to make future decisions pursuant to the [individual's] health care proxy."

Matter of Wingate (Kern), 165 Misc2d 108; 627 NYS2d 257 (Sup. Ct., Suffolk Cty., 1995)

Court appointing guardian may formally declare void a pre-existing simple power-of- attorney.

E. Testamentary capacity/Revocation of Wills

Matter of Khazaneh, ___ Misc3d ___; 2006 N.Y. Misc. LEXIS 3968 (Surr. Ct., NY Cty. 2006) (Surr. Glen)

In this probate proceeding, the Surrogate was called upon to examine whether a testator lacked testamentary capacity because he did not know the exact value of his holdings. The Surrogate looked to Article 81 and focused on its emphasis on "task specific functional ability", and found that the testator, who clearly had the cognitive ability, possessed sufficient capacity to make his Will. In so finding, the Surrogate made the following insightful comment: "Throughout most of our legal history, judges and litigants have utilized unitary concepts like "competent" or "incompetent," "sane" or "insane." Notwithstanding this apparently simple framework, the genius of the common law presaged a more "functional" notion of capacity as legal standards or tests for capacity evolved differently in different areas of law. (fn omitted) It is only relatively recently, however, that the law has explicitly embraced the more nuanced view of modern psychology and psychiatry which recognizes that an individual may be perfectly "competent" in one area, and "incompetent" in another. Our legislature adopted this functional approach to determining capacity when it enacted Article 81 of the Mental Hygiene Law in the early 1990's."

In the Matter of Joseph S. , 25 AD3d 804; 808 NYS2d 426, (2nd Dept 2006)

It was improper for the trial court to invalidate the AIP's will in the order appointing guardian because the petition for guardianship did not seek that relief at any point in the proceeding and appellant, the executor of the AIP's will had not had an opportunity to be heard. The Appellate Division held this in contrast to its annulment of the AIP's marriage to his nurse because the nurse wife was present in the Art 81 proceeding with counsel and did have an opportunity to

be heard.

Estate of Rosa Socolow, NYLJ, p. 24, 9/ 1/04, (Surr Preminger)(NY Cty)

In a proceeding in Supreme Court, Article 81 co-guardians were removed for breach of fiduciary duty upon the finding that they exerted undue influence upon the IP and were self-dealing in that they pressured the IP to name them as beneficiaries in her will. The Supreme Court judge explicitly stated that the issue in that case was the breach of fiduciary duty and not the validity of the will although she acknowledged that invalidating the will was an incidental result. After the IP died, the will was contested in Surrogates Court. Surrogates Court refused to apply collateral estoppel to find the will invalid stating first that the validity of the will was not the issue in the first proceeding and therefore not fully and fairly litigated previously. The court also found that under MHL 81.29 (b) the appointment of an Art 81 guardian is not conclusive evidence that a person lacks capacity to make a will and that there was no specific finding by the Art 81 court that the IP lacked the specific capacity to make a will., See Article in NYLJ, Oct. 20, 2004, Pg. 3, Surrogate's Practice and Proceedings; Pre-Death Probate - Does New York Allow It?, By Charles F. Gibbs and Colleen F. Carew.

Estate of Emilio Pellegrino, 7/13/04, p. 32 (Surr. Czygier) (Surr. Ct., Suff. Cty.)

Codicil to will was executed about one months after an Article 81 proceeding had ben filed and about one week after the Article 81 decision was rendered finding the testator to be in need of a guardian of the property due to functional limitations brought about as a result of a stroke. Surrogate looks to the totality of the circumstances and not just the finding of the Art 81 court and finds that the testator lacked testamentary capacity at the time of the making of the codicil.

Matter of Estate of Rose McCloskey, 307 A.D.2d 737; 763 N.Y.S.2d 187 (4th Dept 2003)

An AIP executed a will while there was an Article 81 proceeding pending. At the time her attorney determined that despite the fact that an Art 81 petition had been filed, the AIP/testator possessed testamentary capacity and allowed her to execute a will. The Court held that although the AIP testator may have been forgetful and cantankerous, the objectants failed to meet the burden of proving that she: (1) understood the nature and consequences of executing a will; (2) knew the nature and extent of the property she was disposing of; and (3) knew those who would be considered the natural objects of her bounty and her relations with them. Also the court stated in other words that the AIP /testator “did not suffer from an insane delusion which directly affected her decision not to leave anything to the [parties objecting to the probate of the will]”

Matter of Will of Colby, 240 AD2d 338; 660 NYS2d 3; (1st Dept., 1997)

Finding of incapacity under Article 81 is based upon different factors from those involved in finding of **testamentary capacity**.

F. Matrimonial law

In re Irving Wechsler, 3 AD3d 424, 771 NYS2d 117 (1st Dept. 2004)

Guardian may not commence divorce action on behalf of ward. Although the guardian does have the power to maintain a civil proceeding, that grant of power does not include filing for divorce because whether to pursue a divorce is too personal a decision.

DeFrance v. DeFrance, 273 AD2d 468, 710 NYS2d 612, (2nd Dept.)

Guardian, who was also wife, sought to force sale of AIP's separate property and have court order proceeds divided equally between AIP and self, on the theory of equitable distribution. Court holds that absent matrimonial proceeding, AIP's funds cannot be divided upon theory of equitable distribution in Art. 81 proceeding.

G. Habeas corpus

Matter of Brevorka (Whittle), 227 AD2d 969, 643 NYS2d 861 (4th Dept., 1996)

Writ is appropriate to bring forward possibly incapacitated elderly woman and to determine her capacity. Art. 81 proceeding can be filed later, after she is brought forward.

Matter of Nixon (Corey), NYLJ, 6/4/96, p. 25, col. 1 (Sup. Ct., Suffolk Cty.)(Luciano, J.)

Where AIP had been secreted, an essential obstacle to commencement of Art. 81 proceeding was petitioner's inability to locate and serve AIP. Court concludes that remedy may be found by combining Art. 81 proceeding with a *sua sponte* habeas corpus proceeding in which party secreting AIP is directed to produce AIP before Court, in order to allow an inquiry as to whether she is being unlawfully restrained, detained or confined.

H. MHL Art 79 (Guardianship for Veterans)

Matter of Zhou Ping Li, Misc3d; 2005 N.Y. Misc. LEXIS 3592; NYLJ, Nov.11, 2005, p. 19 (Sup. Ct. Kings Cty. Pesce, J.)

A guardian for an IP seeks court approval for a settlement entered into with DSS for moneys owed to DSS for substantial sums it provided for the IP's care. The IP is a recipient of substantial VA benefits. The DVA moves to intervene and to oppose the settlement. Some aspects of the proposed settlement involve the disposition of both accumulated and future VA benefits ; other aspects of the settlement involve transfer of real property acquired without using VA benefits. The Court finds that under MHL §79.39(a) the DVA is a proper party in interest with respect to the terms of the settlement that involve the disposition of VA benefits only. The Court also finds that no part of MHL Article 79 prohibits lawful Medicaid and estate planning

conducted on behalf of a disabled veteran and that therefore there was no prohibition against the requested transfers merely because the IP is a recipient of VA benefits. After analyzing the legitimacy of each of the proposed transfers, the Court approved the proposed settlement which involved, among other things the placement of the IP's income, including his VA benefits into a supplemental needs trust.

In re Guardianship (Formerly Committee) for the benefit of W.J. ,9 Misc3d 657 802 NYS2d 897 (Sup.Ct., Rensselaer County) (Ceresia, J.)

A corporate committee was appointed in 1961 for a ward who was receiving VA benefits. In 2005 it moved to be compensated under MHL Art 81 claiming that the work it was doing was in the nature of trustee work and that it should therefore be compensated under SCPA 2309, as set forth in Art 81. The VA and counsel for the ward opposed, claiming that the fiduciary appointment was made pursuant to MHL Art 79 governing veterans and not Art 78 which was repealed in 1992 when Art 81 was enacted in its place. The corporate committee argues in the alternative that if it is to be compensated under Art 79, that it be compensated for "extraordinary services". The court finds that: (1) under the 2004 amendments, Art 81 no longer makes reference to SCPA 2809 as a method for calculating guardians' compensation and that each compensation determination is based upon the specific facts of each case; (2) that the original proceeding was commenced by the VA and under the Civil Practice Act and that CPA §§ 1384-k which governed compensation at that time is now part of MHL Art 79; (3) that MHL Art 79 is still in effect and supercedes other guardianship sections that may be inconsistent and that therefore, this guardianship is governed by MHL Art 79. The Court further found that "the long duration of the guardianship and/or the size of the estate, in and of themselves, were not "extraordinary service" nor was the fact that the services involved "on-going property management responsibilities [in a] highly regulated financial industry [with] a high standard of professional conduct and significant reporting requirements."

I. Collections Matters

Matter of S.K., 13 Misc3d; ___ NYS3d ___ (Sup. Ct. Bronx Cty) (Hunter , J.)

AIP had functional limitations but also had sufficient and valid advanced directives in place as alternative resources. The nursing home where the AIP resided brought an Article 81 proceeding solely for the purpose of collecting it's bill because the AIP's wife, who held the POA, was not paying because she believed the Long Term Care policy should payout. The Court stated: **"The purpose for which this guardianship proceeding was brought, to wit, for the nursing home to be paid for its care of the [AIP] was not the Legislature's intended purpose when Article 81 of the MHL was enacted in 1993."** The Court imposed all costs of the proceeding upon the petitioner.

II. FUNCTIONAL LIMITATIONS/ALTERNATIVE RESOURCES/BEST

INTERESTS OF IP

Matter of Khazaneh, ___ Misc3d ___; 2006 N.Y. Misc. LEXIS 3968 (Surr. Ct., NY Cty. 2006) (Surr. Glen)

In this probate proceeding, the Surrogate was called upon to examine whether a testator lacked testamentary capacity because he did not know the exact value of his holdings. The Surrogate looked to Article 81 and focused on its emphasis on “ task specific functional ability”, and found that the testator, who clearly had the cognitive ability, possessed sufficient capacity to make his Will. In so finding, the Surrogate made the following insightful comment: “ Throughout most of our legal history, judges and litigants have utilized unitary concepts like "competent" or "incompetent," "sane" or "insane." Notwithstanding this apparently simple framework, the genius of the common law presaged a more "functional" notion of capacity as legal standards or tests for capacity evolved differently in different areas of law. (fn omitted) It is only relatively recently, however, that the law has explicitly embraced the more nuanced view of modern psychology and psychiatry which recognizes that an individual may be perfectly "competent" in one area, and "incompetent" in another. Our legislature adopted this functional approach to determining capacity when it enacted Article 81 of the Mental Hygiene Law in the early 1990's.”

Matter of E.H., NYLJ, 11/20/2006, p. 23, col.1; ___ Misc3d ___; 2006 N.Y. Misc. LEXIS 3194 (Sup.Ct.,Bronx Cty 2006) (Hunter, J.)

IP was found to be in need of personal and property guardian where she: could perform most of her activities of daily living but she needs prompting in order to do so, such as bathing daily; she often refused to eat and her meals had to be brought to her hospital room because she refused to eat in the dining hall; she was considered belligerent and angry and had been assaultive with the staff at the hospital; she wanted to return to her apartment in the community, but refused any assistance including devices to aide her with her hearing impairment; the hospital has made efforts to provide care for her if she returns to her apartment in the community, such as Assisted Outpatient Treatment, intensive care management, and APS, but all had declined to work with her because she was non-compliant with her medications and because there was a lack of support in the community; and, because she had been placed on financial management through APS after she faced eviction for failure to pay her rent.

Matter of Williams , NYLJ, 9/1/2006, p. 23, col. 3; 2006 N.Y. Misc. LEXIS 2109 (Sup. Ct., Kings Cty. 2006)(Belen, J.)

The court found clear and convincing evidence that appointment of a guardian was needed to protect a "strong willed and fiercely independent [90 year old] woman with sharp intelligence and great charm" whose physical limitations rendered her without "the strength, vigor, and physical capacity to handle her assets, her apartment and herself" due to her chronic pulmonary disease, hyperthyroidism, difficulty seeing and making herself understood and inability to walk more than short distances, even with the aid of a walker." She had been found by a psychiatrist

to be alert and oriented and without signs of psychiatric illness or dementia and listened attentively and testified cogently during the hearing. She had pieced together a functioning household for herself with an informal network of people from her church and her family whose assistance allowed her to live in her own apartment but they lacked the legal standing and the close personal bonds to protect her from certain opportunistic individuals who had taken advantage of her. Although "her judgment ha[d] been questionable in some of her past dealings and her recent history [was] rife with incidents where her good and trusting nature had been abused", the court declined to make a finding of mental incapacity but rather found that due to the ravages of age and physical incapacity she had become reliant upon the good will and aid of others to perform the functions of everyday life, "had become extremely vulnerable to abuse and predatory behavior" and thus was at risk and did not fully comprehend the degree and consequences of such risk.

Matter of A.C., NYLJ , Aug 25, 2006, p. 24, col. 1; 12 Misc 3d 1190A; 2006 N.Y. Misc. LEXIS 2091 (Sup Ct . Bronx Cty . 2006) (Hunter, J.)

Where 87 years old AIP had significant physical limitations and "mild to moderate cognitive impairment" and required a great deal of assistance, but was receiving that assistance from a home health aide, had appointed her niece as health care agent, had drafted a Last Will and Testament and had not yet given a Power of Attorney to her but still had the capacity and willingness to do so and was aware of the extent of her assets, the Court denied the guardianship application finding that the AIP had sufficient alternative resources.

Matter of Ardelia R. , 28 AD3d 485, 812 NYS2d 140 (2nd Dept 2006)

AIP was properly found to be incapacitated . She was 82-years old, found in her home by APS without running water, food, electricity, or heat, malodorous and frail. She was unable to cook, and was known to wander away from her home. She had forgotten where she banked and did not know her sources of income. Although she owned a home and possessed approximately \$115,000 in savings, she was delinquent on her utility bills. Based on these facts, the hearing record established by clear and convincing evidence that AIP lacked the understanding or appreciation of the nature and consequences of her functional limitations Thus, the Supreme Court's finding that she was an incapacitated person requiring a guardian was proper notwithstanding the lack of medical testimony regarding her medical condition.

In the Matter of Joseph S. , 25 AD3d 804; 808 NYS2d 426; 2006 N.Y. App. Div. LEXIS 949 (2nd Dept. 2006)

Although AIP had not been diagnosed as suffering from any particular psychiatric diagnosis and was sometimes alert and lucid, the Appellate Division upheld a finding of incapacity because he was "at best only somewhat functional and coherent". Court recites that AIP was of advanced age, extremely hard of hearing, suffering from short term memory loss and severe arthritis, he has been hospitalized several times in two years, and he could no longer care for himself alone or his property as relevant findings. Court would not consider the AIP 's home health aide,

whom he married, as a viable alternative resource, citing as relevant that she was 43 years his junior, that prior to the marriage she had isolated him from his family and friends, and that the trial courts annulment of the marriage was being upheld.

In the Matter of The Application of Joseph Meisels (Grand Rabbi Moses Teitelbaum); 10 Misc3d_659; 807 N.Y.S. 2d 268; 2005 N.Y. Misc. LEXIS 25115 (Sup. Ct. Kings Cty.)(Leventhal, J.)

An Article 81 petition was brought for guardianship over the Grand Rabbi of The Satmar sect. He had previously appointed one of his sons and his longtime personal secretary as HCP and POA. The petition alleged that the Rabbi was disoriented, in need of round the clock assistance and was in poor health but there was no allegation that he was not receiving the care he needed. The court allowed the petitioner to submit additional affirmations and considered them as if the pleading had been amended to include them. In fact, the Court visited the Rabbi at home and noted that he has a butler who sleeps in his room, an intercom system linked to his room, a personal secretary, a personal paramedic, a chauffeur and cook and other staff to meet his needs. The judge spoke to the Rabbi who told him that he was satisfied with his care. Since there were no allegations that he was at risk due to his limitations, and since the facts clearly established that he was in fact not at risk and that all his need were met, the court concluded that there was no showing of a need to commence a guardianship proceeding and dismissed the petition.

Matter of J.G., NYLJ, August 19, /2005,(Sup. Ct , Bronx Cty). (Hunter , J.)

Where there was no testimony that the AIP was incapacitated or in anyway lacked functional skills, but AIP consented to the guardianship because he wanted assistance with his upcoming eviction and his finances, court, citing the deprivation of liberty associated with a guardianship directed the petitioner to instead contact Adult Protective Services to assist him. See also, Article - "Helping the Elderly Incapacitated Client, NYLJ, August 19, 2005, p.2., Vol 234.

Matter of Margaret K , 17 AD3d 466, , 2005 N.Y. App. Div. LEXIS 3760 (2005)

Appellate Division uphold order granting guardianship. The petitioner established by clear and convincing evidence that the appellant, Margaret K., is likely to suffer harm because she is unable to provide for her personal needs and property management, or to adequately understand and appreciate the nature and consequences of such inability. Accordingly, the Supreme Court properly appointed a guardian for the appellant's personal needs and property management.

Matter of Shirley I. Nimon, 15 AD3d 978; 789 NYS2d 596, (4th Dept 2005)

During original guardianship proceeding, the trial court appointed both daughters as guardians and directed that the IP live in nursing home near each daughter for half the year. The Appellate Court here overrules trial court's decision, labeling it as an improvident exercise of but not an abuse of discretion, finding that for an Alzheimer's patient such as this IP, relocating every 6 months is disorienting and not in the IP's best interests.

Matter of Dennis Diaz, NYLJ, 7/6/04, p. 21 (Sup. Ct., Queens Cty.)(Taylor, J.)

After an Article 81 hearing, a disabled man was found to be in need of a guardian of the person and property. He was found, among other things, to have the functional level of approximately a 5th grader and specifically to be in need of assistance in handling his own finances. Before a guardian could be bonded and qualified, he retained counsel and entered into a contract of sale to purchase a tavern with his own funds. Under pre-Art 81 law, contracts entered into by persons adjudicated incompetent and who have committees or conservators are presumptively void. Contracts with persons who do not have committees or conservators but are of unsound mind and unable to appreciate the consequences of their own actions were considered voidable. Article 81 does not result in a finding of incompetence but rather only findings of specific functional limitations and guardianship powers tailored to be the least restrictive form of intervention. This AIP was found to lack the ability to handle his own finances so here, the Court does void and revoke the contract.

Matter of Rosa B., 1 AD3d 355; 2003 NY App Div LEXIS 11503 (2nd Dept. 2003)

The Appellate Division re-emphasized that the rules of evidence apply in an Article 81 proceedings but that a court, for good cause, may waive the rules in an uncontested proceeding. Specifically, the physician patient privilege applies and the AIP does not waive it by contesting the application for guardianship if he does not specifically put his *medical condition* at issue. In this case, even though it was a jury trial, the court found that the violation of the privilege was harmless error since there was sufficient independent evidence of functional incapacity based upon non-medical evidence.

In the Matter of Joseph A. (Anonymous) a/k/a Joseph B..A., 304 AD2d 660, 757 NYS2d 481 (2nd Dept 2003)

Appellate Division reverses order on the law without costs, denied petition and dismisses proceedings upon finding that "petitioner failed to prove by clear and convincing evidence that the appellant was unable to provide for the management of his property and did not appreciate the consequences of such inability." (no facts discussed in opinion)

Matter of David C., 742 NYS2d 336; 294 AD2d 433 (2nd Dept., 2002)

Appellate Division reverses order appointing guardian, holding that "a precarious housing situation and meager financial resources do not, without more, constitute proof of incapacity such that a guardian is warranted under Mental Hygiene Law §81.02."

Matter of Hoffman (Zeller), 288 AD2d 892, 2001 N.Y. App. Div. 11287 (4th Dept., 2001)

Appellate Division reverses and remits for hearing where Supreme Court did not hold a hearing and therefore the Appellate Division had no record upon which to determine whether there was

clear and convincing evidence of incapacity.

Matter of Lauro, NYLJ, 9/7/01, p. 17, Sup. Ct., Onondaga Cty.) (Wells, J). 2001 NY Slip Op. 40109U; 2001 NY Misc. LEXIS 491

Where AIP was eccentric, but happy, living in a habitable but cluttered apartment, had no debts or other financial problems, and was visited by a social worker with whom she had a pleasant relationship, there was no clear and convincing evidence that AIP was functionally impaired within the meaning of Article 81.

In the Matter of the Commissioner of Social Services, Orange County, Daisey R. (Anonymous), 275 AD2d 713, 713 NYS2d 204 (2nd Dept., 2000)

Appellant, and others, challenged an order and judgment granting petition of county social services commissioner for the appointment of a guardian. The appellant was a woman with mild retardation who suffered from respiratory insufficiency, congestive heart failure, and morbid obesity. The trial court found that respondent had established, by clear and convincing evidence, that the appellant was incapacitated within the meaning of Article 81. Clear and convincing evidence established that appellant was not able to understand and appreciate the nature and consequences of her inabilities, and that she was likely to suffer harm due to her limitations and her inability to appreciate the consequences. The Appellate Division affirmed.

Matter of Grinker (Rose), 77 NY2d 703; 570 NYS2d 448 (1991)(*superceded by statute*)

Mental illness, without more, held insufficient basis to appoint conservator with power to place AIP in nursing home. To deny such personal liberty, there must also be clear and convincing evidence that the illness has rendered person substantially impaired in ability to function and conduct own affairs. No substantial impairment of ability to function found where mentally ill artist was aware of her financial problems and had applied for and was awaiting overdue public assistance grant but refused to sell her artwork to raise money to pay her bills.

Matter of Harney (Seth), 248 AD2d 182; 670 NYS2d 17 (1st Dept., 1998); *app. dismissed*, 93 NY2d 845, 688 NYS2d 490 (1999)

Guardianship properly granted where AIP was unable to attend to daily needs alone and was uncooperative and abusive to home care workers.

In re Karen P. 254 AD2d 530, 678 NYS2d 802 (3rd Dept., 1998)

AIP with progressively deteriorating Huntington's disease who: (1) frequently dropped lighted cigarettes on furniture and rugs throughout her apartment, (2) was unable or unwilling to clean home, (3) has caused two kitchen fires, (4) had exhausted her bank accounts, (5) was about to lose her apartment, and (6) had only \$100 in weekly income from a divorce settlement, refused

to apply for any type of government benefits, insisting that she was seeking, and would obtain, gainful employment. Court found that respondent's inability to recognize extent and nature of her limitations and inability to comprehend scope and urgency of her situation or to realistically evaluate and address difficulties she faces rendered her functionally limited and in need of guardian.

Matter of Hammons (Ehmke), 164 Misc2d 609; 625 NYS2d 408 (Sup. Ct., Queens Cty., 1995); *aff'd* 237 AD2d 439 (2nd Dept., 1997)

Family of three intelligent, mentally competent adults (two frail parents and adult daughter) unable to function in that they were living in unsafe and unsanitary conditions including: filth, fly infestation, without funds for heat except for space heater deemed a fire hazard, with numerous structural repairs needed, with thousands of dollars of unpaid bills and home at risk of foreclosure, but refused assistance-deemed functionally limited and in need of guardian.

Erlich v. Oxenhorn (Matter of Lula XX), 224 AD2d 742; 637 NYS2d 234 (3rd Dept., 1996), *app. dismissed*, 88 NY2d 842; 644 NYS2d 683 (1996)

Totally dependant, medically frail, obese woman, unable to turn herself over without 2 aides or breathe without a ventilator and tracheotomy, without family or responsible friend and for whom no home health agency would continue to provide services was at risk because she refused to consider nursing home or other alternative-held functionally impaired and in need of guardian.

Matter of Rimler (Richman), 164 Misc2d 403, 625 NYS2d 443 *aff'd*, 224 AD2d 625; 639 NYS 390 (2nd Dept., 1996), *lv. to app. denied*, 88 NY2d 805; 646 NYS2d 985 (1996)

Guardianship granted-Bedridden 37-year old morbidly obese woman was, among other things, unable to walk without assistance and required help with toileting, bathing, and getting in and out of bed. Numerous home care agencies had refused to provide her with necessary care due to her repeated verbal abuse, her refusal to allow such care, and deplorable living conditions in her apartment, such as vermin and roach infestation. Court found that appellant needed a guardian of the person because she was likely to suffer harm because she was incapable of adequately understanding and appreciating nature and consequences of her disabilities, as reflected in her self-defeating behaviors. With respect to ability to manage property, court finds her history of living in deplorable conditions, failure to pay for services rendered, and failure to pay rent, despite her continued receipt of social security checks which remained uncashed to be evidence of her need for a property guardian.

Matter of Marguerite VV, 226 AD2d 786; 640 NYS2d 311 (3rd Dept., 1996)

Guardianship with power to place AIP in nursing home granted. Bedridden AIP who required 24-hour-a-day supervision, was unable to ambulate, transfer self from bed to chair, or dress self as a result of physical problems, and was incontinent and unable to keep herself clean, continually refused medical tests and other forms of treatment. Necessary services to enable

respondent to live at home could not be provided because of AIP's abusive behavior to home care workers and respondent's refusal to retain a physician. Placement with respondent's family and friend was not possible given lack of meaningful relationship between respondent and her family and frailty of her only friend who could not adequately care for her.

Matter of Maher, 207 AD2d 133, 621 NYS2d 617 (2nd Dept., 1994)

No functional limitation found where AIP, who was himself an attorney, had become aphasic and partially paralyzed as result of a stroke. Court finds clear and convincing evidence establishing that AIP suffered from certain functional limitations in speaking and writing, but that he was not likely to suffer harm because he was capable of adequately understanding and appreciating nature and consequences of his disabilities as evidenced by his granting a power-of-attorney to colleague, and by his adding his wife as a signatory on certain of his bank accounts.

Matter of Lambrigger, NYLJ, 5/31/94, p. 37, col. 1 (Sup. Ct., Suffolk Cty.)(Luciano, J.)

Court denies petition for guardianship of AIP, who had suffered massive stroke that left her with severe physical disabilities, holding that mental and physical disabilities are not co-extensive, noting that AIP has not lost any cognitive abilities and is fully competent to make her own decisions, including with matters such as property management. However, court did appoint special guardian to help the AIP "manifest and give effect to her own decisions." The special guardian was granted no substituted judgment power and was not authorized to make any decision without consulting with and explaining the transaction to AIP, who was to lose no rights to conduct her own affairs as a result of the order.

In Re: DOE, 181 Misc2d 787; 696 NYS2d 384 (Sup. Ct., Nassau Cty., 1999)

Irresponsible and immature 18-year-old with short attention span and rebellious attitude, who abused drugs and alcohol, and who had unrealistic sense of entitlement found not functionally limited within meaning of Art. 81. Court holds Art. 81 is not a method for parents to extend their control over rebellious children, nor is it to be used as estate planning tool by their parents seeking to divest themselves of assets to avoid estate taxes.

Matter of Ruth B. Ginsberg, 200 AD2d 571; 606 NYS2d 302 (2nd Dept., 1994)

Conservator proper where elderly woman was mentally weak and susceptible to influence of others, particularly her grandsons to whom she has given over \$700,000 for "medical treatment." Her execution of an irrevocable trust did not negate need for conservator because trust does not provide same safeguards as conservator, such as accounting requirement.

Matter of Hammons (Perreau), NYLJ, 7/7/95, p. 29, col. 3 (Sup. Ct., NY Cty.)(Goodman, J.)

Guardianship denied where 90-year-old AIP who was otherwise able to meet needs for food and

shelter agreed to accept help from city to care for his eyes and keep his apartment clean. Court finds that necessary services could be provided by PSA whether or not there was a guardian.

Matter of Koch, NYLJ, 11/29/99, p. 25, col. 3 (Sup. Ct., Queens Cty.)(Kassoff,J)

Hospital petitioned for guardian of diabetic, leg amputee, who had been transferred from nursing home because of infection. When he no longer required acute care, his insurer refused to pay for any more care. Due to his age he was not eligible for Medicaid. He refused to leave hospital even after it offered to help him make arrangements. Dismissing petition, court said patient was stubborn, difficult and a management problem for the hospital, but not incapacitated and that Art. 81 was not appropriate forum for hospital to redress its predicament.

Matter of Edith Leiva (Quarter), 170 Misc2d 361; 650 NYS2d 949 (Sup. Ct., NY Cty., 1996)

Guardianship denied for 20-year-old AIP who resided with his parents, where petitioner grandmother alleged emotional and physical abuse by parents and parents refusal to allow AIP to visit with her, constant criticism of him by alcoholic father, household was in constant turmoil, the AIP's emotional and educational upbringing had been neglected and delayed and he was entirely dependent on his parents. Court states that AIP is not likely to suffer harm in that he is able to provide for personal needs and property management, is able to work, and fact that he lives with his parents is irrelevant.

Matter of Peterson, NYLJ, 1/15/97, p. 26, col. 4 (Sup. Ct., NY Cty., 1996) (Gans, J.)

Court denies petition for guardianship over the person/property of 75-year-old AIP subsequent to eviction for non-payment of rent, first from city apartment and then from emergency housing in welfare hotel. Despite having mild memory deficits, delusions, and paranoia, he was not incapacitated as eviction for non-payment of rent by itself is not evidence of incapacity, particularly given the hotel's high daily cost and the fact that AIP described it "as a hellhole, inhabited by prostitutes and junkies." AIP's housing problems indicate lack of affordable decent senior housing, not incapacity or mental illness on his part. AIP appreciates consequences of his disability by working with VA, social services, and friends to help manage his property and provide for his personal needs.

Matter of Seidner, NYLJ, 10/8/97, p.25, col. 1 (Sup. Ct., Nassau Cty.) (Rossetti, J.)

Court denies petition, filed by wife during bitter divorce action seeking appointment of guardian, where 62-year-old respondent husband was presently living in his car or with his sister because he could not afford other housing after Family Court ordered all of his income turned over to his wife for maintenance of marital residence. Having found that AIP "continues to make conscious and rational decisions as to the manner in which he chooses (or, perhaps, is constrained) to live," the court also commented that "Article 81 is not and was never intended to be a vehicle for squabbling spouses..." and "... if [the AIP's] situation warranted a guardian, then every

homeless person would require such an appointment.”

Matter of Donald Loury (Loury), NYLJ, 9/23/93, p. 26, col. 2 (Sup. Ct., Kings Cty.)

AIP was found locked in apartment into which he refused entry, requiring family to drill locks. He was found dressed in dirty clothes, unshaven, holding a bible surrounded by trash bags, debris, numerous containers of a liquid appearing to be urine. There was a strong smell of feces present. There was no running water in building. AIP owned several investment properties which were all in disrepair and in default of real estate taxes. Court concludes that AIP’s present functional level and functional limitations impair his ability to provide for his personal needs and to manage his property; that he cannot adequately understand and appreciate the nature and consequences of such inability; and that he is likely to suffer harm because of such inability and lack of understanding.

Matter of Sobol (Tait), NYLJ, 5/31/94 31, 1994, p. 28, col. 1 (Sup. Ct., NY Cty., 1994)

Mentally ill homeless woman who had arranged for manager of single-room-occupancy hotel residence to negotiate her Social Security checks and pay rent from proceeds found not to be incapacitated within meaning of Art 81.

Matter of Flowers, 197 AD2d 515; 602 NYS2d 194 (2nd Dept., 1993)

Court affirmed decision in an Article 77 proceeding appointing a conservator for a 69-year-old man. Held that clear and convincing evidence existed of substantial impairment of AIP’s ability to manage his property because he failed to pay his real estate taxes for many years and would not acknowledge impending threat of foreclosure, as well as refusing to take any steps or accept help to stop foreclosure and help him keep his property.

III. EFFECT OF GUARDIANSHIP ON RIGHTS OF AIP

A. Transfer to nursing home

Matter of Grinker (Rose), 77 NY2d 703; 570 NYS2d 448 (1991)(superceded by statute)

Mental illness without more held insufficient basis to appoint conservator with power to place person in nursing home. To deny such personal liberty, there must also be clear and convincing evidence that the illness has rendered person substantially impaired in ability to function and conduct own affairs.

Matter of Application of St. Luke's Hospital Center (Marie H.) 159 Misc2d 932; 607 NYS2d 574 (Sup. Ct., NY Cty., 1993), *modified and remanded*, 215 AD2d 337; 627 NYS2d 357 (1st Dept., 1996), *aff'd*, 226 AD2d 106; 640 NYS2d 73, *aff'd*, 89 NY2d 889, 653 NYS2d

257 (1996)

Valuable discussion of impact upon AIP's liberty where guardian has power to transfer AIP to nursing home or to make major medical or dental treatment decisions without AIP's consent.

Erlich v. Oxenhorn (Matter of Lula XX), 224 AD2d 742; 637 NYS2d 234 (3rd Dept., 1996), *app. dismissed*, 88 NY2d 842; 644 NYS2d 683 (1996)

Guardian granted power to place AIP in nursing home where AIP was totally dependant, medically frail, obese woman, unable to turn herself over without 2 aides or breathe without a ventilator and tracheotomy, without family or responsible friend and for whom no home health agency would continue to provide services.

Matter of Gambuti (Bowser), 242 AD2d 431; 662 NYS2d 757 (1st Dept., 1997)

Art. 81 does not permit special guardian to involuntarily commit AIP to nursing home. Protective arrangements and transactions as contemplated by Art. 81 are far less intrusive and therefore mechanism for appointment of special guardian under section 81.16 (b) inadequately addresses liberty concerns of AIPs in context of involuntary commitment. Appointment of full guardian is required for nursing home placement.

Contrast

Matter of Grace PP, 245 AD2d 824; 666 NYS2d 793 (3rd Dept., 1997), *lv. to app.denied*, 92 NY2d 807; 678 NYS2d 593 (1998)

Temporary guardian was appointed, with specific limited powers of placement of the AIP in a nursing home.

Matter of Jospe (Grala), NYLJ, 1/30/95, p. 30, col. 2 (Sup. Ct., Suffolk Cty.)(Luciano,J.)

Court granted hospital's petition seeking appointment of guardian for elderly female AIP, who suffered from dementia, memory loss, and cardiac problems. Court found that she required a guardian because her "desire to return home without apparent regard for her inability to care for herself demonstrates her lack of understanding and appreciation of her functional limitations... and she will surely suffer harm." Even if home health aides could be arranged, she could not safely return home because she had no close family or other responsible person to serve as a back-up. Noting that guardian could not be back-up, guardian was given the power to place her in a nursing home but also given the responsibility to explore any alternative arrangements acceptable to social services that would permit the AIP to safely reside in her home.

Matter of Hammons (Ehmke), 164 Misc2d 609; 625 NYS2d 408 (Sup. Ct., Queens Cty.,

1995); *aff'd* 237 AD2d 439 (2nd Dept., 1997)

Court denies guardian authority to place AIPs in nursing home and instead orders guardian to secure much needed assistance to enable AIPs to continue to live in own home.

B. Consent to psychiatric hospitalization and treatment

In the Matter of Rhodanna C.B., AD3d ; N.Y.S.2d ,2006 N.Y. App. Div. LEXIS 13055 (2nd Dept 2006)

Appointment of a guardian with the authority to consent in perpetuity to the administration of psychotropic medication to the ward, over the ward's objection and without any further judicial review or approval, is inconsistent with the due process requirements of *Rivers v. Katz* ,(67 N.Y.2d 485).

Matter of Hill, (unpublished), Sup. Ct. Orange County (DeRosa , J) Index# 2004-3317

Court denied application for guardianship where the primary purpose of the guardianship was to compel involuntary psychiatric hospitalization and supervised living for a woman who was a mentally ill drug addict who engaged in illegal activity. The Court found that the AIP had only SSI for which the Dept of Social Services was already Representative Payee, the criminal and correctional system would deal with her criminal behavior and the AIP's psychiatric treatment needs were governed by the provisions of the Mental Hygiene Law. The Court stated: To allow such relief, a guardian would be given the power to determine a mentally ill substance abusers place of residence without adhering to the stricter requirements of involuntary admission to a psychiatric facility under the Mental Hygiene law or indeed to any guidelines for choosing a persons place of abode. Such an expanded use of Article 81 was not contemplated or envisioned by the Legislature.

Matter of New York Presbyterian Hospital, Westchester Div. (JHL), 181 Misc2d 142; 693 NYS2d 405 (Sup. Ct., Westchester Cty., 1999) appeal dismissed, 276 AD2d 558(2nd Dept., 2000)

Guardian may not waive IP's right to Rivers hearing. IP retains right to hearing to challenge effort to medicate over objection. Appeal dismissed on technical grounds.

Matter of Beth Israel Medical Center (Farbstein), 163 Misc2d 26; 619 NYS2d 239 (Sup. Ct., NY Cty., 1994)

Guardian for personal needs of IP with power to consent to or refuse routine and major medical treatment without IP's consent, cannot admit IP to hospital against wishes to receive psychiatric evaluation and administration of psychotropic medication. "Article 81 does not supersede

Article 9.”

Matter of Berg, NYLJ, 12/11/98, p. 25 (Sup. Ct., Rockland Cty.)(Weiner, J.)

Court denies petitioner power to consent to administration of psychotropic medication over objection of AIP who was patient in hospital infirmary and also psychiatric outpatient.

Matter of Gordon, 162 Misc2d 697; 619 NYS2d 235 (Sup. Ct., Rockland Cty. 1994)

Petitioner's request for power to compel AIP to receive psychiatric treatment and administration of antipsychotic drugs without person's consent is denied. A guardian cannot compel person to obtain psychiatric treatment and medication against will.

Matter of Gertrude K. (Shari K.), 177 Misc2d 25; 675 NYS2d 790 (Sup. Ct., Rockland Cty., 1998)

Petitioner's application for authority, with unlimited duration, to consent to ECT for AIP denied. Hospital must apply for court authorization.

Contrast

Matter of Diurno (Conticchio), 182 Misc2d 205; 696 NYS2d 769 (Sup. Ct., Nassau Cty., 1999)

Guardian granted power to authorize antipsychotic drugs, with proviso that guardian take into account IP's wishes to extent person had capacity to make an informed treatment decision.

C. Withholding of life-sustaining treatment

Matter of Russell, Article, NYLJ, 3/4/03, p.1, col.3 (decision on transcript, Sup. Ct., Nass. Cty., Rosetti, J., Jan. 23, 2003 (copy in Mineola and also distributed to MHLS 2nd Dept. staff under separate cover)

Guardian, Family and Children's services, was appointed for IP. The guardian was not granted end of life decision making powers. In 1991, IP signed a Health Care Proxy (HCP) when she was competent stating that she did not want artificial nutrition or hydration under any circumstances. There was no precondition that she have irreversible brain damage or terminal illness. In the 1991 HCP she named her nieces as her proxy. In 1995 she executed a Living Will that also said no artificial nutrition or hydration but includes the pre-condition that she be suffering from a terminal illness with irreversible brain damage. IP then executed a 1999 HCP. This time she named one Roger Russell as her proxy to act as HCP but she did not address the

end of life issues in specifics in that document. In 2003, when IP was terminally ill, Roger Russell wanted to keep her on life support. The court *sua sponte* conducts an O'Connor hearing to determine the IP's prior express intent. The court finds that putting the patient on life support is contrary to the IP's wishes as expressed in the earlier HCP and Living Will and that such was her only expression of intent. Court finds that the latter HCP which did not address the end of life decision, did not cancel out the express intent in the previous instruments and therefore, the court voids the latter HCP and empowers the guardian to make the end of life decision consistent with the IP's express intent as found by the Court.

Matter of Barsky (Kyle), 165 Misc2d 175; 627 NYS2d 903 (Sup. Ct., Suffolk Cty., 1995)

Power to direct whether life-sustaining treatment should be provided to or withheld from IP is denied. The right to decline treatment is a personal one which cannot be exercised by a third party if patient is unable to do so unless health care proxy or "Do Not Resuscitate Order" (DNR) is in place or there is otherwise clear and convincing evidence of patient's wishes regarding such treatment while patient was competent.

Matter of Maxwell Z., NYLJ, 10/1/96, p. 21, col. 3 (Sup. Ct., Suffolk Cty.)(Prudenti, J.)

Two sisters each petitioned for guardianship of their father, who was unconscious and in a fetal position due to advanced Parkinson's disease. While this matter was pending, a temporary guardian was appointed. One sister requested an order giving authority to issue DNR order. Court denied this request, finding that "while there was credible evidence that Mr. Z. indicated in casual, rather than in solemn settings, general sentiments against the use of a respirator or machinery..." there was not clear and convincing evidence that the patient had ever formally expressed a desire to withhold life-sustaining treatment such as resuscitation, however medically futile it might be.

D. Voiding questionable marriages and other contracts

In the Matter of Joseph S. , 25 AD3d 804; 808 NYS2d 426; 2006 N.Y. App. Div. LEXIS 949 (2nd Dept 2006)

An annulment is an available remedy in an Article 81 proceeding where the evidence shows that the AIP is "incapable of understanding the nature, effect and consequences of the marriage". The remedy was available in this case even though it was not sought in the original petition because at the close of the guardianship proceeding petitioner moved to amend the petition, the court advised the wife that it would consider the relief and the wife was participated through her own counsel. The fact that she was not formally made a party was not an impediment to the annulment under these circumstances because she received a full and fair opportunity to present evidence and actively litigated the issue.

Powers v. Pignarre , NYLJ , July 19, 2005 , p. 18, (Sup Ct NY Cty) (Drager ,J.)

Guardian of wealthy IP brings action to have IP's marriage annulled on grounds of lack of capacity DRL 7(2) and fraud and duress (DRL 7(4), Court annuls marriage for lack of capacity only. Very detailed discussion of circumstances in text of decision.

Matter of Dennis Diaz, NYLJ, 7/6/04, p. 21 (Sup. Ct., Queens Cty.)(Taylor, J.)

After an Article 81 hearing, a disabled man was found to be in need of a guardian of the person and property. He was found, among other things, to have the functional level of approximately a 5th grader and specifically to be in need of assistance in handling his own finances. Before a guardian could be bonded and qualified, he retained counsel and entered into a contract of sale to purchase a tavern with his own funds. Under pre-Art 81 law, contracts entered into by persons adjudicated incompetent and who have committees or conservators are presumptively void. Contracts with persons who do not have committees or conservators but are of unsound mind and unable to appreciate the consequences of their own actions were considered voidable. Article 81 does not result in a finding of incompetence but rather only findings of specific functional limitations and guardianship powers tailored to be the least restrictive form of intervention. This AIP was found to lack the ability to handle his own finances so here, the Court does void and revoke the contract.

Matter of Jayne Johnson, 172 Misc2d 684; 658 NYS2d 780 (Sup. Ct., Suffolk Cty., 1997)

Marriage of 84-year-old incapacitated woman which occurred after commencement of Art. 81 proceeding but prior to appointment of guardian, is annulled by court hearing Art. 81 petition where proof was sufficient to establish that on marriage day woman was incapacitated and incapable of understanding nature, effect and consequences of marriage. Court bifurcated issues of marriage dissolution and economic rights and heard only dissolution issue.

Matter of Kustka, 163 Misc2d 694; 622 NYS2d 208 (Sup. Ct., Queens Cty., 1994)

81-year-old IP marries housekeeper three months after death of his wife. New wife begins depleting IP's bank account and sending money to her family abroad. Court appoints independent property guardian after finding AIP's testimony on financial issues was confused but did not appoint personal guardians and did not annul marriage.

Tabak v. Garay, NYLJ, 9/18/95, p. 25 (Sup. Ct., Kings Cty.)(Rigler, J.)

85-year-old man had married defendant, and shortly thereafter a court found him incapacitated. Eight months after man died, his niece sought to annul the marriage. Court found this was matrimonial action that could proceed under Domestic Relations Law §140(c). It disqualified defendant's attorney because he had been appointed guardian for decedent and thus might be called as witness.

E. Use of AIP's funds

Matter of Michael Alfonso, NYLJ, 6/26/03, p. 28, col. 6 (Surr. Ct., West.Cty.)

Parents were permitted to use funds in SNT for profoundly disabled child to purchase family home. After stating that purchase of home with SNT funds is presumptively improper and subject to stringent review by court, court authorizes purchase on conditions that purchase price is fair, house is appropriate to meet child's needs, title to be 100% in child's name, carrying charges to be paid by parents except for major repairs, parents may not sell or alienate property without prior approval of court, money will be returned to SNT if sale not concluded, and named bank to be co-trustee.

Matter of William L., 253 AD2d 432; 676 NYS2d 625 (2nd Dept., 1998)

Petitioner denied reimbursement for expenditures he made on behalf of his father (AIP) from joint bank account created and funded by his mother in both his and her names. Petitioner claims that at least some money in account was his. Record indicated that assets used to fund account had been jointly owned by petitioner's mother and father.

Matter of Le Bovici (Menzel), NYLJ, 2/26/97, p.25, col. 3 (Sup. Ct., Queens Cty.)(Kassoff, J.)

Court denied guardian's motion to vacate and discharge mortgage on grounds of incapacity of elderly woman at time of transaction in 1994, approximately one year before guardian was appointed in 1995. Notary and title closer testified that she was responsive and coherent at closing with no "unusual" behavior. Despite other testimony that she was incapacitated as her mental status had been deteriorating since 1993, court denied motion as the title held by a bona fide purchaser for value (the bank), cannot be disturbed if there was no possible notice of the incompetency. As law presumes the competency of the individual, without more substantial evidence about the AIP's mental state at the time of the transaction itself, the "mere opinion" of a doctor about how long incapacity existed is insufficient to disturb the mortgage.

Matter of Marmol (Pineda), 168 Misc2d 845; 640 NYS2d 969 (Sup. Ct., NY Cty., 1996)

Guardian, parent of incapacitated infant, may withdraw funds from infant's personal injury settlement to pay for "unusual circumstances" necessitated by child's disability irrespective of parents' ability to pay for them, and for expenses reasonably necessary for infant's maintenance justified by financial circumstances of family. This does not warrant alleviating petitioner from parental obligation regarding cost of routine dental and pediatric care, but funds may be used to cover extraordinary costs associated with various therapies, special education, neurological and orthopedic treatment occasioned by automobile accident in which her son was severely injured.

Furthermore, since family plans to relocate to Dominican Republic where public transportation was not extensively developed and private means of transportation must be relied upon, guardian was empowered to withdraw \$25,000 from infant's funds for purchase of an automobile to insure that infant can attend therapeutic sessions, and to purchase a suitable ranch-style house that has features beneficial to the child and can accommodate his physical limitations.

Matter of Nix, 177 Misc2d 845; 676 NYS2d 915 (Surr. Ct., NY Cty., 1998)(useful 17-a case)

The guardian of a mentally retarded adult is authorized to make arrangements for direct deposit of government checks to ward's bank account. There is no loss of supervisory ability by the court since guardian will continue to make proper application for reimbursement of funds expended.

F. AIP's right to sue or be sued

Walker v. Feller, 2005 U.S. Dist. LEXIS 17055 (EDNY)

Civil action brought by IP was dismissed, because once adjudicated incapacitated, he could not bring suit on his own. However, while an incapacitated person cannot commence a civil action on his or her own behalf, the Mental Hygiene Law specifically provides that such a person can seek to remove the guardian "when the guardian fails to comply with an order, is guilty of misconduct, or for any other cause which to the court shall appear just. (§ 81.35.) Thus, the IP can sue his guardian (Self Help) to bring its alleged misconduct to the attention of the State court which appointed SHCS by making a motion to remove the guardian (NYCHA commenced a nonpayment proceeding. Self Help, allegedly made no effort to pay the arrearage or to contest the eviction proceedings. As a result, the IP appeared in Civil Court himself, where he "explained to the Judge that [his] ... Guardians where [sic] conspiring with [NYCHA] ... to defraud [him] ... out of [his] ... apartment by refusing to aid [him] ... and protect [his] ... rights"). See also, related case- In re Michael Tazwell Walker, 2005 Bankr. LEXIS 1576 (Bankruptcy Ct, EDNY 2005) (Feller, J.) (Order by bankruptcy court dismissing petition with prejudice, on grounds *inter alia*, that person for who guardians is appointed under MHL Art 81 lacks capacity to file petition in own name.

In re Irving Wechsler, 3 AD3d 424, 771 NYS2d 117 (1st Dept. 2004)

Guardian may not commence divorce action on behalf of ward. Although the guardian does have the power to maintain a civil proceeding, that grant of power does not include filing for divorce because whether to pursue a divorce is too personal a decision.

Matter of the Application for an Individual with a Disability For Leave to Change Her Name, 195 Misc2d 497 (Civ. Ct., Richmond Cty) (Straniere, J.)

Mildly MR individuals was permitted to change her name in Civil Court without a guardian. Court was initially uncertain whether it could hear case without guardian but, after reviewing purpose of Art. 81 ultimately decides that she is not so functionally limited as to be unable to petition for her name change. Court also points out that it has no jurisdiction over guardianship and would have to refer the case to Supreme Court first and further that is no Article 81 Part in Richmond County and recommends statutory amendments to alter this situation.

Matter of Black (Seiber), 2002 NY Misc LEXIS 1442, October 31, 2001, Sup. Ct., Suff. Cty. (Berler, J.)

Although CPLR 1201 refers to service of legal papers on incompetents and conservatees and it should also be construed to include incapacitated persons for whom Art. 81 guardians have been appointed -Ward may not be sued directly- Guardian must be sued in representative capacity and only then, with leave of the guardianship court which can hold hearing to determine whether to grant such leave as suit will affect the guardianship estate and cost IP legal expenses. Guardian who is an attorney may not act as IP's attorney in a suit against the IP and guardian in his representative capacity-conflict of interest and appearance of impropriety arises.

Matter of M.G., NYLJ, 9/3/02 (Sup. Ct., Westchester Cty. 2002)(Rosato, J.)

Person adjudicated incapacitated may not contract to hire an attorney. Attorney who was retained by an IP who knew about his clients prior adjudication of incapacity could not recover fees, even in *quantum meruit*.

Saratoga Hospital v. Timothy Chamberlain, (Sup. Ct., Saratoga Cty) Index No, 2000-3209 Oct. 11, 2001 (NOR) (copy attached)

Plaintiff, who initially sued an IP's guardian without alleging that he was doing so in the guardian's representative capacity for the IP sought leave to amend his complaint. Court denied motion to amend finding that the amendment is without merit because an IP is not adjudicated incapacitated and thus may sue or be sued in the same manner as any other person. The court states "The proper defendant is [the IP]."

Palamera v. Palamera, NYLJ, 6/7/01 (Sup. Ct., Kings Cty.)(Rappaport, J.)

Where proceeding brought under RPAPL 1521(1) to void real estate transaction on the theory that the transferor lacked the capacity to make the transaction named the allegedly incapacitated transferor as one of the plaintiffs, proceeding will be dismissed absent any proof that the transferor possessed the capacity to retain counsel to pursue this claim. The proper procedure would have been to apply for an Article 81 guardian and for the guardian to pursue the claim on behalf of his ward.

Matter of City of Ithica (Barol), 283 AD2d 703,724 NYS2d 211 (3rd Dept., 2001)

Court appoints special guardian for woman who was delinquent in real state taxes. finding that her incapacity interfered with her ability to recognize that her failure to pay taxes will result in her loss if her property. Special guardian fails to file bond and assume duties, is eventually dismissed and no further guardian is appointed. Court reasons that there is no need for the special guardian since a guardian ad litem can be appointed in the foreclosure proceedings. Such proceeding are then filed against the woman personally as she now has no guardian. The pleadings do not assert that she may have doubtful capacity but they do not mention the prior Art. 81 proceeding as part of the procedural history. No hearing on her capacity is held and no guardian ad litem is appointed. Trial court eventually grants foreclosure, Appellate Division reverses and remands stating that petitioner should have been more diligent in bringing the capacity issue to the court's attention and developing it and that once the issue of capacity was even raised, the court had the duty to protect a party incapable of protecting her own interests, especially when her home is in controversy.

140 West Equities v. Fernandez, NYLJ, 8/16/00, p. 21 (Civ. Ct., NY Cty.)(Hoffman, J.)

Person with guardian can defend a civil suit only through the guardian.

Obsanzki v. Simon, NYLJ, 3/5/03, p.17., Col. 2 (Kramer, J.)

Person with guardian can defend a civil suit only through the guardian; Gal can not replace Art 81 guardians even where landlord did not know of the existence of the Art 81 guardian.

Surry Hotel Assoc., LLC v. Sabin, NYLJ, 6/29/00, p. 25 (Civ.Ct., NY Cty.)(Lau, J.)

Person with guardian can defend a civil suit only through the guardian. Judgment vacated where guardian was not served even though landlord had never been served with Art.81 order appointing guardian since landlord had reason to know of tenant's incapacity.

Matter of Linden-Rath, 188 Misc2d 537; 729 N.Y.S.2d 265 (Sup. Ct., NY Cty. 2001) (Lebedeff, J.)

Where AIP was served with Notice of Eviction it was proper for guardian to seek stay in the guardianship part. Once guardian is appointed, litigation against the guardian, as representative of the AIP, should not proceed without permission of the court that appointed the guardian. Guardian cannot waive this obligation by appearing in another court and no other court can waive the obligation by proceeding with suit.

Matter of Ruth "TT", 283 AD2d 869, 725 NYS2d 442, (3rd Dept. 2001), 2001 NY App. Div. LEXIS 5417

Ruth "TT" set up intervivos trust leaving her estate to charity and excluding three presumed distributees. Trustee of that trust petitions under Art.81 for guardianship of Ruth TT's person

and property. In Art. 81 proceeding in Supreme Court the trustee/petitioner is represented by law firm DFH&K. Supreme Court in that Art 81 proceeding appoints trustee/petitioner as the Art. 81 guardian of the person and special guardian to report to Supreme Court on handling of trust. Thereafter, the three presumed distributees commence proceeding in Surrogate's Court to challenge Ruth TT's capacity to establish the trust. In this Surrogate's proceeding, the three presumed distributees are represented by law firm DFH&K. The trustee/Art 81 guardian of the person /special guardian moves to have the law firm DFH&K disqualified because, as counsel for the trustee/petitioner .in the Art. 81 proceeding, they had access to information in Ruth "TT"'s files that they can now use against her interest in keeping the trust alive as she had created it. Surrogate's Court hold that the trustee/Art 81 guardian of the person /special guardian has standing to bring the motion to disqualify on ward's behalf by reason of her fiduciary duty to Ruth TT and consequent right to assert ward's legal rights. Surrogate's court concludes further holds that law firm DFH&K should be disqualified by reason of their conflict of interest. Appellate Division affirms the decision of Surrogate's Court for same reasons.

Murphy v. NYC, 270 AD2d 209; 704 NYS2d 818 (1st Dept., 2000)

Appointment of guardian did not deprive IP of standing to sue.

Huber v. Mones, 235 AD2d 421; 653 NYS2d 353 (2nd Dept., 1997)

A person of unsound mind but not judicially declared incompetent may sue or be sued in same manner as any ordinary member of community. Where person who had not been declared incompetent or incapacitated commenced a proceeding in Surrogates Court, a subsequent determination by Supreme Court in an Article 81 proceeding that she was in need of appointment of special guardian to manage her property did not mean that she lacks standing to bring proceeding in Surrogates Court.

Surrey Hotel Assoc. v. LLC. v. Sabin, NYLJ, 6/29/00, (Civ. Ct., NY Cty., 2000)

Default judgment against IP vacated where guardian was not served.

G. Limitations on Guardian's powers

**Matter of Oringer, 8 Misc3d 746; 2005 N.Y. Misc. LEXIS 1036 (Sup Ct , NY Cty 2005)
(Lucindo-Suarez , J.)**

Where Order appointing guardian did not specifically authorize guardian to exercise right of election under EPTL 5-1.1-A, guardian could not do so absent a subsequent order of the court authorizing same since, under MHL 81.29 all rights and powers are specifically retained by IP unless specifically authorized by the court .

Matter of Solomon T R., 6 A.D.3d 449; 774 N.Y.S.2d 360; (2nd Dept. 2004)

Guardians, who had power to make decisions about APS social environment, sought and obtained order restraining certain individuals from harassing or visiting the AIP. These individuals appealed. Appellate Division, *inter alia*, reverses the order finding that on the facts there was no proof that these individuals were harassing the AIP or that they should be restricted from visiting him. Although the decision does not provide any details, the Court does quote MHL 81.22[a][2] and seems to suggest that restricting their visits might be inconsistent with the AIP's wishes and preferences and that in making the decision to restrain the visitors, the guardian may not have kept in mind these considerations.

Estate of Levine, 196 AD2d 654, NYLJ, 9/21/00, p. 27 (Surr. Ct., Bronx Cty.)(Surr. Holtzman, J.)

Guardian may not have implicit authority to change AIP's legal residency where order appointing guardian does not specifically grant that power.

Matter of Burns, 267 AD2d 755; 699 NYS2d 242 (3rd Dept.)

Where guardian sought court approval to make charitable gifts from IP's assets, notice was to be given to IP's presumptive distributees.

Matter of Heagney, NYLJ, 4/24/00, p. 37, col. 5 (Sup. Ct., Westchester Cty.)(Friedman, JHO)

In guardian's petition for final accounting, County of Rockland contested, *inter alia*, failure of guardian to properly and expeditiously apply to Medicaid so that County could be repaid money owed for services. Court found that guardian was not given power "to apply for government and private benefits on behalf of the person," and thus, did not violate fiduciary duties towards AIP.

H. Power to do Estate and Medicaid planning

(i) Substituted judgment

Matter of Rolland, Misc3d; 2006 NY Misc LEXIS 1640 (Sup. Ct., Tompkins Cty 2006) (Peckham, J.) 2006 Slip Op 26263

The original order appointing a guardian did not grant the power to make gifts on behalf of the AIP. The guardian later petitioned for authority to make gifts to the AIP's sisters and to have the order issued *nunc pro tunc* to a date prior to the effective date of the Federal statute extending the look back period to 5 years (42 USC 1396p(c)(1)(B)(i). The court agrees that under MHL 81.21

and the doctrine of substituted judgement it can grant gift giving power and then analyses the factors in MHL 81.21 (d) to determine if the power should be granted in this case and, if so, whether it should be granted to the extent requested. It finds that the AIP did not have a pattern of gift giving and that he held a firm belief that people should work hard and save for their own retirement. The court also calculates whether the AIP would have enough to meet his own needs if he were to give such gifts and find that he could not meet his own needs if the gifts were given in the amounts requested. The court reasoned that it cannot grant the order *nunc pro tunc* because it would not be merely correcting a ministerial error and that even if it could do so, it would not help because the new Federal statute requires that the funds actually be distributed prior to the effective date of the statute. Thus, the court finds that under the new Federal law, the AIP would have to retain 5 years worth of his own assets to become Medicaid eligible at the time he finally spends them down. Based on those calculations, the court grants the gift giving power to the guardian but limits the amount of the gift to half of the amount requested in the petition.

In the Matter of Judith Watson, as Guardian of the of the person and/or property of Herman Hagerdorn, an Incapacitated Person, to engage in Medicaid Planning, 9 Misc3d 560; 800 NYS2d 338 (Sup. Ct., Monroe Cty (Polito, J.)

Petitioner sought to do Medicaid planning *nunc pro tunc* retroactive to the date the AIP was transferred to a facility eligible for Medicaid funding. The parties did not dispute that this application for Medicaid planning met the several requirements of MHL § 81.21, or that retroactive effect may be given to the date of application but the County disputed the request of petitioner to make the transfer retroactive to the date the AIP went into facility. Court finds that the petitioner failed to make a timely transfer or request at that time either under her power of attorney, or her guardianship authority and that the premise behind MHL §81.21 in approving Medicaid transfers was to give the guardian the same rights that the incompetent would have had if not incompetent, but no greater.

Matter of Oringer, 8 Misc 3d 746; 799 NYS2d 391; (Sup Ct , NY Cty 2005) Lucindo-Suarez, J..)

Where Order appointing guardian did not specifically authorize guardian to exercise right of election under EPTL 5-1.1-A, guardian could not do so absent a subsequent order of the court authorizing same since, under MHL 81.29 all rights and powers are specifically retained by IP unless specifically authorized by the court .

In the Matter of the Application of Mark Forrester for the Appointment of a Guardian for the Person And Property of Carl Forrester , 1 Misc3d 911A; 2004 NY Misc LEXIS 53 (Sup. Ct., St. Lawrence Cty. (2004) (Demarest, J.).

Where petitioners, the AIP's niece and nephew who had little prior contact with the AIP, sought to be named co-guardians and to engage in Medicaid planning that would result in the transfer of the AIP's assets to themselves, Court approves the appointment of them as guardians but denies the

application to do Medicaid planning. Court reasons that although Medicaid planning is a legitimate function of a guardian, (a) the petitioners were not the AIP's dependants, (b) there was no clear and convincing evidence that they were the natural objects of the AIP's bounty, (c) the AIP had not expressed any prior donative intent toward his niece and nephew through a pattern of past giving and (d) the AIP would not benefit from the transfers other than to become prematurely Medicaid eligible. Court holds that it will not read into the guardian's power to use substituted judgement a presumption that people would rather their property go to relatives rather than be put to use for their own care, even if it means that their property will go to the government.

Matter of McNally (Williams), 194 Misc2d 793, 2003; 755 NYS2d 818; Misc LEXIS 105 (2/7/03) (Sup. Ct., Suff. Cty. (J.), *aff'd* 4 AD2d 432; 771 N.Y.S. 356 (2nd Dept., 2004)

“..neither [the court] nor the guardian should be empowered to substitute their judgment for that of a person for whom a guardian has been appointed merely because they believe that the decision of such person is not the best one. This is not the case here. Medical testimony establishes that [the AIP] suffers from dementia. Her expressed preferences is not only undesirable, it is not rationale and abundantly contrary to her best interests.”

Estate of Domenick J. Carota, NYLJ, 2/26/02 (Surr. Ct., Westchester Cty. 2002)

Guardian may exercise right of election for IP under EPTL 5-1.1-A(C)(3)(E)

Matter of Burns (Salvo), 287 AD2d 862, 731 NYS2d 537 (3rd Dept., 2001)

Where guardian wants to make charitable gift on behalf of IP to entities that were not beneficiaries of her estate, court reaffirms guardian's power to use substituted judgment and effect such transfer if, under the circumstances, a reasonable person in the IP's position would have done so.

Matter of Shah, 95 NY2d 148, 711 NYS2d 824, 733 NE2d 1093, (2000); *affirming*, 257 AD2d 275; 694 NYS2d 82 (2nd Dept., 1999) 2000 NY LEXIS 1362

Guardian (wife) allowed to transfer all of comatose IP husband's assets to herself to render IP Medicaid eligible and to maintain her support. Court makes it absolutely clear that a person should normally have absolute right to do anything that he wants to do with his assets, including giving those assets away to someone else “for any reason or for no reason.” No agency of the government has any right to complain about fact that middle class people confronted with desperate circumstances choose voluntarily to inflict poverty upon themselves when it is government itself which has established rule that poverty is prerequisite to receipt of government assistance in defraying of medical expenses. If competent, reasonable individual in position of IP would be likely to make such a transfer, under the same circumstances to insure that his care be paid by the State, as opposed to his family, then guardian can do it for him.

Matter of John "XX," 226 AD2d 79; 652 NYS2d 329 (3rd Dept., 1996), *lv. to app. denied*, 89 NY2d 814; 659 NYS2d 854 (1997)

Guardian properly transferred bulk of his assets to IP's adult daughters within Medicaid guidelines, in order to shield those assets from potential Medicaid lien for cost of nursing facility and other medical services. IP was likely to require continued nursing home care, costs of which will exhaust his assets, and it cannot be reasonably contended that competent, reasonable individual in his position would not engage in estate and Medicaid planning proposed by guardian. Finally, incapacitated person appears not to have manifested any intention inconsistent with proposed transfer, and there can be no question that his daughters are natural and (as expressed in his will) actual objects of his bounty.

Matter of Phlueger, 181 Misc2d 294, 693 NYS2d 419 (Surr. Ct., NY Cty., 1998)

Re: Substituted judgment standard: where the IP has indicated views on the act for which the approval is sought, or his desires are otherwise known, the court will approve act even if it is not optimal choice so long as it is within parameters of reason. On the other hand where there is no information as to the IP's intent for the act, the court is more likely to restrict approval to acts within the range of reasonable choices that would optimize the person's situation.

Matter of Schulze, NYJL, 9/3/96 pg. 1, col. 1 (Surr. Ct. NY Cty. 1996)(Surr. Preminger)

Court allows 17-A guardians to make gifts for estate tax planning purposes under same test that applies to Art 81 guardians. In this case, it allowed the gift giving since it would not leave the ward with an estate so depleted that she could not cover the cost of her own care and further her immediate family, which was wealthy in its own right pledged to provide for her care should there be a change in circumstances.

Matter of Baird, 167 Misc2d 526; 634 NYS2d 971 (Sup. Ct., Suffolk Cty., 1995)

Guardian may renounce inheritance on behalf of IP in order to retain IP's Medicaid eligibility if IP could have exercised same option had she not had guardian.

Matter of Beller (Maltzman), NYLJ, 8/31/94, p. 23, col. 4 (Sup. Ct., Kings Cty.) (Leone, J.)

In this excellent analysis of Medicaid planning under Article 81, the court ordered that guardian (son of 81-year-old nursing home patient with degenerative dementia that is not expected to improve) be permitted to transfer his mother's assets to himself and her grandchildren for the purpose of making her eligible for Medicaid that will pay for her nursing home stay. Court held that under §81.21, patient; 1) lacks the mental capacity to perform this act and is not likely to regain it because of her degenerative condition; 2) there was clear and convincing evidence that a competent person would perform these acts (the transfers) under the same circumstances as no one would rationally choose to "spend-down" all of their assets for nursing home care when the law provides an estate-preserving alternative; 3) there was clear and convincing evidence, shown by

her will, that the patient, when she had capacity, did not manifest any intention inconsistent with the acts for which approval has been sought.

Matter of Cooper (Daniels), 162 Misc2d 840; 618 NYS2d 499 (Sup. Ct., Suffolk Cty., 1994)

Guardian could transfer IP's property to daughter to make IP eligible for Medicaid. IP should be permitted to have same options available to him with respect to transfers of his or her property that are available to competent individuals. A reasonable individual in father's position would be likely to make proposed transfer since such person would prefer that this property pass to his child rather than serve as a source of payment for Medicaid and nursing home care bills where choice is available.

Matter of Da Ronca (Da Ronca), 167 Misc2d 140; 638 NYS2d 275 (Sup. Ct., Westchester Cty., 1994).

Guardian who is wife may transfer the husband's assets to herself where Medicaid will pick up cost of nursing home care and cost of nursing home care will deplete estate in less than seven years, which will render his wife and son destitute. MHL 81.20 (a) (6) (iv) provides that guardian of the property shall use property and financial resources and income available therefrom to maintain and support IP, and to maintain and support those persons dependent upon IP." MHL 81.21 (a)(2) provides that powers of a guardian may include the power to "provide support for persons dependent upon [IP] for support, whether or not incapacitated person is legally obligated to provide that support."

Matter of Driscoll, 162 Misc.2d 840; 618 NYS2d 499 (Sup. Ct., Suffolk Cty., 1993)

Petitioner, Article 81 guardian of his wife, sought power to renounce on her behalf a substantial inheritance (the ½ share) that his wife was due to receive from their deceased son. Social Services primarily objected because it felt that the inheritance should have been disclosed in the Medicaid application and that renunciation would make IP ineligible for Medicaid. However, court granted power of renunciation, citing Social Services Law §366 for substituted judgment doctrine, also adopted in Article 81, that institutionalized people do not become ineligible for those services solely by the transfer of a resource if that transfer was made to or for the benefit of the patient's spouse because a spouse is the "natural object of his [partner's] bounty."

Matter of Furrer, NYLJ, 2/22/96, p. 35, col. 2 (Sup. Ct., Suffolk Cty., 1996) (Luciano, J.)

At time of petition, AIP was patient in State psychiatric facility. There were already probate proceedings pending regarding estate of AIP's late husband. The petitioner, hospital director, sought to be appointed as Art. 81 guardian so that he could exercise surviving spouse's right of election in order to offset part of her outstanding debt to state for her care. AIP's son also filed cross-petition for Art. 81 guardianship. GAL had already been appointed in probate proceeding. Under the EPTL, either guardian may exercise the right of election. Principal issue was whether the Article 81 guardian should be given preference over the Surrogate's GAL in exercising right

of election. Finding the AIP clearly incapacitated, the court appointed her son as Art. 81 guardian for property management but reserved right of election to Surrogate Court's GAL because of Surrogate's special expertise. Judge Luciano emphasized that this special expertise is particularly important as there may be questions under the EPTL law as to extent of the AIP's right of election.

Matter of DiCeccho (Gerstein), 173 Misc2d 692; 661 NYS2d 943 (Sup. Ct., Queens Cty., 1997)

Court grants guardian, AIP's son, power to transfer AIP's residence to himself, with life estate retained for life of AIP and to transfer some assets to other family members, provided that sufficient assets are retained to pay for AIP's needs during period of Medicaid ineligibility.

Matter of Klapper, NYLJ, 8/9/94, p. 26, col. 1 (Sup. Ct., Kings Cty.)(Leone, J.)(We do not have this on file)

Guardians may be granted authority to make Medicaid planning transfers if the three requirements of §81.21 were met as, to rule otherwise would deny incapacitated persons the opportunity to preserve their assets that is available to those with capacity. Court held that IP's intent to continue to support her son's family could be established by her pattern of past gifts.

Matter of Laudia, NYLJ, 7/2/96, p.25, col.1 (Sup. Ct., Nassau Cty.)(Rossetti, J.)

Court granted petition of wife, already co-guardian of her incapacitated husband, seeking approval for transfer to her of his interest in their joint property and his individual property. Transfers were intended to support her, as Medicaid's minimum monthly needs allowance is insufficient. Transfers are not required to continue his eligibility for Medicaid because he is already incapacitated. Having applied the §81.21 test, the court concluded that the transfers are appropriate within the legislative intent of providing for the IP's dependents.

Matter of Mattei, 169 Misc2d 989; 647 NYS2d 415, (Sup. Ct., Nassau Cty., 1996)

Guardian directed to exercise IP's right of election against husband's estate where failure to do so would likely have resulted in IP's Medicaid ineligibility due to IP's failure to pursue available resources. Interests and well-being of IP are paramount, and while desire to provide for one's children may be considered, such should not be given controlling weight where there are potential adverse consequences to IP. There was a substantial probability that if IP was Medicaid ineligible, her nursing home placement would be terminated. But see, Matter of Street, infra.

Matter of Street, 162 Misc2d 199, 616 NYS2d 455 (Surr. Ct., Monroe Cty., 1994)

Where DSS intervened in probate proceeding in effort to force guardian for incompetent surviving spouse in nursing home to exercise right of election, which would make him Medicaid ineligible, Court examines whether it is in best interest of incapacitated spouse for right to be exercised and determined that nothing would change in his care if court forced guardian to exercise right of election, therefore court denied DDS request.

Matter of Parnes, NYLJ, 11/2/94, p. 32, col. 2 (Sup. Ct., Kings Cty.)

Court authorized transfer of an elderly IP's assets to her husband for Medicaid planning. Court notes that amount of interspousal transfers which can be made is not limited to amount of community spouse resource allowance. Institutionalized spouse can transfer unlimited assets to community spouse without triggering any period of ineligibility for Medicaid payment of nursing home costs.

Matter of Scheiber (Zahodnick), NYLJ, 10/18/93, p. 38, col. 5 (Sup. Ct., Suffolk Cty., 1993)

Court allows guardians to renounce inheritance on behalf of AIP, without direct proof that it would have been AIP's intent, where there was no evidence that it was contrary to AIP's intent, and it was reasonable that AIP might have acted to enhance tax savings.

Matter of Vignola (Pollock), NYLJ, 9/26/97, (Sup. Ct., Queens Cty.)(Kasoff, J.)

For Medicaid planning purposes, guardian sought to renounce half of inheritance ward would receive from her deceased husband's estate. Noting the "rule of halves," guardian argued that this renunciation should not result in criminal penalties and that no period of Medicaid ineligibility would be imposed. Discussing recent legislation, court granted the power to make the renunciation, provided that sufficient assets were retained to pay for the ward's needs during any penalty period.

Matter of Heller (Ratner), NYLJ, 7/28/95, p.21 (Sup.Ct., Kings Cty.) (Leone, J.)

Guardian moved for order authorizing him to establish Medicaid exempt luxury and burial accounts and to gift portions of her assets to her family, pursuant to the terms of her Totten trusts, for purpose of Medicaid planning. Court applied §81.21(d) four factor test and ruled that because she is incapacitated; unlikely to regain capacity; she has no dependents and her needs will be accommodated by Medicaid and reserving funds for the penalty period; and the court resolved the question of IP's testamentary intent by looking to her Totten trusts that name proposed donees as beneficiaries.

Matter of Elsie B. (Lerner), 265 AD2d 146; 707 NYS2d 695 (3rd Dept., 2000)

Court can empower guardian under MHL §81.21 to authorize guardian to exercise right retained by IP as settlor of revocable intervivos trust to modify trust by adding co-trustees.

(ii) Medicaid Planning trusts: Supplemental Needs/Pooled Trusts

a. Funds that can be placed into trust

(i) Personal injury awards/own funds

Matter of Dowd, NYLJ, 10/13/06 , p.32, col. 1 (Surr. Ct. Westchester Cty.) (Surr. Scarpino)

17-A ward had a non-payback (3rd party) SNT funded directly with an inheritance. He also had two other guardianship accounts, one funded by an inheritance that went to him directly instead of directly into an SNT and the other was savings from his own wages. His guardians sought to render him Medicaid eligible so he could enter a group home and petitioned to pour both accounts into the existing SNT. The Court held that they could not do so but that they could create a payback, (1st party) SNT and pour the funds into that which would render him Medicaid eligible during his life time and he would have to pay back Medicaid upon his death with any remaining funds to the extent that there were any liens.

Ferguson v. IHB Realty, Inc., Misc3d; NYLJ, Oct .12, 2006 , p.23 ,col. 3 (Sup. Ct. Kings Cty) (Lewis, J.)

N.B. This case raises important issues related to SNT's but does not involve an SNT)

Supreme Court, Kings County held that the US Supreme Court decision in Ahlborn did not dictate that a Medicaid lien should remain unsatisfied just because in hearing a personal injury claim it sent the damages determination to an arbitrator who did not allocate any portion of the damages to medical expenses. The court reasoned that when it delegated the damages assessment to the arbitrator, it reserved for itself the right to determine certain issues, including satisfaction of liens, when confirming and ordering the arbitration award and it could, consistent with public policy and the intent of the relevant portions of OBRA '93, order a portion of the settlement to go to satisfy the Medicaid lien.

Matter of Dowd, Misc3d; NYLJ ,Oct. 10, 2006, p. 32, col 1, (Surr. Ct., Westchester Cty) (Surr.Scarpino)

A mentally retarded 17A ward was the beneficiary of a 3rd party, "non-payback" SNT. He lived at home and was not receiving Medicaid. In addition to the funds in the SNT, he had two bank accounts outside of the trust: one containing funds he had inherited directly and the other containing funds he had earned. When the guardians sought to move him to a group home, they needed to apply for Medicaid and petitioned the court to transfer the two bank accounts into the existing SNT to avoid having to spend the funds down to achieve eligibility. DSS objected. The Surrogate denied the application without prejudice to bringing a new application to create a 1st party "payback" SNT for the contents of both bank accounts.

Estate of Cora Barnes v. Lawrence Nursing Home, NYLJ, 11/20/03, p. 19 (Sup. Ct., Kings Cty.)(Kramer, J.)

Interpreting PHL 2801-d(5) the court holds that where nursing home resident received a tort damage award for personal injury inflicted by the nursing home, the award would not become a pyrrhic victory by rendering her ineligible for Medicaid in the FUTURE, however, applying the

principals of Cricchio, the Medicaid lien for PAST treatment would not be waived.

Ianazzi v. Seckin, NYLJ, 12/9/02) (Sup. Ct., Kings Cty.)(Pesche,J)

Example of case where DSS lien is upheld under Cricchio (see below)

Gold v. United Health Services, 95 NY2d 683; 723 NYS2d 117 (2001); 746 NE2d 172

Social Services Law §104 (2) limits the amount that a public welfare official may recoup from an infant who receives public assistance benefits but that limitation does not apply to an infant who receives Medicaid funds. Medicaid is always the payor of last resort and a Medicaid lien must be satisfied in full before the infant's funds may be placed into an SNT, even if it means that there will be nothing left to place into the SNT. **OVERULED BY ARKANSAS v. AHLBORN (SEE BELOW)**

In re: Blakey (Buhania), 187 Misc2d 312; 722 NYS2d 333 (Sup. Ct., Monroe Cty., 2000)

Court denies OMRDD claims for reimbursement of "improperly paid" Medicaid because when the benefits were paid, the funds were not "available" to the client and will not be "available" until she has a guardian to take them on her behalf. Court authorizes attorneys fees to the AIP's attorney pursuant to the Civil Rights Attorney's Fee Act of 1976 against AG for raising this argument, even though Attorney General claims to have raised the argument in good faith claiming this area of the law is still unsettled.

Carpenter v. Saltone Corp., 276 AD2d 202, 716 NYS2d 86 (2nd Dept., 2000)

Under rule of Baker v. Sterling, 39 NY2d 397 (1976), a Medicaid lien for a person under age 21 must be satisfied to the extent to of reimbursing Medicaid for funds paid for medical treatment for the minor. Citing the Appellate Division decision in Gold v. United Health Services Hosps., 261 AD2d 67 (1999), and other cases, Court held that counsel for an infant in a personal injury action may not circumvent the rule of Baker by denominating the entire settlement as being for pain and suffering.

Matter of Link v. Town of Smithtown (Gibson), 162 Misc2d 530; 616 NYS2d 171 (Sup. Ct., Nassau Cty., 1994), *aff'd*, 226 AD2d 351; 640 NYS2d 768 (2nd Dept., 1996), *reversed and remanded sub nom Cricchio v. Pennissi*, 90 NYS2d 296; 660 NYS2d 679 (1997) *on remand sub nom as Link v. Town of Smithtown*, 175 Misc2d 238; 670 NYS2d 692, (1997), *later proceeding AD2d, 700 NYS2d 52 (1999)*.

Department of Social Services is entitled to satisfy Medicaid lien placed on proceeds of personal injury settlement before those funds can be transferred into an SNT.

Calvanese v. Calvanese, 93 NY2d 111, 688 NYS2d 479 (1999), *cert denied, sub nom., Callahan*

v. Suffolk Cty., 528 US 928; 120 S. Ct. 323 (1999)

Deals with question left open in Cricchio whether entire amount of a personal injury settlement is available to satisfy Medicaid lien, or only that portion of settlement specifically allocated to past medical expenses? Court holds that restricting recovery of lien to that portion of a settlement allocated to past medical expenses is contrary to statutory mandate that Medicaid be payor of last resort. Entire amount of personal injury settlement, not only that portion of settlement specifically allocated to past medical expenses, is available to satisfy Medicaid lien and cannot be placed into a SNT. **OVERULED BY ARKANSAS v. AHLBORN (SEE BELOW)**

Matter of Fredric, NYLJ, 6/8/98 (Sup. Ct., Nassau Cty., 1998)(Rossetti, J.)

Lower court decision following Calvenese issued just after App. Div decision.

Lugo v. Beth Israel Medical Center , NYLJ 8/10/06 p. 23, col. 1. Supreme Court , NY Cty)

Trial court holds that Arkansas v. Kansas (above) overrules Calvenese (above) and Gold (above). Only that portion of settlement specifically allocated to past medical expenses, is available to satisfy Medicaid lien and the rest CAN be placed into a SNT .

Arkansas Department of Health and Human Services, v. Ahlborn, 164 L. Ed 2d 459; 74 U.S.L.W. 4214; 2006 U.S. LEXIS 3455 ; 126 S. Ct. 1752 (2006)

An individual was severely and permanently injured in an auto accident and her medical expenses were covered by Medicaid administered by the Arkansas Department of Health and Human Services (“ADHS”). The recipient subsequently settled with alleged tortfeasors for approximately one sixth of her damages which, in addition to medical expenses, included future expenses, permanent injury, and lost earnings. The recipient contended that the ADHS was only entitled to claim the portion of the settlement attributable to medical expenses, but the ADHS asserted that under its state code ADHS was entitled to recover from the settlement the full amount it paid in medical expenses. The U.S. Supreme Court unanimously held that federal Medicaid law concerning third-party liability did not authorize the ADHS to recover an amount in excess of the recipient's recovery for medical expenses, and that the federal anti-lien provisions affirmatively prohibited such recovery by the ADHS. Federal laws requiring the recipient to assign payments from third parties only extended to payments for medical care and did not allow ADHS to collect the full amount of benefits paid, and the ADHS was federally precluded from asserting a lien on the settlement for the full amount.

Matter of Moretti, 159 Misc2d 654; 606 NYS2d 543 (Sup. Ct., Kings Cty., 1993)(superceded by statute)(1994 amendment to EPTL 7-1.12)

Court finds that if AIP had capacity to act, it is apparent that he would have created an SNT with

proceeds of personal injury settlement, naming himself as the beneficiary, which would “supplement and not supplant” government entitlements, thereby enabling him to enjoy an enhanced quality of life. While it is noted that §81.21(a)(6), in describing the guardian's powers to make transfers on behalf of IP, refers to such transfers as those made "for the benefit of another person", OBRA '93 now makes clear that disabled person's assets may be transferred to SNT for his own benefit.

Matter of Bigajer, NYLJ, 5/27/94, (Surrogate Court, Kings Cty.)

Court applies OBRA '93 and grants application by co-guardians (parents) to create SNT for developmentally disabled ward (son) with personal injury award before NY adopted OBRA, citing supremacy clause of US constitution.

Matter of LaBarbera (Donovan), NYLJ, 4/26/96, p. 36, col. 6 (Suffolk Sup.)(Luciano, J.)

Court denies application to establish SNT for comatose AIP with proceeds of personal injury settlement where income from settlement currently exceeds and is likely to continue to exceed her expenses, although it did give guardian opportunity to seek establishment of SNT should this situation change in future.

(ii) Inheritances

Matter of Olive VV., (Stipulation of 12/7/00)(attached)

The Attorney General agreed to withdraw its appeal and has stipulated that inherited funds are not "available" for Medicaid qualifying purposes until the date of distribution rather than the date of death. Therefore, such inherited funds may be placed into Supplemental Needs Trusts rather than applied to satisfy pre-existing Medicaid liens. This agreement is consistent with the outcomes in Matter of Patrick B.B., Matter of Steven S., and Matter of William S., either previously reported in the main volume of this booklet or in this volume.

Matter of Patrick “BB”, 267 A.D.2d 853, 700 NYS2d 301 (3rd Dept., 1999); NY App. Div. LEXIS 13572

Question whether IP’s inheritance was available resource for purposes of Medicaid eligibility, was rendered moot where State relinquished its claim and did not object to the funding of SNT.

Matter of Steven S., Sup. Ct., Kings Cty., 6/19/00, (Scholnick, J.)(NOR) (not an Art. 81 case)

Medicaid lien accruing after death of ward’s father but prior to distribution of inheritance to ward cannot be satisfied before creation of SNT because funds did not belong to ward when Medicaid lien was created, they were just an expectancy but not vested and not under his control or his

representatives control when lien accrued.

Matter of William S., Index No. 1999-002249, (Sup. Ct. Broome Cty., 1/28/00 NOR)(Thomas, J.), NOR

OMRDD petitioned for the appointment of guardian of the person and property for profoundly retarded man who became the beneficiary of his deceased father's IBM tax-deferred savings plan. OMRDD wanted guardian to control that fund and turn it entirely over to the state as compensation for past care, arguing that it became an "available resource" as soon as the father died in 1997 and Medicaid had therefore been incorrectly paid for the care of William S. The court followed the MHLS argument and cited as controlling precedent, Matter of Little, 256 A.D.2d 1152 for the proposition that for the purpose of determining Medicaid eligibility, a resource is not available until it is actually distributed to and in the control of the Medicaid recipient. The court then granted MHLS partial summary judgment, dismissing OMRDD's claim of incorrectly paid Medicaid and then ordering the inheritance placed in a supplemental needs trust upon the determination, following an evidentiary hearing, that William S. requires a special guardian.

(iii) Income and benefits

Matter of Kaiser v. Commissioner of the NYS Department of Health, ; 13 Misc 3d 1211A; _____ NYS 2nd _____; 236 N.Y.L.J. 38; 2006 N. Y. Misc. LEXIS 2546; NYLJ , Aug 24, 2006, p. 24, col. 3 (Sup Ct., Nassau County)

An Article 81 guardian had been appointed pursuant to an order which directed the guardian to establish an SNT for the benefit of the IP's disabled daughter into which the guardian would pour the IP's Social Security and pension income. The IP was in a nursing home and her care was funded by Medicaid and Medicare. When the guardian tried to set up the trust as directed, the Commissioner calculated the NAMI (Net Available Monthly Income) as including the IP's income described above so that there was no money left to with which to fund the trust. The Commissioner took the position that in order to be exempt from inclusion in the NAMI, the income placed into the trust had to be for the benefit of the IP only and could not be diverted for the daughter's support. After Fair Hearing, the Commissioner's position remained the same. The guardian brought on an Article 78 petition in Supreme Court, Nassau County to challenge the Commissioner's decision and that court granted the petition, holding that the income could be set aside in an SNT for the disabled daughter under the express language of State law (Soc. Services Law §366.5(d)(3)(ii)(C),(D)), the Commissioner's own regulations (18 NYCRR 360-4.4(c)(2)(iii)(C)(1)(iii)) and Federal Law (42 USC 1396p(c)(2)(B)(iii)). This out come was consistent with a previous unpublished decision of that Supreme Court, Nassau County (Covello, J.) in Matter of Correrri, Nassau County, Index # 17372/04 (May 19, 2005).

Matter of Sussman , NYLJ, p. 25, 9/7/04 (Surr. Ct. Westchester Cty)(Surr. Scarpino)

“...the funding of a supplemental needs trust with funds emanating from Social Security Disability Income is permissible and does not contravene any public policy considerations ..(see Matter of Kennedy ...) ...”

Matter of Kennedy, NYLJ, 4/21/04, p. 20 (Surr. Ct., Nass.. Cty.)(Surr. Riordan)

SNT may be funded with SSD monthly income and such funding, which has the effect of avoiding the spend down requirement of Soc. Serv. Law §366(2)(a)(7), does not violate that section. Therefore, 40 year old mentally retarded man living in the community receiving both SDD of \$1,391/mo. and Community Medicaid did not have to spend down the difference between his SSD and the SSI of \$662/mo by applying the remaining \$729/mo to his care by AHRC and could instead put the \$729/mo into the SNT to be used for his supplemental needs that Medicaid and SSI would not pay for.

b. Proper trustees

Matter of Lauro, 44 AD2d 951; NYLJ, 9/7/01, p. 17, (Sup. Ct., Onondaga Cty.)(Wells, J.); 1974 NY App. Div. LEXIS 8274

Court denies application for guardian to determine the supplemental needs of the AIP so that SNT trustee, a bank, can disburse funds to meet the AIP's supplemental needs in accordance with the trust. Court finds that proper trustee is the one named in the trust. Trust requires that the named trustee use its discretion, not the discretion of person unnamed in the trust. Appointing the guardians for this purpose would, in effect, reform the trust impermissibly.

Matter of Patrick "BB", 284 AD2d 636; 725 NYS2d 731, 2001 NY App. Div. LEXIS 6030 (2001).

Where Court held that MHL §81.19(e) prohibited appointment of Commissioner of OMRDD as guardian of property because OMRDD is a creditor of AIP, it also held that MHL §13.29 and §29.23 did not authorize said Commissioner to hold the funds in any other capacity short of guardianship, such as "SNT-like account".

Matter of Larson, 190 Misc2d 482; 738 NYS2d 827(Surr. Ct., Nassau Cty.)

Court permits creation of Other Qualifying Instrument calling it a “MHL 13.29 account” (SNT like trust) for OMRDD client in which OMRDD is the trustee. Decision states that parents, who were the co-guardians, “conditionally gifted” the funds (\$25,000) to the State and the state set up the trust with the “gifted” funds. Court finds it different from Patrick BB because these funds were actually gifted.

Matter of Regina, NYLJ, 11/2/01, p.20, col. 4 (Sup. Ct., Queens Cty.)

Mother, who was already the Art 81 guardian of the person and property management was permitted to be named as SNT trustee despite conflict of interest with income beneficiary so long as trust was amended to include an annual accounting requirement and notice to DSS.

Matter of Pace, 182 Misc2d 618; 699 NYS2d 571 (Sup. Ct., Suffolk Cty., 1999)

Co-guardians were parents of their adult disabled son who resides in group home and attends day programs, both of which are funded through Medicaid program. Parents could serve as co-trustees of SNT even though they ultimately stood to inherit corpus of the trust after Department had been reimbursed for medical assistance provided. Court held that there is no blanket rule prohibiting all parents or relatives who are remaindermen, from serving as trustees of supplemental needs trusts.

Matter of Kacer (Osohowsky), NYLJ, 11/1/94, p. 33, col. 1 (Sup. Ct., Suffolk Cty.) (Luciano)

Establishment of SNT denied where trust named same persons as co-trustees and beneficiaries of trust corpus upon the person's death, which presents serious conflict of interest. READ FOR EXCELLENT DISCUSSION OF SNT'S AND RELATIONSHIP OF FEDERAL OBRA '93 STATUTE TO EPTL STATE STATUTE AUTHORIZING SNT'S.

Contrast

DiGennerro v. Community Hospital of Glen Cove, 204 AD2d 259; 611 NYS2d 591 (2nd Dept., 1994)

Establishment of SNT denied where trust named infant's parents as both co-trustees and beneficiaries of trust corpus upon infant's death, which presents serious conflict of interest. Additionally, there was no provision in trust instrument for court approval of withdrawals made by trustees, nor was there any requirement that trustees account to court on annual or bi-annual basis.

Matter of Mc Mullen, 166 Misc2d 117; 632 NYS2d 401 (Sup. Ct., Suffolk Cty., 1995)

A request by parents (co-guardians) of incapacitated child for authorization to establish SNT is denied where co-trustees are also potential remaindermen, since this arrangement creates an impermissible conflict.

Matter of De Vita, NYLJ, 2/17/95, p. 33, col. 5 (Sup. Ct., Suffolk Cty., 1995)

2/17/95--A mother and father applied for an order approving SNT for incapacitated son's personal injury award with the mother to serve as trustee. The mother also served as guardian. Court denies request because trustee gives accountings to guardian and requiring her to report to herself is an impermissible conflict of interest.

5/22/95-- Prior problem with inadequate accounting was resolved with provision requiring that

copies of trust's federal tax return be submitted to father and court examiner as well as herself as guardian. However, court still did not approve SNT because mother, who served as trustee, still stood to benefit by another provision distributing all remaining principal and income by the laws of intestacy. This was an impermissible conflict of interest, despite fact that any money left would be negligible.

c. Pooled trusts

Matter of Christine Banks, NYLJ, 6/28/00, p. 26 (Sup. Ct., NY Cty.)(Parness, J.)

Court appointed guardian with power to establish pooled trust for benefit of IP. Guardian fails to carry out its duty to establish trust. During roughly 2 years time that trust should have been in existence but was not, Medicaid made substantial medical payments on IP's behalf. Then, new guardian appointed. He locates additional assets and then applies to add them to pooled trust previously approved by court. DSS opposes, saying that it has lien for payments made and Medicaid should be payor of last resort. Court allows establishment of pooled trust citing intent of Court of Appeals in Shah and rule of equity that says that "equity regards as done that which should have been done."

Matter of Steffi Salomon, NYLJ, 9/2/98, pg. 23, col. 5 (Surr. Ct. New York Cty. 1998)

An Article 17-A guardian can transfer a ward's assets into a charitable pooled asset trust. The UJA Trust is established pursuant to Social Security Services Law, which mirrors the substance of the federal Omnibus Reconciliation Act of 1993. The pooled trust concept combines the resources of various individual beneficiaries and enables them to receive the advantage of nonprofit investment management which an individual supplemental needs trust could not ordinarily obtain.

Matter of Siegel (Altschuler), 169 Misc2d 613, 645 NYS2d 999 (Sup. Ct., Nassau Cty., 1996)(Rossetti, J.)

Trustees sought to transfer assets from SNT to charitable pooled trust. The income trust was set up for two allegedly incapacitated sisters. The court stated that, if assets were put into a pooled trust, when the sisters died remaining amounts could be kept in the trust for charitable purposes, rather than just for reimbursing Medicaid. Court stated that the "U.J.A. trust" at issue was a proper pooled asset trust under federal Medicaid legislation, but it did not approve the transfer, as the income trust was irrevocable without certain steps taken.

Matter of Sarah Rosenbloom, Index No. 9404844, (Sup. Ct., Dutchess Cty.)(Bernhard, J.) 5/9/95, NOR

80-year-old mentally retarded woman inherited \$34,000 from brother. Court, pursuant to 42 U.S.C. §1396, appointed UJA to place money in "pool trust," because SNT is only available for Medicaid purposes to people under 65. However, "pool trust," which must be established and managed by non-profit association, functions in same way, as state will still be reimbursed after her death.

d. Notice to and Involvement of local DSS

Cano v. Shmonie Corp., NYLJ July 22, 04 (Sup. Ct., Bronx Cty 2004)(Katz, J.)

Infant plaintiff's personal injury action was settled for \$2.19 million. Plaintiff sought an order permitting the placement of settlement proceeds in a "portable" supplemental needs trust [SNT]. Department of Social Services [DSS] argued that that SNT's should not be "micro-managed" by courts. Court rejected the assertions by the DSS that a portability provision within the SNT would violate Estate, Powers and Trusts Law §[7-1.9, with the result that the SNT might be considered a revocable trust, rendering the plaintiff ineligible for Medicaid. The court determined that to permit an SNT to be constructed in a way to prevent the family of a disabled person to move freely to another state without jeopardizing the disabled's ability to receive entitlement payments would violate public policy.

Matter of Mc Mullen, 166 Misc2d 117; 632 NYS2d 401 (Sup. Ct., Suffolk Cty., 1995)

DSS should be given notice of proceeding to establish SNT so they may intervene and provide guidance regarding beneficiary's eligibility for Medicaid since SNT that is judicially approved and conforms to all criteria necessary to render beneficiary eligible for Medicaid, may later be determined ineligible by an administrative determination. To assure that proposed SNT qualifies to fulfill its intended purpose, guardian's motion to establish and fund such trust will be denied until trust is formally approved by County and State DSS, or any appropriate reviewing authority, in writing.

e. Creation of SNT/Proper petitions and petitioners

Matter of Romsey, NYLJ, October 11, 2006, Vol. 236, (Kings Cty, Surrogate's Ct) (Surr. Lopez Torres)

Example of another case permitting an SNT to be settled by a self

Matter of Bruce S. DeaMario, NYLJ 8/12/05, p. 30 (Surr Ct , Nassau Cty)(Surr. Czygier)

Example of another case in which petitioner self settles an SNT acting as his own petition. Petitioner suffers from Multiple Sclerosis but is competent to handle his own affairs. Court citing Gillette grants petition.

Estate of Paul M. Schuller, NYLJ, 11/3/04, p.31 (Surr Czygier) Surr Ct. Suff. Cty.)

Petitioner, a physically disabled man who was mentally competent to handle his own affairs, petitions to establish self settled SNT. Court grants petition citing Matter of Gillette)

Matter of Cusack, NYLJ, 10/29/03 (Surr. Czygier)

Petitioner, a physically disabled woman who was mentally competent to handle her own affairs, petitions to establish self settled SNT. Court grants petition citing Matter of Gillette)

Matter of Gillette, NYLJ ,4/4/03, p. 23, col 3 (Broome County, Surr. Peckham)

Disabled person under 65 who has no parents, grandparents or need for guardian sets up his own SNT w/o court intervention. SSA refuses to recognize the trust as an OBRA qualifying trust and therefore counts the resources in the trust when determining eligibility. Disabled person petitions the court to recognize the trust and set it up *nunc pro tunc* as of the date it was first funded. Court holds that it cannot do it because it can not retroactively establish something that was not legitimate in the first instance. Therefore, disabled person petitions the court to create a new trust. **“HE DOES NOT SIGN OR FUND IT BEFORE SUBMISSION TO THE COURT”** Court notes, “In this way the expense of a guardianship proceeding can be avoided for a person who is disabled, but not otherwise in need of a guardian”. **See, excellent article discussing how to establish first party SNT in light of this case at NYLJ, 6/2/03 p.1 col. 1. See, Newsday 9/3/03 p. A23 “allowing a trust without a guardian” by Robin Topping (discussing Nassau County case before Surr. Riordan following Gillette)**

f. Proper Court

Matter of Isaiah Jenkins; NYLJ, 6/2/03, p. 33, col. 5 (Surr. Scarpino)

Surrogate’s Court has the authority to review an SNT and determine whether its terms satisfy applicable statutory requirements and case authority (EPTL 71.12; OBRA 93, 42 USC §1396p[d][4][A]; SSL §366[2][b][2]. This review protects the incapacitated person’s interest and ensures the fulfillment of fiduciary obligations and compliance with the controlling laws and rules regarding eligibility for government benefits.

g. Reformation of Trusts to SNTs

Estate of De Rosa, NYLJ, 4/20/06, p. 30, col. 2 (Surr. Ct. , Kings Cty (Surr.))

Surrogate permits reformation where testamentary trust was created prior to the codification of EPTL 7-11.2, the beneficiary was aged and in need of a home attendant, the will provided that the trust proceeds be used only to supplant and not supplement other available resources, there was a clause in the trust providing for termination of the trust if the beneficiary was denied benefits due to the trust’s existence and the trust also provided that the beneficiary has no power to dispose of any trust assets.

Matter of Kamp, 7 Misc. 3d 615; 790 NYS2d 852 2005 (Surr Ct. Broome Cty.) (Peckham, J.);

Court examines the question whether a third party testamentary trust benefitting the settlor's mentally retarded son who had a SCPA 17-A guardian, for which payout of income is not discretionary with the trustee and that was created before the enactment of EPTL 7. 1-12 and OBRA '93 can be reformed into an SNT where the payout of both income and principal would be required by law to be discretionary with the trustee. Court finds that the trust can be reformed because: (1) The settlor's intent to provide for the care of his mentally retarded son and minimize taxes is clear and it may be presumed that he would have created an SNT is that was then possible; (2) the clear intent of the Legislature was to benefit persons with disabilities; and (4) a guardian has the right and power to engage in Medicaid planning; and (5) The court can substitute its judgment for what the disabled individual would have done if able. The court rejects the reasoning of Matter of Rubin , 4 Miscd3d 634 (NY Cty 2004) as construing the law of reformation too narrowly.

Matter of Sylvia U. Rubin, NYLJ, p. 24, 6/15/04 (Surrogate Preminger)

Trusts that was created before Supplemental Needs Trusts were invented by either case law or statute (pre- OBRA '93, pre- Escher and pre- EPTL 7-1.12) could not be reformed to be third party non-payback SNT's because the reformation would alter the intent of the settlor of the trust not merely correct a mistake in the trust and the court would be substituting its own intent for that of the settlor's. Moreover, it could not be said that the settlor's intent to take care of the disabled person could not be carried out since the guardian's could still created "payback" (self settled) SNT's. Court denied reformation but permits creating of payback trusts. See also, Matter of Katherine H. Mortimer , NYLJ, p. 24, col 5, 6/15/04 (Surr. Preminger)(NY County)(also denying reformation)

Matter of Ciraolo, NYLJ, p. 31, 2/9/01 (Surr. Ct. Kings Cty ., Feinberg, J.)

Court permits reformation stating: " it is divorced from the realities of life to presume that if the testator were aware of the facts as they now exist, he would desire to pay the immense cost for his child's care in preference to having society share his burden. (Citing Matter of Escher)

Matter of Henry J. Winski,NYLJ, 6/30/03, p.33, col. 1

Example of reformation of testamentary trust into SNT. (No discussion)

Article: Departing from Terms of a Trust : Doctrine of Equitable Deviation Comes into Play, NYLJ p. 1 , vol. 234 , Oct 3 , 2005

h. Trustee Compensation/Legal Fees

Matter of Sussman, NYLJ, p. 25, 9/7/04 (Surr. Ct. Westchester Cty)(Surr. Scarpino)

Counsel fees set by court upon Affirmation of Services and paid from the funds earmarked for the trust prior to its funding (SCPA 405(1)(b)

Matter of Mathew Ryan F., NYLJ, 2/19/04, p. 20 (Sup. Ct., NY Cty).(Berler, J).

Where SNT is created by Art 81 guardian, legal fees paid by the trustees are inherently reviewable by the Art 81 Court, even if the trustee does not object to paying such fees. SNT 's cannot be used to circumvent the protections of guardianship. While most trusts leave legal fees to the discretion of the Trustee, SNT's are unique. In this case, the Court reduces the fees because many were charged to assist the trustee to learn about matters that did not require the assistance of a lawyer. A simple call to DSS by the trustee would have yielded the same results.

i. Court supervision of trusts

Matter of Petition to Create First Party Supplemental Needs Trust Pursuant to EPTL §7-1.12 for the Benefit of David Berke, NYLJ, 11/29/06, p. 25, col. 6 (Surr.Ct., NY Cty) (Surr. Glen)

First party SNT for mentally competent, physically disabled adult under the age of 65 was approved. Court directed that the accountings be submitted to the Department of Social Services and also to Mr. Berke, the trust beneficiary, but stated that it was unnecessary to submit the accountings to the court.

Matter of Paul Harris , NYLJ June 10, 2005, p. 34 (Surr Ct., Kings Cty) (Surrogate Tomei)

Court requires SNT to provide for annual accounting and bond and continuing court supervision NY even though TTE plans to move out of state until another court in the next state assumes jurisdiction over the trust.

Matter of Kevin Pete Kaidirimaoglou , NYLJ, 11/5/04, p.28 (Surr Czygier) (Surr Ct. Suff. Cty.)

Court (1) dispenses with requirement that trustee file annual accounting, reasoning that (a) trustee must notify DSS if he will make large expenditure depleting the estate and (b) trustee must judicially settle account prior to his discharge. Ct states: "The undersigned has opined on a number of occasions that a supplemental needs trust trustee should not be treated differently than a testamentary or inter vivos trustee. There are safeguards in place to protect the lifetime beneficiary and DSS, for example, the trustee must give notice to the social service district in advance of certain transactions [see 18 NYCRR 360-4.5 and Article 5.2 of the proposed trust] and is required to post a bond. Furthermore, this court has the authority to compel a trustee to account at any time and an interested party may petition for same. It is therefore unnecessary to mandate an annual accounting and burden the trust with the inherent costs. Accordingly, the request of DSS to include a provision directing the filing of an annual accounting is denied." **BUT** holds that SNT may not provide for automatic succession of true successor trustee. successor must be

approved by court at time of successions.

Estate of Paul M. Schuller, NYLJ, 11/3/04, p.31 (Surr Czygier) (Surr Ct. Suff. Cty.)

Court dispenses with requirement that trustee file annual accounting, reasoning that (a) trustee must notify DSS if he will make large expenditure depleting the estate and (b) trustee must judicially settle account prior to his discharge.

Cano v. Shmonie Corp., NYLJ, 7/22/04 (Sup. Ct., Bronx Cty., 2004)(Katz, J.)

Infant plaintiff's personal injury action was settled for \$2.19 million. Plaintiff sought an order permitting the placement of settlement proceeds in a "portable" supplemental needs trust [SNT] without court supervision. The court held that its supervisory and protective role with respect to the infant plaintiff, who remains a ward of the court, superceded the assertion by the Department of Social Services [DSS] that SNT's should not be "micro-managed" by courts.

j. Termination of trust

Matter of Ortiz, NYLJ, 8/27/04, p. 26, (Surr Ct., Bronx Cty)(Surr Holtzman)

SNT was terminated when beneficiary's circumstances changed after it was no longer needed. The court terminated the trust upon the condition that the relevant governmental agencies were reimbursed for the benefits paid to the beneficiary while the trust was in existence.

I. Voiding previously executed legal instruments including Wills, Conveyances, Contracts, Health Care Proxies and Powers of Attorney

In the Matter of Loretta I., 34 AD3d 480, 824 NYS2d 372, 2006 NY Slip Op 8134 (2nd Dept 2006) and In the Matter of Johanna C., 34 AD3d 465; 824 NYS2d 142; 2006 N.Y. App. Div. LEXIS 13340 (2nd Dept 2006); In the Matter of Annette I., 34 AD3d 479; 823 NYS 542; 2006 N.Y. App. Div. LEXIS 13353 (2nd Dept 2006)

In a guardianship proceeding brought on because 3 allegedly incapacitated persons had allegedly been taken advantage of by a third party and , *inter alia*, coerced into signing away the deed to their home, the third party was neither named nor given notice that the court could ultimately divest her of her title to the property. Title was held by two of the AIPS and the third AIP was the child and natural heir of one of them. The Appellate Division did order that title revert back and the third party appealed on the grounds that the court lacked jurisdiction over her to so divest her of title. With respect to the appeals in the matter involving the 2 AIP's who were title holders, the Appellate Division reversed that portion of the order noting that the transactions in question were not made by persons who were yet adjudicated incompetent and for whom a guardian had already been appointed but, rather, by persons who were unable to understand the nature and consequences of their actions, rendering the transactions *voidable but not void* and concluded that granting the

guardians authority to commence a turnover proceeding against the third party rather than deeming the transactions void, and enjoining any further transfer of the subject real property pending the turnover proceeding was a more appropriate course of action. In the appeal involving the child and natural heir of the title holders, the appeal was dismissed on the grounds that the non-title holding child was not aggrieved.

Matter of Susan Jane G., 33 AD3d 700; 823 NYS2d 102 (2nd Dept. 2006)

The AIP was disabled as a result of a 1998 brain injury. Her functional limitations were undisputed. In 1992, prior to her brain injury, she executed an HCP in favor of her husband. In 1999, subsequent to her injury, she also executed a POA in favor of her husband. After keeping her at home with him for 5 years, her husband placed her in a nursing home. Two years later, her daughters became dissatisfied with her living arrangements and with their father's performance as POA. They brought an Article 81 petition. The trial court revoked both the 1992 HCP and the 1999 POA and appointed the daughters as co-guardians, finding that there was clear and convincing evidence that the 1999 POA had been executed when the AIP was incapacitated and also that the husband was no longer "reasonably available, willing or competent to fulfill his obligations under PHL 29-C, thereby warranting revocation of the 1992 HCP."

Matter of Margaret S., 2006 Misc LEXIS 2833 ; NYLJ , July 14, 2006 , p. 23, col. 1 (Sup. Ct. Richmond Cty.)(Giacobbe, J.)

Court voided the previously executed Health Care Proxy and Power of Attorney to the extent that the powers were granted with in the guardianship, stating that since the parties stipulated that the AIP was incapacitated and in need of a guardian, any consideration of the continued viability of the power of attorney and health care proxy was academic. The court reasons that by stipulating that the appointment is necessary, it is conceded *a fortiori* that the available resources defined in MHL §81.03 (e) were inadequate to provide for the AIP's needs. The court also reasoned that by applying for guardianship, the attorney-in-fact had, in effect, renounced his prior appointment.

In refusing to void a prior real estate conveyance by the AIP , the court notes that the burden was on the daughter who was challenging the conveyance to prove undue influence and that she failed to meet the burden. The court noted that the AIP's diagnosis of Alzheimer's disease did not give rise to a presumption that the AIP lacked the capacity to make the transfer and that there was sufficient evidence that despite her illness she deliberately transferred the home to her son who had been living there for years and caring for her.

With respect to her last Will and Testament, which addressed the fact that she had previously transferred the house to her son, the court noted that it's validity was not before the court but that in any event, a finding of incapacity under MHL Article 81 was based on factors that were different for those determinative of testamentary capacity.

Matter of Rita R., 811 NYS2d 89; 26 AD3d 502 (2nd Dept .2006)

During an Article 81 proceeding held in Surrogates Court the AIP was found to be incapacitated and also to have been lacking capacity during the preceding two years when she executed certain legal instruments including a POA, HCP, Trust and Will. Pursuant to MHL 81 29 (d) the Surrogate's Court voided the POA, HCP and Trust. On appeal, the Appellate Division upheld the Surrogate Court's order and also modified it to also invalidate the Will.

Matter of Shapiro, NYLJ, 4/19/01, p. 17 (Sup. Ct., Nassau Cty.)(Rosetti, J). NYLJ only.

Elderly IP transferred all \$680,000 of her assets to neighbors who recently began helping her, although there were relatives in the picture who had been supportive. Despite presumption of capacity, evidence of dementia shifted burden to recipients of transferred funds to show that transfer was not due to undue influence or incompetence. Court voids transfer. Court noted that while it is bound to consider wishes and desires of IP, it is only bound to consider "competent " wishes consistent with IP's best interest.

J. Guardian may waive professional privileges on behalf of ward

Matter of Colby, 187 Misc2d 695, 723 NYS2d 631 (Surr. Ct., NY Cty., 2001) (Surr. Roth)

Guardian, as personal representative, may waive attorney-client privilege on behalf of ward. (As of this writing, as a result of Colby, there is a proposed amendment to CPLR 4501 (4501-a) granting guardians and other personal representatives the power to waive professional privileges after the death or disability of the person whom they represent.)

K. Guardian's power to protect ward's assets

Matter of Kent, 188 Misc2d 509; 729 NYS2nd 352 (Sup. Ct., Dutchess Cty.)(Pagones, J.)

Where guardian believe that AIP's prior attorney-in-fact had misappropriated funds belonging to IP, guardian properly sought and was granted an accounting under MHL §81.44 where following four factors existed: (1) fiduciary relationship; (2) entrustment of money or property; (3) no other remedy; and, (4) demand and refusal of accounting. Court reasoned that guardian had duty to protect ward assets under MHL §81.20 (6)(iii) and needed power to do that.

L. Least restrictive alternative/Deprivation of liberty

In the Matter of The Application of Joseph Meisels (Grand Rebbe Moses Teitelbaum); 10 Misc3d_659; 807 N.Y.S. 2d 268; 2005 N.Y. Misc. LEXIS 25115 (Sup. Ct. Kings Cty.) (Leventhal, J.)

An Article 81 petition was brought for guardianship over the Grand Rabbi of The Satmar sect. The

parties wanted to bring the proceeding in the Bet Din religious tribunal but could not agree on which one so the petitioner ultimately filed in State Supreme Court. The court noted that the matter could not have been held in the Bet Din, which would have been akin to submitting it to arbitration because the case involved the capacity of an individual and not a religious matter; guardianship involves important civil liberties protected by due process, that such process includes a plenary hearing with counsel, application of the rules of evidence, the clear and convincing evidence standard, the placement of the burden of proof on the petitioner and the right to a jury. Thus, the court stated: “ An Article 81 proceeding cannot be heard or determined other than by a New York State court.”

Matter of J.G., NYLJ, August 19, 2005 (Sup. Ct , Bronx Cty). (Hunter , J.

Court, in denying the petition for assorted reasons, states: “There was no indication that the [AIP] understood that a finding of incapacity would deprive him of a great deal of power and control over his life....”

Beach Haven Apartments, Assoc. LLC v . Riggs , NYLJ, July 20, 2005 , p. 20 col. 1 (Civ Ct, Kings Cty) (Finkelstein, J.)

Motion to appoint Guardian Ad Litem in eviction proceeding denied because there was no proof of proper service upon the proposed respondent. The Court states in the context of this decision that lack of service would be especially serious because the appointment of a GAL carries with it a loss of liberty merely “by the imposition of a stranger in the proposed ward’s life.”

Matter of Joyce Z., NYLJ, 6/15/04 (Supreme Court, Nassau Cty.)(Asarch, J.)

Although the IP had been surviving, albeit in a psychotic state, in a home that was barely habitable, Court finds that it is not financially feasible to maintain her home and that it would be the least restrictive alternative to expand powers of Special Guardian to full guardianship powers and to allow the guardian to place the IP into adult foster care, sell the IP’s home to pay off all outstanding liens and place the funds into an SNT.

Matter of Jospe (McGarry), Sup. Ct .Suff. Cty, unpublished decision, index # 00185/03 (Berler, J.) (copy distributed to MHLS 2nd Department staff under separate cover)

AIP consented to appointment of a guardian and admitted to functional limitations. She nominated her friend and neighbor to be her guardian. This friend was not physically able to help bath and dress AIP. The only matter in dispute was AIP’s place of abode. AIP was in psych hospital at the time of the petition and hearing. The treatment team maintained that she could be discharged only to an assisted living facility or adult home. The AIP wanted only to return home to her own apartment. While in the hospital, she met another patient who happened to be a licensed home health aide. This woman needed a job and a place to live. She and the AIP agreed that she would assist the AIP in exchange for room and board. Citing MHL §81.22 (A)(9) the court held that the availability of less restrictive alternative resources in the community dictated that the AIP should

not be removed from her home and granted the guardian the power to change the AIP's abode only subject to further court order.

Matter of Lauro, NYLJ , 9/7/01, p. 17 (Sup. Ct., Onondaga Cty.) (Wells, J.)

Court denies a petition for guardianship where there was already an SNT in existence who would serve the same function stating: "Article 81 is designed to promote the use of the "least restrictive form of intervention" (MHL 81.01) ...Guardianship... no matter how noble, is still a deprivation of a person rights."

M. Major medical decisions

Matter of Guardianship of B., 190 Misc2d 581; 738 NYS2d 528 (Sup. Ct., Tompkins Cty., 2002)(Peckham, A.J.)

Where order appointing guardian provides that no sterilization procedures should be performed without further hearing and with a GAL for the IP, and the IP and guardian petition for such procedure to be authorized, court (1) finds that IP, who wants the tubal ligation, has the capacity to make decision for herself and that such would be the least restrictive alternative and (2) that the guardian can be authorized to under MHL §81.22 to make major medical decisions in the best interest of the IP and in accordance with the IP's wishes so that guardian can also be authorized to make the decision here.

N. AIP As Incapacitated Fiduciary

Estate of Patricia Cohen , NYLJ , 1/2/07, p.24, col. 3

Where an 84 year old retired attorney who was living in a nursing home subsequent to a stroke petitioned to become administrator of his wife's estate, and such petition was opposed by his daughter, the court, granted his petition, and noted, inter alia, that he had not been the subject of a guardianship proceeding.

Estate of Ella Mae Niles, NYLJ, 7/13/04, p. 30 (Surr. Ct., Kings Cty.)(Surr. Feinberg)

A guardian moved to revoke the letters of administration previously granted to his ward. on the grounds that she was now incapacitated to act and further sought to have letters of administration d.b.n. granted to him in her stead and to authorize him to convey the estate's interest in real property. The court granted all three applications.

Estate of Seymour Teitelbaum, NYLJ, p. 25, col 6, (Surr. Ct., West. Cty., Jan. 1, 2003)

Where IP was the named executor of an estate, and was now incapacitated to serve, IP's guardian

could serve as the executor in IP's stead as Administrator c.t.a. In this case no executor's bond was required. Court allowed Guardianship bond to be sufficient.

O. Change of IP's domicile

Estate of Louise Bausch, NYLJ, 1/8/04, p. 20 (Surr. Ct., Suff. Cty.)(Surr. Czygier)

Ct. makes three relevant statements concerning change of domicile: (1) A finding that deceased was functionally impaired such that she required a guardian was not automatically a finding that she lacked the ability to formulate the intent to change her domicile; (2) A provision in an order of guardianship permitting the guardian to change the IP's abode is not a power authorizing the guardian to change domicile; (3) a court may change domicile and in this case, the court *implicitly* DID change the domicile because the substance of the order was directed to slowly moving the IP and her property back to Austria and directing that her ashes be returned to NY for burial with her husband.

Matter of Roy (Lepowski), 164 Misc2d 146; 623 NYS2d 995 (Sup. Ct., Suffolk Cty., 1995)

Court empowers guardian to change abode but not domicile stating: "... the personal needs co-guardians ...shall choose the place of abode (Mental Hygiene Law §81.22[a]9), provided that the choice of the place of abode shall not constitute a change of ... domicile to a jurisdiction outside the State of New York."

P. Right/Obligation to Testify

Lopez v. Meluzio, 2006 U.S. Dist. LEXIS 93912 (EDNY 2006)

The court held that a finding of incapacity in State court under Article 81 did not automatically render an IP incompetent to testify at a deposition in this Federal proceeding. The court found although this IP who suffered from cerebral palsy had difficulty speaking and spoke slowly, it was a result of his physical limitations and not the result of any inability to understand questions and frame answers.

IV. GUARDIANS

A. Proper guardians

(i) Preference for Family Members Unless Unfit or Conflict

Matter of Gladwin, AD3d, 2006 N.Y. App. Div. LEXIS 15500 (4th Dept. 2006)

In their respective wills signed in 1999, the parents of 12 children, including one disabled son, named one of his 12 siblings as his guardian and another of his 12 siblings as the alternate guardian. The trial court determined therefrom that the parents considered both parties to be acceptable guardians. The court determined that after the parents died, although the physical needs of the disabled sibling were being adequately met by the first sibling who has been living with and caring for the elderly parents and the disabled sibling that the disabled sibling's emotional and developmental needs had been severely restricted to his detriment by his socially isolated living environment. The court thus concluded that it was in the disabled sibling's best interests to live with the sibling named as alternate guardian and her family in another state, where he would have "a more socially active and enriching life through organizations and groups which are specifically set up to meet his needs," as well as unlimited access to all his siblings.

Matter of Mel S., 12 Misc3d 1193A; 2006 N.Y. Misc. LEXIS 2145 (Sup. Ct., Otswego Cty) (Peckham, J.)

The Court identified financial self-dealing by the daughter who was petitioning for guardianship over her mother and therefore appointed a neutral guardian of the property and appointed the daughter guardian of the person only. The specific self-dealing was that the daughter used the AIP's funds allegedly to make their home handicapped accessible for the AIP so she could visit but the evidence suggested that the work was really to make the home more comfortable for the daughter and her family and it also appeared that the AIP's condition was so debilitated that it was unlikely that she would ever leave the nursing home to visits the daughter's home in any event.

Matter of Williams, 2006 NY Slip Op 51521U; 2006 N.Y. Misc. LEXIS 2109 (Sup. Ct., Kings Cty. 2006) (Belen, J.)

Although AIP had freely given power of attorney to her grand nephew, the court found him unfit to serve as guardian because his behavior had evidenced impropriety and self dealing. Moreover, at the hearing, the AIP had clearly and unequivocally testified that she believed her grandnephew was stealing from her and plotting to dispossess her of her home and assets and that she wanted nothing to do with him anymore. The court recited the following evidence that the grandnephew was unfit to serve: (1) he had a conflict of interest because he had a vested interest in the AIP's testamentary estate, a life-long reliance on his grandaunt for his own financial needs and a belief, despite all evidence to the contrary, that his grandaunt wished to continue to support him; (2) while in control of her assets, even after she had revoked the power of attorney, he wrote more than \$18,000.00 in checks to himself and deposited over \$6,000 meant for her account into his own account, (3) he acknowledged the disappearance of approximately \$200,000.00 from the AIP's account's during the time period that he had a valid power of attorney, a matter which was being investigated by the District Attorney; (4) he had attempted to set up a situation whereby he could protect his own inheritance by causing the AIP to disinherit her developmentally disabled adult son; and (5) he had moved her into a nursing home that she did not need to be in, then moved into her apartment, removed her personalty from the apartment, refused to return her keys, diverted her mail, and barred her church friends from contacting her under the guise of helping her without her permission, based upon a power of attorney that she had validly revoked.

Matter of Margaret S., 2006 N.Y. Misc LEXIS 2833; NYLJ July 14, 2006 , p. 23, col. 1 (Sup. Ct. Richmond Cty.) (Giacobbe, J.)

Where there was acrimony between an AIP's son and daughter, both of whom were loving adult children capable of acting as guardian, the court, finding that it would be in the best interest of the AIP to have both of her children involved, appointed the daughter as guardian of the property along with an independent co-guardian of the property and the son as guardian of the person along with an independent co-guardian of the person. The court notes that it is mindful of the history of confrontation and disagreement between the siblings and the potential for further conflict between them in their roles as guardians. The court stated that it therefore appointed independent co-guardians to exert a moderating influence.

Matter of S.M., 13 Misc3d 582; [REDACTED] NYS2d [REDACTED] (Sup. Ct. , Bronx Cty. 2006) (Hunter, J.)

Petitioner, the AIP's son sought to be appointed guardian. The petition failed to mention that he was a convicted felon. Although the Court Evaluator, who did address the conviction in her report, told the petitioner and his counsel that weeks before the hearing that Part 36 (22 NYCRR 36.2(c)) prohibited his appointment and that petitioner was not bondable, petitioner's counsel continued to advocate for his appointment. The Court, stated that *it was counsel's obligation to disclose the proposed guardian's felony conviction in the petition and during her examination of him on the stand*. The Court proposes several amendments to Part 36 to insure that those seeking appointment as guardians have not been convicted of a crime or abuse or neglect. Ultimately, the court appoints an independent guardian.

Matter of Ardelia R. , 2006 NY Slip Op 2549; 2006 N.Y. App. Div. LEXIS 4077 (2nd Dept 2006)

Supreme Court providently exercised its discretion in appointing an independent guardian since the record established that AIP's family members were unsuitable AIP had been admitted to the hospital after being found in her home without running water, food, electricity, or heat, malodorous and frail. She was unable to cook, and was known to wander away from her home. She had forgotten where she banked and did not know her sources of income. Although she owned a home and possessed approximately \$115,000 in savings, she was delinquent on her utility bills. Upon admission to the hospital, she executed a power of attorney in favor of her brother. The record demonstrated that her brother told her to sign the document without reading it and, thereafter, withdrew funds from her bank accounts and failed to account for a substantial portion of those funds. As there was evidence of undue influence in the brother's actions to bring about the execution of the power of attorney and evidence of impropriety in his management of the AIP's property, he was providently deemed unsuitable to act as guardian. Since AIP's other two relatives were likewise unsuitable or unwilling to act as guardian. Supreme Court properly appointed an independent guardian.

In re Application of Arnold J. Mars, 13 AD23d 91; 785 NYS2d 451 (1st Dept 2004)

Appellate Division finds that the Court's decision not to follow the recommendation of the Court Evaluator to appoint a neutral third party was appropriate. Although the record indicated that of the AIP's children, respondent-appellant daughter played the more substantial role in seeing to his care, and that the parents preferred that she rather than petitioner son handle their financial and personal matters if they became incapacitated, the record also provided indication that respondent-appellant's interests came into conflict with those of her father when decisions respecting expenditures for her father's care arose. Accordingly, the determination that petitioner should serve as his father's guardian is supported by the evidence and is not contrary to Mental Hygiene Law. §§81.19[b],[d][1] and 81.17.

Matter of Wynne, 11 AD3d 1014; 738 NYS2d 179(4th Dept 2004)

Although acknowledging that preference should be given to family, court appoints non-family member as guardian as being in the best interests of the AIP because the petitioner (AIP's wife) and the other the family members (AIP's siblings) have a 30 year long history of contentions and conflict involving cross-accusations that the other was stealing money from the AIP.

In the Matter of the Application of GWC, 4 Misc3d 1004A 791 NYS2d 869; 2004 N.Y. Misc. LEXIS 968 (Sup. Ct., Tompkins Cty.)(Peckham, J.)

Where evidence showed that father of a mildly mentally retarded woman was not a nurturing parent, was not the primary caregiver during his daughter's lifetime, had no real understanding of her limitations as a mentally retarded adult, and was doling out only \$10/week of her funds to her, court appoints AIP's siblings as co-guardians of the person and property, despite the fact that they had secured a Power of Attorney from her which they used to withdraw a large sum of money from an account her father maintained for her and put the money into an account in their own names. The Court found, based upon the facts adduced at hearing, the court evaluator's recommendation, and the AIP's nomination of her siblings, that these inappropriate acts were motivated by a concern for the AIP and were an effort by the siblings to help the AIP gain access to her own funds then under her father's unreasonable control.

Matter of Flight, 8 A.D.3d 977, 778 N.Y.S.2d 815 (4th Dept. 2004)

App. Div. affirms lower court decision appointing AIP's brother as his guardians and rejects, without discussion of the facts, the contention by petitioner that the non-family members she proposed should have been appointed instead.

Matter of Kathleen FF, 6 AD3d 1035; 776 N.Y.S.2d 609 (3rd Dept 2004)

The guardian nominated by AIP was a family member (niece) who lived out of state. Another family member contested the niece's appointment because she was also the trustee and beneficiary of several trusts that she had set up for the AIP while holding the POA. Court finds after hearing that the niece was a proper guardian because (a) there was evidence of love between the AIP and

her niece; (b) the niece was handling the financial matters of other family members as well; (c) there was no evidence of wrongdoing by the niece; and (d) the court would be monitoring the financial dealings of the guardian.

Matter of Nasquan S., 2 A.D.3d 531 (2nd Dept.)

Petitioner was the AIP's mother. She sought to be appointed guardian and to have the attorney appointed as co-guardian. The trial court refused to appoint the attorney as co-guardian and instead appointed a third party stranger. In reversing the trial court, the Appellate Division stated: "The case law in this firmly establishes that a stranger will not be appointed as guardian of an incapacitated person "unless it is impossible to find within the family circle, or their nominees, one who is qualified to serve."

Matter of Bertha W., 1 AD3rd 603 (2nd Dept. 2003)

Appellate Division modifies order to eliminate appointment of non-family member co-guardian of the property stating that there is a preference for family members unless it is impossible to find a qualified family member to serve and that there was no showing that the AIPS nephew required a co-guardian to assist him in carrying out his duties.

Matter of Joseph V., 307 AD2d 469 (3rd Dept. 2003)

Court finds that although there is a preference for family members, court appoints independent guardian after considering factors including: the strained relationships between AIP's family members; the substance abuse problems of all the family members, the families unrealistic views of the AIP's condition, the plans of some family members to move the AIP out of a nursing home to his detriment, some family member's disregard for the AIPS wishes to forgo life support measures and the possibility that other family members may be quick to terminate life support.

Matter of Goryeb., NYLJ, 1/6/03 (2nd Sup. Ct., Kings Cty. 2003)

Where ex-wife cross-petitioned to be named guardian, Court found that (1) she is NOT a family member entitled to the preference given to family members and (2) she had conflict of interest in that she was a creditor of the IP because the divorce agreement provided for child support that had never been paid and therefore under the prohibition of MHL §81.19 against appointing creditors, could not be appointed even though the AIP said he wanted his ex-wife appointed.

Matter of Nellie Lopez (Salazar), 739 NYS2nd 147 (1st Dept., 2002)

Mother would not be appointed guardian where she failed to properly account for expenditures on AIP daughter's behalf under infant compromise, abandoned house that she was supposed to buy to give child needed space and comfort because she felt that her own interests were not protected under the deed and also because she sought both an Art. 17-A and Art. 81 guardianship at the same time without informing both courts of the proceedings pending in the other court.

Matter of Mary "J"., 290 AD2d 847; 736 NYS2d 542; (3rd Dept., 2001), 2002 N.Y. App. Div. LEXIS 564

Appellate Division held that where family member that AIP preferred to have as guardian was moving out of state and remaining siblings remained in local area where AIP had resided all her life, the hearing court properly appointed the two siblings as co-guardians, despite the AIP's wish to the contrary.

Matter of Zdeb, 215 AD2d 803; 626 NYS2d 298 (3rd Dept., 1995)

Where petitioner, AIP's daughter, had failed to satisfactorily propose definite plan for AIP to leave acute care facility after his stroke, despite repeated requests and a more than adequate opportunity to do so, and where there was ample evidence that petitioner failed to cooperate with AIP's caregivers in formulating and effectuating a discharge plan for AIP, even though there was no reason to retain him in an acute care facility, daughter was not suitable to act as guardian.

In re Sabol (Colon), NYLJ, 5/25/93, p. 25, col. 2 (Sup. Ct., Kings Cty.)(Leone, J.)

Where son visits mother in nursing home regularly but is very abusive and threatening to the nursing home staff and wants mother to return home where he intends to care for her, but evidence presented including report of guardian ad litem, indicated that son cannot adequately care for his mother in his home and refuses to assist in her care at nursing home. Court does not appoint son as guardian. Moreover, court determines that appointing an individual from fiduciary list to take on difficult problems associated with unique problems involved with managing affairs of AIP and with dealing with her son with little or no compensation would be inappropriate and appoints instead Commissioner of DSS.

Matter of Darius Ignatius (Wilber, M.); 202 AD2d 1; 615 NYS2d 367 (1st Dept., 1995)

Father was not suitable guardian for son where evidence of petitioner's poor judgment, included his refusal to consent to his son's surgery for a broken jaw anywhere but in Manhattan, even after he was informed that delay could be harmful to his son, and his blunt refusal before Surrogate to sign agreement with developmental center to have facility act as cooperating agency to fulfill the conditions of Surrogate's original decree that he designate an organization which would be giving him advice and counsel. Further his reiteration that he was concerned only with obtaining custody of his son further shows his unfitness for the role of guardian in view of uncontroverted evidence that treatment being received by son was vital for his well-being.

Matter of Lois "F." (Ruth "F."), 209 AD2d 856; 618 NYS2d 920 (3rd Dept., 1994)

Although family members are generally preferred for appointment, where petitioner mother who obviously loved AIP was incapable of providing necessary care, mother was unfit to be guardian. Court identifies "fixed delusional system" that interferes with her ability to make sound judgments,

inability to lift AIP out of bed or otherwise manage her, inability to recognize AIP's needs, frequent refusal to cooperate with AIP's caregivers, and fact that testimony at hearing was unfocused, discursive and erratic, as evidence of unsuitability.

In re: Robinson, 272 AD2d 176, 709 NYS2d 170 (1st Dept., 2000)

App. Div. reverses trial court's appointment of court evaluator as guardian, stating that although family is not financially sophisticated and estate is large and complex, family is the preferred guardian and they can hire financial advisor.

Matter of Bailin (Geiger), NYLJ, 5/19/95, p. 36, col. 4 (Sup. Ct., Rockland Cty.)(Weiner, J.)

Petitioner nursing home sought appointment of guardian for resident. Resident's nephew, who was attorney-in-fact and who had close, personal, relationship with AIP for many years, sought appointment as guardian of person and property. AIP's niece and other nephews were either unable or unwilling to be appointed. Nephew, however, would not make further payments toward cost of care. He also sold AIP's home and used some proceeds for his personal expenses, claiming she authorized it. Court revoked nephew's power of attorney, appointed him as guardian of person only, and appointed an attorney as guardian of property.

In re: Chase, 264 AD2d 330; 694 NYS2d 363 (1st Dept., 1999)

AIP suffered severe stroke which rendered him unable to communicate. In anticipation of his arrival home, petitioner, daughter, arranged for wheelchair, hospital bed, therapist, and home health-care aides to provide 24 hour care, established charge accounts at grocery store and pharmacy, made sure his bills were paid, and hired a geriatric case manager. Despite conclusions of court evaluator that portrayed petitioner as greedy daughter who was raiding assets of her incapacitated father, court should not have issued an order naming a non-family member as guardian. Daughter was appropriate and preferred guardian, evidence indicated that her care was proper, and there was no actual financial conflict of interest based on evidence.

Matter of Kustka, 163 Misc2d 694; 622 NYS2d 208 (Sup. Ct., Queens Cty., 1994)

Court properly departed from practice of appointing next of kin or close blood relatives or nominees where it found that wife's interests were adverse to AIP's, where new wife (who was formerly AIP's housekeeper and nurse to AIP's first wife) had been found to have been withdrawing AIP's funds from bank and sending them to her relatives in Czechoslovakia.

Matter of Donald Loury (Loury), NYLJ, 9/23/93, p. 26, col. 2 (Sup. Ct., Kings Cty.)

Petitioner relatives, sought to become co-guardians. Court finds that both were strongly motivated to repay certain substantial loans to AIP from AIP's father. Court finds interest of relatives adverse to interest of ward, and declines to appoint petitioners despite usual practice appointing next of kin, close blood relatives or their nominees.

Matter of Pasner (Tenenbaum), NYLJ, 7/14/95, p. 29, col. 1 (Sup. Ct., Kings Cty.)(Leone, J.)

Nephew was suitable guardian for uncle where he and uncle had close relationship, had worked together, nephew was uncle's primary care giver and uncle had nominated nephew as guardian. Court also expressed preference to appoint family member, despite their status as potential beneficiary under will.

Matter of Wingate (Kern), 165 Misc2d 108; 627 NYS2d 257 (Sup. Ct., Suffolk Cty., 1995)

Cross petition by friend of 40 years and former named power-of-attorney of AIP sought appointment as guardian of personal needs and property management was denied where cross-petitioner had previously engaged in activities with respect to AIP's assets that are colorably inconsistent with fiduciary duties. While cross-petitioner may, in fact, have at all times acted honorably and with no intent to profit at expense of IP, court's responsibility is to give primary consideration to protection of rights and interests of AIP. Moreover, to put cross-petitioner in position wherein she may be both grantor and recipient of AIP's property is to create situation in which appearance of, and potential for, actual impropriety are manifest. Any decision she might make by which she could enjoy immediate or future pecuniary benefit would be subject to scrutiny and doubt. Court should not knowingly allow state of events to evolve that will burden cross-petitioner with specter of future criticism, and create doubt and conflict about decisions intended to benefit AIP.

Matter of Priviteri (Goldstein), NYLJ, 10/29/95, p. 27, col. 3 (Bronx Sup.)(Friedman, J.)

Where petitioner for guardianship of property was AIP's presumptive heir, there was conflict of interest because guardian stood to seek to enlarge estate for his own benefit, rather than that of ward. After considering size of estate, nature and closeness of familial relationship between proposed guardian and AIP, proposed guardian's financial circumstances, and motivation of proposed guardian, court avoided appearance of impropriety and conflict of interest by appointing AIP's sister as personal needs guardian and nephew plus a co-guardian to be appointed later as her property management guardian.

Matter of Parsoff, NYLJ, 6/6/95, p. 38, col. 5 (Rockland Sup.)(Weiner, J.)

Where both AIP's daughter and husband sought appointment as guardian, and there was history of conflict between petitioners with actions pending in Family Court alleging unlawful conduct and asset misappropriation, courts appoints daughter as guardian of person, refuses to appoint husband at all because he had been uncooperative with Social Services and refused to disclose available assets, and appoints local lawyer as property guardian.

(ii) Public agencies

Matter of Keith H., unpublished, Sup.Ct., Hamilton Cty. (Montgomery County Spec. Term) (Index # 6296-06) (Sept 18, 2006) (Sise, J.)

The Consumer Advisory Board (“CAB”) formed under the Federal Court “Willowbrook Decree” to protect the class members against dehumanizing practices and violations of their individual or legal rights does not automatically have powers of a guardian under Article 81 and, did not automatically have the authority to retain counsel on behalf of a profoundly retarded class member to prosecute a tort claim for an automobile accident until, after a full Art. 81 proceeding where appropriate findings were made, it was first appointed as guardian.

Matter of Ethan Hylton, NYLJ, p. 26, 1/6/05 (Surrogate Ct, Bronx County) (Surr Holtzman)

Although not the subject of this brief case, it is worth noting that in this case, the **Public Administrator** was named the Article 81 guardian.

Matter of Patrick "BB", 284 AD2d 636; 735 NYS2d 731 (3rd Dept., 2001)

MHL §81.19(e) prohibits appointment of **Commissioner of OMRDD** as guardian of property where OMRDD is a creditor of AIP and there is no evidence that there no other party without a conflict of interest who could be appointed instead. Guardian must be neutral and disinterested person. Under same logic, court also holds that under NYSARC's charter, it may be also be a potential creditor and therefore, NYSARC may not be appointed special guardian.

Court also holds that neither MHL §13.29 nor §29.23 authorize the Commissioner of OMRDD to hold the funds in any other capacity short of guardianship, such as "SNT-like account".

Matter of Maria Cedano, 171 Misc2d 689; 655 NYS2d 283 (Sup. Ct., Suffolk Cty., 1997), related case, 251 AD2d 105; 674 NYS2d 34 (1st Dept., 1998)

Community guardian, which served as conservator for elderly woman before she was permanently placed in long-term nursing home facility, may be appointed guardian, pursuant to Article 81, until substitute guardian is located and appointed, even though **under Social Services Law §473-d**, community guardian is required to relinquish duties once conservatee entered long-term residential facility. Court notes that woman will have no one to watch over her if community guardian is relieved of its duties and its account is settled. While Article 81 authorizes court to appoint successor guardian, apparently no funding is available, and no public guardian or any other person or entity is available, to serve as guardian for an indigent person residing in nursing home. Purpose of Article 81 is not served by current funding scheme under which community guardians must terminate services to older people who are placed in nursing homes.

Matter of Commissioner of Cayuga Cty. for Appointment of Guardian for Bessie C., 225 AD2d 1027; 639 NYS2d 234 (4th Dept., 1996)

Commissioner of DSS who seeks to recoup payments or resources from recipient of public

assistance has conflict of interest with AIP recipient of benefits and should not have been appointed guardian of her property. A neutral, disinterested person should be appointed guardian of the property. For same reason, it was error to appoint Commissioner of DSS special guardian for purpose of exercising her right of election. Also executor and beneficiary of the estate from which AIP stood to inherit has a conflict of interest with AIP that bars his appointment as guardian of her property but there is no bar to his appointment as guardian of person.

Erlich v. Oxenhorn (Matter of Lula XX), 224 AD2d 742; 637 NYS2d 234 (3rd Dept., 1996), app. dismissed, 88 NY2d 842; 644 NYS2d 683 (1996)

Where there was longstanding ill will between AIP and DSS and DSS was petitioner and therefore AIP's adversary, there was conflict of interests and it was inappropriate for court to appoint DSS as guardian.

Matter of Sutkowsky (Wallace), 270 AD2d 943; 705 NYS2d 786; 2000

Where **commissioner of social services agency** was appointed guardian of respondent, and order directed commissioner to personally visit each of his wards four times per year, commissioner could delegate duties of guardianship to staff.

(iii) Out of State/Foreign guardians

Matter of Kathleen FF, 6 AD3d 1035; 2004 NY App Div LEXIS 5064 (3rd Dept 2004)

Court approves appointment of niece as guardian. Although it was not the main issue in the case, it is noted that the niece lived in California and the aunt lived in NY. The niece visited regularly and had already been handling her aunts financial matters as POA.

Matter of Bowers, 164 Misc2d 298; 624 NYS2d 750 (Surr. Ct., NY Cty., 1995)

A foreign guardian of nonresident AIP who is sole distributee of estate of New York domiciliary may proceed in Surrogate's Court to obtain letters of guardianship and acquire standing to apply for letters of administration in estate. Surrogate's Court enjoys limited jurisdiction over Art. 81 proceedings where impaired person has beneficial interest in estate. Although Article 81 does not specifically confer jurisdiction on Surrogate's Court where beneficiary of an estate is neither resident of nor physically present in New York, 81.05 governing venue, provides that where AIP is not present in State, residence shall be deemed to be county in which property is located. Thus, petitioner will not be required to proceed in two courts.

Matter of Sulzberger, 159 Misc2d 236; 603 NYS2d 656 (Sup. Ct., NY Cty., 1993)

Where AIP had resided in France for many years; and pursuant to French law, conservators of his property had been appointed, daughter of AIP, and one of the conservators appointed by French court, sought order appointing her as ancillary guardian in New York to deal with AIP's substantial

financial holdings in this state. Court noted lack of guidance in statute and directs counsel for petitioner to find out whether foreign courts procedure provided same protections as NY, such as court evaluator, in order to determine whether court should honor foreign court finding of incapacity or appoint court evaluator now.

In re: Robinson, 272 AD2d 176; 709 NYS 170 (1st Dept., 2000)

Court appoints co-guardian who is living out of the country temporarily, stating that modern transportation and communication will enable him to serve adequately.

(iv) Counsel or court evaluator as guardian

Matter of GLM (Gloria Loise Meyers), NYLJ, 5/6/03, p19, col 2 (Sup. Ct., Kings Cty.,) (Leventhal, J.)

Court finds extenuating circumstances under **22 NYCRR 36.29(c)(10)** to appoint the court evaluator in a proceeding as the guardian for a 14 year old girl where there was \$3.5 million involved, where the parents were financially unsophisticated and also divorced acrimoniously, where they both had a good relationship with the court evaluator and where the court evaluator was an experienced elder law attorney whose office was near the home of both parents and the child. Of note is that the court did not identify why he could not find someone other than the court evaluator to appoint under the circumstances.

Matter of Turner (Iuyomade a/k/a Felix), 2002 NY Slip Opinion 50062U (will not be published in official reporter); 2002 Misc. LEXIS 108

Although Commission on Fiduciary Appointments found abuses in guardianship appointments and said that it was improper to appoint counsel and/or court evaluators as guardians because there would be a conflict of interest when there were funds involved, but no conflict to appoint the court evaluator if there were no funds involved, the Legislature has not set up an absolute bar to such appointments. Thus, here, where indigent Nigerian AIP had stroke after start of the Art. 81 proceeding and required temporary guardian to make medical decisions, and wife and son were not competent to make such decisions due to their own limited judgment, court faced with no other options, appoints counsel and court evaluator who had developed trusting relationship with AIP to serve *pro bono*. Court expresses concern over having rules apply differently to AIPS without funds and also expresses opinion that the abuses found by the Commission on Fiduciary Appointments were not characteristic of the guardianship bar.

B. Temporary guardians

Matter of Astor, Misc3d ___; NYS 2nd ___; 2006 N.Y. Misc. LEXIS 2451 (Sup. Ct., NY Cty. 2006)

A bank that had been appointed as a temporary guardian moved for an order expanding its powers to include the power to do extensive discovery concerning recent questionable transfers of the AIP's assets and to commence litigation to recover misappropriated assets if appropriate. The court denied the motion on the grounds that "the relief sought appear[ed] overly zealous and premature" The court further reasoned that the temporary guardians had been appointed for the limited purpose of paying the AIPs bills and marshaling her assets to preserve the status quo until the underlying issues in the guardianship processing were determined. Finally, the court also pointed out that there was no evidence that the assets were at risk of dissipation or waste or that the parties thought to have misappropriated her assets any longer had access to the AIP's funds.

Matter of Grace "PP", 245 AD2d 824; 666 NYS2d 793 (3rd Dept., 1997), lv. to app. denied, 92 NY2d 807; 678 NYS2d 593 (1998)

Temporary guardian was appointed, with specific limited power to place AIP in a nursing home.

Matter of Wingate (Longobardi), 166 Misc2d 986; 637 NYS2d 1010 (Sup. Ct., Suffolk Cty., 1996)

It is not necessary for court to appoint temporary guardian to withdraw funds and write checks against checking account. Court evaluator is appointed to protect property of AIP from waste, misappropriation or loss. Consistent with the authority established in section 81.09 (e), court evaluator may take necessary steps to preserve property of AIP, including management of the checking account.

C. Special Guardians

Matter of Lambrigger, NYLJ, 5/31/94, p. 37, col. 1 (Sup. Ct., Suffolk Cty.)(Luciano, J.)

Court denies petition for guardianship of AIP, who had suffered massive stroke that left her with severe physical disabilities, holding that mental and physical disabilities are not co-extensive, noting that AIP has not lost any cognitive abilities and is fully competent to make her own decisions, including with matters such as property management. However, court did appoint special guardian to help AIP "manifest and give effect to her own decisions." Special guardian has no substituted judgment power and may not make any decision without consulting with and explaining transaction to AIP, who loses no rights to conduct her own affairs as result of order.

Matter of Patrick "BB", 267 AD2d 853, 700 NYS2d 301 (3rd Dept., 1999)

Although case was mooted out, facts show instance where Supreme Court appointed special guardian who was directed to increase AIP's personal account, establish burial account for respondent, and pay balance of funds to petitioner, after deducting expenses and compensation for special guardian.

Matter of Gambuti (Bowser), 242 AD2d 431; 662 NYS2d 757 (1st Dept., 1997)

Involuntary commitment to nursing home by special guardian is not authorized. Protective arrangements and transactions as contemplated by Art. 81 are far less intrusive and therefore mechanism for appointment of special guardian under section 81.16 (b) inadequately addresses liberty concerns of AIP in context of involuntary commitment. Appointment of full guardian is required for nursing home placement.

Matter of Wingate (Mascalone), 169 Misc2d 701, 647 NYS2d 433 (Sup. Ct., Queens Cty., 1996)

Court revoke attorney-in-fact's power-of-attorney where attorney-in-fact refuses to sell AIP's cooperative apartment to render her Medicaid eligible and enable her to remain in nursing center, and appoints special guardian to effectuate sale, since attorney-in-fact, as agent for principal AIP, has not exercised utmost good faith toward AIP.

Matter of Luby, 180 Misc2d 621, 691 NYS2d 289 (Sup. Ct., Suffolk Cty., 1999)

Court finds that nursing home should have applied for special guardian rather than take power-of-attorney from resident where purpose of powers was for nursing home to be paid.

In re: Phlueger, 181 Misc2d 294; 693 NYS2d 419 (Surr. Ct., NY Cty., 1999)

Court appoints special guardian even though there was also general Art. 81 guardian appointed, where there may have been conflict of interest on specific issue.

Matter of Janczek, 167 Misc2d 766; 634 NYS2d 1020 (Sup. Ct., Ontario Cty. 1995)

Court appointed Commissioner of Social Services as a special guardian, pursuant to §81.16 (b) for limited purpose of providing adult protective services, pursuant to Social Services Law §473, in form of arranging for visiting nurse or other home health care services and arranging regular medical examinations by AIP's current physician. Although AIP's life could perhaps have been extended by placement in adult care facility, a special guardian for these limited purposes was appointed to permit her to return to her home and enjoy quality of life which she has previously experienced with her friends and family.

D. Nomination of guardians

Matter of Williams, 2006 NY Slip Op 51521U; 2006 N.Y. Misc. LEXIS 2109 (Sup. Ct., Kings Cty. 2006)(Belen, J.)

The court declined to honor the AIP's nomination of two individuals as her co-guardians because:

(1) the first nominee was disqualified under MHL §81.19 (e) since she was the Director of Social Work at the nursing home that had recently provided care to her, even though the AIP was no longer a resident of the nursing facility and even though the statute made no reference to former caregivers; (2) the second nominee, the AIP's attorney, had been nominated only to serve as a co-guardian along with the first disqualified nominee, and (3) the VERA Institute guardianship project was available to serve in the alternative and had done a good job as Temporary Guardian. The court made this appointment even though the AIP objected to the Vera Institute continuing to act as guardian because the Court found that the aspects of their prior service that she objected to concerning her lack of access to her own funds appeared to have already been remedied.

In the Matter of the Application of GWC, 4 Misc. 3d 1004A (Sup. Ct., Tompkins Cty (Peckham, J.)

Court allows mildly mentally retarded individual with IQ of 50 to nominate her siblings as her own co-guardians upon finding that the nominees are fit and their appointment is in the best interest of the AIP.

Matter of Nasquan S., 2 A.D.3d 531, 767 N.Y.S.2d 906 (2nd Dept. 2003)

Petitioner was the AIP's mother. She sought to be appointed guardian and to have the attorney appointed as co-guardian. The trial court refused to appoint the attorney. As co-guardian and instead appointed a third party stranger. In reversing the trial court, the Appellate Division stated: "The case law in this state firmly establishes that a stranger will not be appointed as guardian of an incapacitated person "unless it is impossible to find within the family circle, or their nominees, one who is qualified to serve". [Note: calling this "nomination" may be a misnomer; See, MHL §81.17 (nomination is done by the AIP).]

Matter of Loccisano, NYLJ, 8/28/96, p. 27, col. 6 (Sup. Ct., Suffolk Cty.)(Prudenti, J.)

Court allows AIP to select own guardian of person finding that person selected was suitable but declines to appoint selected person as guardian of property finding certain improprieties in selected person's past behavior toward AIP's funds.

E. Breach of fiduciary duty/removal /sanctions

In the Matter of Marilyn F. , 31 AD3d 760, 818 NYS2d 467 (2nd Dept 2006)

Where MHLS moved to have Self Help Community Services, removed as guardian, and the IP's brother-in-law substituted, the Appellate Division, describing the specific facts of this case as "particularly challenging", found that Self Help had adequately fulfilled its responsibilities as guardian by "stabilizing the living conditions and financial situation of the IPs, thereby enabling them to avoid eviction from their rent stabilized apartment and to continue living independently within their means."

Columbia Memorial Hospital v. Barley , 16 AD3d 748; 790 NYS2d 576 2005 (3rd Dpt)

Plaintiff hospital sues IP and her guardian DSS to recover payment for medical services rendered. Plaintiff alleges in a motion for summary judgement that IP's home was transferred to her brother without fair consideration and alleges that the guardian was in breach of its fiduciary duty to the IP for failing to prevent the fraudulent transfer. Court finds that plaintiff's claim against the guardian for breach of fiduciary duty should have been dismissed because plaintiff did not plead that the guardian had a fiduciary duty to plaintiff. Court states that plaintiff can however, raise the issue in the Article 81 court and in the context of whether DSS breached its duty to the IP.

Matter of Cuban (Carmen Castro), NYLJ, 11/4/03 (Sup. Ct., Queens Cty.) (Thomas,J)

Co-guardian A is sanctioned for contempt of court, incarcerated for 7 days and directed to pay attorneys fees for Co-guardian B of \$15,000 for impeding Co-guardian B's access to the IP (their mother) to provide for her medical care. Co-guardian A concealed the legal authority to act of Co-guardian B to EMT technicians.

Matter of Turner (Williams), 307 AD2d 828 (1st Dept 2003)

Where a guardian, who was satisfactorily performing his duties, sought to resign, the costs associated with the resignation proceeding such as the accountant's fees for the final accounting and the fee for the court evaluator (GAL) may be paid from the IP's funds. Such expenses may only be assessed against the guardian personally if he is being removed because he failed to perform his duties or is being removed for cause.

In re Estate of Mary Gustofson, 308 AD2d 305, 764 NYS2d 46 (1st Dept. 2003)

Removal was not appropriate where guardian, a relative, was not self dealing but was having some difficulty filing reports that were satisfactory to the Court Examiner that were free of accounting errors and where guardian failed to seek prior approval to pay management fees to a brokerage house.

Matter of Charles Butin, 301 AD2d 193; 750 NYS2d 619 (2nd Dept., 2002)

Attorney disbarred for various abuses and breaches of fiduciary duty related to his roles in several Article 81 proceedings in which he arranged an incapacitated person's finances in such a way as to be able to make unauthorized payments to himself.

Matter of D.S., NYLJ, 10/31/01, Sup. Ct., Suff. Cty. (Berler, J.)

Where guardian is an attorney, guardians may not represent the IP in a lawsuit against IP- Guardians is sued in his representative capacity and a conflict of interest and appearance of impropriety exists. Also, guardian cannot "negotiate with himself" to arrive at a fair fee.

Matter of Gerald J. Friedman, NYLJ, 12/28/01 (Sup. Ct., NY Cty.)(Lowe, J.)

Court finds no breach of fiduciary duty where

(1) guardian created trust and named himself trustee because there was no self dealing-trust expressly provided that if trustee was the same person as the guardian, there could be no double fees paid-also inclusion in trust of exculpatory clause wasn't a breach of the guardian's duty

(2) guardian was overzealous and intrusive in protecting the ward by being intrusive and by exceeding the authority granted to him-his action were motivated by desire to protect IP not increase fees paid to him.

Reliance Insurance Company of New York v. Chemical Bank, NYLJ, 9/5/96, p. 21, col. 1, (Sup. Ct., NY Cty.)

Guardian withdrew and misused IP's funds. Plaintiff insurance company, as surety, sued bank alleging breach of contracts and fiduciary duty with IP. Court entered summary judgment for bank and entered default judgment against former guardian, holding that although funds belonged to IP, there was never contractual relationship between bank and IP, only with guardian. Therefore, there was no breach of contract. There was also no breach of fiduciary duty because 1) there is no fiduciary relationship between bank and IP as "relationship of debtor to creditor that exists between a bank and its customer does not change merely because the funds on deposit are those of a fiduciary," as well as fact 2) that bank had no concrete reason to believe that money was being misappropriated.

Matter of Wingate (Mascalone), 169 Misc2d 874: 647 NYS2d 433 (Sup. Ct., Queens Cty., 1996)

Court finds breach of fiduciary duty by attorney-in- fact, revokes power of attorney and appoints special guardian in Article 81 proceeding where AIP is unable to make any type of decisions regarding her property management based on fact that she resides in nursing center and suffers from Alzheimer's disease and dementia, and attorney-in-fact refuses to sell AIP's cooperative apartment to render her Medicaid eligible and enable her to remain in nursing home.

Matter of Heagney, NYLJ, 4/24/00, p. 21 (Sup. Ct., Westchester Cty.)(Friedman, JHO)

Court found that although guardian did not violate fiduciary duties towards IP, because of "negligence and sloppiness" in not filing required designations and in not filing annual reports, no fee was to be awarded.

Matter of Morris Honig, 213 AD2d 229, 623 NYS2d 862, (1st Dept., 1995)

Burden of proof lies with conservator to prove that he did not breach fiduciary duty.

Matter of Luckert, NYLJ, 4/15/97, p. 25, col. 3 (Sup. Ct., Nassau Cty.)(Rossetti, J.)

AIP's next-door neighbor served as her guardian. However, court removes guardian and replaces with temporary guardian because of "questionable conduct" including removing personal effects from and changing locks on ward's home, and making personal use of ward's car, all without court authorization. Removed guardian also "was instrumental in having AIP execute power-of-attorney naming her (the guardian) as attorney-in-fact. This document was executed, strangely enough, one day before guardian swore in court to ward's incapacity. Combination of inappropriate conduct led to court order of removal, as well as an order to turn over all of ward's personal effects, keys, and records to newly appointed temporary guardian.

Matter of Bomba, 180 Misc2d 977; 694 NYS2d 567 (Sup. Ct., Queens Cty., 1990)

Court examiner submitted order requesting hearing to determine whether guardian should be removed, questioning whether guardian had properly reimbursed herself, without court order, for disbursements for photocopying, fax transmissions, local travel expenses, United Clerical Service, and telephone charges. Court found that evidence of misconduct did not rise to level necessary to warrant guardian's removal. However, disbursements for which guardian reimbursed herself were disallowed. Reimbursements questioned were characterized by court as routine, incidental costs incurred by guardian, which were expected to be absorbed in guardian's statutory commission. Court noted that statutory references to "reasonable and necessary expenses" had not been construed to encompass general administrative fees incurred by guardian, but rather pertained to actual expenditures made by guardian, which were necessary to collect, preserve, and distribute estate property.

Matter of Nicks, NYLJ, 1/29/98, p. 25, col. 1; p. 32, col. 6 (Sup. Ct., Nassau Cty.)(Rossetti, J.)

TOUCH INC., a not-for-profit corporation that assists disabled indigent persons, was appointed guardian. It failed to file its reports on time and to cooperate with the ward's residence in pursuing Medicaid. After residence and court examiner sought to remove it as guardian, TOUCH resigned. It sought an order settling its final account. Court denied compensation to the TOUCH and surcharged it to partly reimburse the court examiner for services required by guardian's omissions.

Matter of Arnold "O." 226 AD2d 866; 640 NYS2d 355 (3rd Dept., 1996) *lv. to app. denied*, 88 NY2d 810, 649 NYS2d 377 (1996), *related proceeding*, 256 D2d 764, 681 NYS2d 627 (3rd Dept., 1998)

Motion to remove guardian which was part of lengthy dispute between guardian, and IP's family is denied and sanctions are levied against petitioner for maliciousness of motion and harassment of guardian, with whom family disagreed as to control of IP.

Matter of Boice, 226 AD2d 908; 640 NYS2d 681 (3rd Dept., 1996)

Where implied contract existed because guardians accepted services from care facility for ward

(son) after NYS transitional funding terminated, but guardians failed to pay for services, petition to remove them as guardians was denied but they were ordered to pay outstanding bill.

F. Discharge/Termination

Matter of Turner (Williams), 307 AD2d 828 (1st Dept 2003)

Where a guardian, who was satisfactorily performing his duties, sought to resign, the costs associated with the resignation proceeding such as the accountant's fees for the final accounting and the fee for the court evaluator (GAL) may be paid from the IP's funds. Such expenses may only be assessed against the guardian personally if he is being removed because he failed to perform his duties or is being removed for cause.

Matter of Marvin W., 306 A.D.2d 289; 760 NYS2d 337 (2nd Dept. 2003)

App. Div. reverses order of Supreme Court that denied, without hearing, IP's application to terminate the guardianship. Court holds that MHL §81.36(c) requires that a hearing be held, that the burden of proof is on the person opposing termination of the guardianship, and that the standard of proof is clear and convincing evidence that the guardian's authority should not be terminated.

Matter of Alexandre Penson, 289 AD2d 155; 735 NYS2d 51 (1st Dept., 2001)

Where evidence showed that IP was now living independently with his wife in Florida, understands his limitations and has sought the advice of an attorney and financial consultants in formulating a plan that both secures his financial future and affords him a current level of independence and self-determination, guardian was discharge and IP was restored to capacity status. A trust fund created in NY by the guardian was dissolved and the funds were transferred to a Florida trust created by the IP. Since the transfer would take place prior to an accounting of the NY trust, certain reserves were properly withheld pending the final accounting to satisfy possible claims against the NY trust for legal fees and health care expenses. The court noted that the IP could meet his needs in Florida without these reserve funds.

Matter of Donald F.L., 242 AD2d 536; 662 NYS2d 75 (2nd Dept., 1997)

Courts refusal to remove guardian unless IP appear for psychological evaluation by court-appointed psychiatrist and for deposition was not improper. Further, there was insufficient evidence to support finding that IP had become able to provide for his personal needs or manage his affairs.

Matter of Warshawsky, NYLJ, 1/9/95, p. 30, col. 4 (Sup. Ct., Kings Cty.)(Leone. J.)

IP petitioned for discharge of guardian on ground that he was no longer incapacitated. Two employees of nursing home said his condition had improved enough for discharge, and friend said she would assist him with cooking and shopping at home. However, psychiatrist and guardian said

he still required nursing home care. Court discharged guardian finding that IP was capable of exercising the power that had guardian's authority.

Matter of Lee “I” (Murphy), 265 AD2d 750, 697 NYS2d 385 (3rd Dept., 1999)

IP seeks to have guardian discharged but court finds clear and convincing evidence that IP still in need of guardian.

G. Multiple wards

Matter of Hammons (Hazel E., Nancy E., Neil E.), 164 Misc2d 609, aff'd 237 AD2d 439; 656 NYS2d 875 (2nd Dept., 1997)

Court appoints single guardian for dysfunctional family of three, including aging fragile parents and adult daughter, even though daughter is not providing assistance into them in the home and is preventing others from helping them as well.

H. Compensation

Matter of E.H., NYLJ, 11/20/2006, p. 23, col.1; Misc3d; 2006 N.Y. Misc. LEXIS 3194 (Sup.Ct.,Bronx Cty 2006)(Hunter, J.)

Court orders that Integral Guardianship Services, a not-for profit social service agency, be compensated in the amount of \$ 450.00 per month, to be deducted from the IP's \$600/mo. Social Security benefits and held that such sum be deemed excluded from available income for the purpose of the Medicaid calculation of net available monthly income ("NAMI"), because such expenditure was necessary to insure the medical and physical well-being of the IP.

Matter of William J.J. , 32 A.D.3d 517; 820 N.Y.S. 2d 318 (2nd Sept 2006)

In the 9th Judicial District, one judge sits in the Guardianship Accounting Part ("GAP") to review and confirm the reports of the Court Examiners in all of the counties of the 9th District. When confirming the Court Examiner's report the instant case, the GAP judge, in two orders, also: (1) added the requirement that the guardian be required to file a bond even though the appointing judge who issued the Order and Judgment had dispensed with a bond; (2) deleted the provision of the Order and Judgment providing that the guardian could draw an annual salary as compensation from the assets of the IP and added that the guardian was required to obtain prior court approval before taking a Commission, and, (3) curtailed the power granted in the Order and Judgment that allowed the guardian to retain professional services of attorneys and accountants etc. with the IP's funds without prior court approval. The Appellate Division held that the GAP judge had

exceeded his authority under MHL §81.32 to alter the guardian's compensation because such compensation can only be altered if the guardian had violated MHL 81.32(c); that the GAP judge exceeded his authority when he modified the guardian's powers to pay the professional fees without prior court approval because that power was reserved to the appointing judge, and even the appointing court could not act *sua sponte*, but only upon application of the guardian, the IP or any other person entitled to commence a proceeding and only then upon notice and hearing; and that the GAP judge has also erred in directing the filing of the bond in the absence of such provisions in the original Order and Judgement.

In re Guardianship (Formerly Committee) for the benefit of W.J. , 2005 NY Slip OP 253421 2005 N.Y. Misc LEXIS 1775 (Sup.Ct., Rensselaer County) (Ceresia, J.)

A corporate committee was appointed in 1961 for a ward who was receiving VA benefits . In 2005, it moved to be compensated under MHL Art 81 claiming that the work it was doing was in the nature of trustee work and that it should therefore be compensated under SCPA 2309 , as set forth in Art 81. The VA and counsel for the ward opposed, claiming that the fiduciary appointment was made pursuant to MHL Art 79 governing veterans and not Art 78 which was repealed in 1992 when Art 81 was enacted in its place. The corporate committee argues in the alternative that if it is to be compensated under Art 79, that it be compensated for "extraordinary services". The court finds that: (1) under the 2004 amendments, Art 81 no longer makes reference to SCPA 2809 as a method for calculating guardians' compensation and that each compensation determination is based upon the specific facts of each case; (2) that the original proceeding was commenced by the VA and under the Civil Practice Act and that CPA §§ 1384-k which governed compensation at that time is now part of MHL Art 79; (3) that MHL Art 79 is still in effect and supercedes other guardianship sections that may be inconsistent and that therefore, this guardianship is governed by MHL Art 79. The Court further found that "the long duration of the guardianship and/or the size of the estate, in and of themselves, were not "extraordinary service" nor was the fact that the services involved "on-going property management responsibilities [in a] highly regulated financial industry [with] a high standard of professional conduct and significant reporting requirements. "

In re Proceeding of Alfreda Kenny , Guardian of the property of Shirley I. Ellman , 7 AD3d 423; 777 NYS2d 432 1st Dept., 2004)

Where order appointing guardian provided that she (1) be paid in accordance with SCPA 2307(2) reimbursed for all reasonable disbursements and (3) that she could retain an accountant and pay up to \$15,000 for that purpose, App Div found that in the absence of any finding of wrong doing, that she should be paid under items (1) and (2) but that she would be denied certain disbursements for (a) photocopying expenses because she did not prove that they reflect her actual costs, (b) faxing because she did not show that there was no markup for long distance faxes, and (3) for messengers and overnight delivery services because she did not prove that they were used only when time was of the essence.

Matter of Turner (Williams), 307 AD2d 828 (1st Dept 2003)

Where a guardian, who was satisfactorily performing his duties, sought to resign, the costs associated with the resignation proceeding such as the accountant's fees for the final accounting and the fee for the court evaluator (GAL) may be paid from the IP's funds. Such expenses may only be assessed against the guardian personally if he is being removed because he failed to perform his duties or is being removed for cause.

Matter of a Trust Created by Rose BB, 303 AD2d 873 (3rd Dept., 2003)

In calculating guardians commissions, MHL81.28 specifically recognizes that court may be guided by, among other things, SCPA 2307 (fiduciaries commissions) or SCPA 2309 (trustees commissions).

Matter of Gerald J. Friedman, NYLJ, 12/28/01 (Sup. Ct., NY Cty.)(Lowe, J.)

Where the guardian, who was himself an attorney, hired attorneys to perform virtually all of the legal work for the IP and the only work done solely by the guardian could have been done by a non-lawyer, it was improper for the court to have compensated him at his legal billing rate. Justice Lowe, a Supreme Court justice, who was substituted for the prior Sup. Ct justice who recused himself, opens decree and sends matter of disgorgement of fees already paid to a referee.

Matter of Livingston, NYLJ, 8/31/01, p. 17 (Sup. Ct., Queens Cty.) (Thomas, J.); 2001 NY Misc LEXIS 570; 2001 NY Slip Op 40311U

Guardian, who was an attorney, submitted request for disbursements and legal fees from IP's estate, in addition to her request for a commission. The court states that she is entitled to her commission under SCPA §2307. The guardian included hours spent defending herself in an action by the court examiner to have her removed. She also included hours spent preparing the initial report, annual reports and final account, as well as faxing postage, phone bills and photocopying expenses. Court denies all but basic commission saying that commission covers same and application for fees evidenced avarice.

Matter of Arnold "O.", 279 AD2d 774; 719 N.Y.S.2d 174 (3rd Dept., 2001).

In very complicated case, where guardian of person and property was an attorney who also performed legal services for IP and was also the trustee of an SNT, the guardian was properly paid fees separately for the guardianship services, the trustee services and the legal services to the extent that no services were double billed. Also, it was not improper to reimburse guardian at the same rate for his services as guardian of the person and guardian of the property.

In re Crouse (Lindsay), 276 AD2d 451,715 NYS2d 395 (1st Dept., 2000)

Under Mental Hygiene Law §81.28, the compensation paid to a guardian "may be similar" to the compensation of a trustee under SCPA §2309. However, the reference to SCPA §2309 is only a guideline and a court retains the discretion to adopt a compensation plan it deems appropriate in

a particular case. Here, App. Div. refused to disturb the determination that the value of the ward's literary property rights and her residence should be excluded from the commission base and that commissions based on \$ 4,430,750.81 in assets, rather than \$5,560,850.81, constituted fair and reasonable compensation. While trial court found that the guardians faithfully discharged their duties, the value of their efforts is not necessarily related to the dollar value of the ward's assets. In any event, the guardian of an incompetent is the mere custodian of the incompetent's property and is not entitled to commissions on the value of unsold real estate.

Tootsie v. Cottrell, NYLJ, 4/10/01, p. 17 (Sup. Ct., NY Cty.)(Bransten, J.)

Where guardian was discharged and later found to have been negligent and have breached her fiduciary duties, by failing to take guardianship course, failing to file interim and annual reports for several years, failing to amend bond to cover after acquired property, and failing to maximize assets in estate, court denied commissions even though no real damage to estate occurred.

Matter of Beane (Spingarn), NYLJ, 7/2/01, p. 17 (Sup. Ct., NY Cty.)

Guardian's fee was calculated under SCPA 2309 (1) allowing for 1% of all principal paid out; disbursements were also allowed under SCPA 2309(1).

Matter of Nicks, NYLJ, 1/29/98, p. 25, col. 1, p. 32, col. 6 (Sup. Ct., Nassau Cty.) (Rossetti, J.)

TOUCH INC., a not-for-profit corporation that assists disabled indigent persons, was appointed guardian. It failed to file its reports on time and to cooperate with the ward's residence in pursuing Medicaid. After the residence and court examiner sought to remove it as guardian, TOUCH resigned. It sought an order settling its final account. Court denied compensation to the company and surcharged it to partly reimburse the examiner for services required by the guardian's omissions.

Matter of Bomba, 180 Misc2d 977; 694 NYS2d 567 (Sup. Ct., Queens Cty., 1990)

Court examiner was assigned to review guardian's reports. Court examiner submitted order requesting hearing to determine whether guardian should be removed. Court examiner questioned whether guardian had properly reimbursed herself, without court order, for disbursements for photocopying, fax transmissions, local travel expenses, United Clerical Service, and telephone charges. Court found that evidence of misconduct did not rise to level necessary to warrant guardian's removal. However, disbursements for which guardian reimbursed herself were disallowed. Reimbursements questioned were characterized by court as routine, incidental costs incurred by guardian, which were expected to be absorbed in guardian's statutory commission. Court noted that statutory references to "reasonable and necessary expenses" had not been construed to encompass general administrative fees incurred by guardian, but rather pertained to actual expenditures made by guardian, which were necessary to collect, preserve, and distribute estate property.

Matter of Haberstich (Lya Sher), 169 Misc2d 543; 646 NYS2d 937 (Surr. Ct., NY Cty., 1996)

Compensation must be determined case by case, based upon responsibilities of guardian, nature and extent of assets and anticipated duration of guardianship. Where guardian must marshal assets and make investments that can be readily liquidated for period that is expected to be short in duration, such fiduciary is acting more like personal representative and compensation plan should reflect this. Where guardianship is expected to last a long time and holds substantial assets, guardian's duties more resemble those of trustee because of increased degree of sophistication required to develop an investment strategy and concomitant exposure. Under such circumstances, guardian should be compensated like trustee for responsibility for long-term ongoing property management and distribution to ward. However, court is not limited to choosing either rate fixed for trustees or that fixed for executors or administrators. §81.28 permits court in its discretion to devise any compensation plan it deems reasonable after considering whether guardian's duties more resemble those of a trustee or of an executor.

Matter of Daisy Pope, NYLJ, 1/12/99, p. 25, col. 3 (Sup. Ct., NY Cty.)

Court examiner was assigned to review guardian's reports. Court examiner submitted order requesting hearing to determine whether guardian should not removed. Court examiner questioned whether guardian had properly reimbursed herself, without court order, for disbursements for photocopying, fax transmissions, local travel expenses, United Clerical Service, and telephone charges. Court found that evidence of misconduct did not rise to level necessary to warrant guardian's removal. However, disbursements for which guardian reimbursed herself were disallowed. Reimbursements questioned were characterized by court as routine, incidental costs incurred by guardian, which were expected to be absorbed in guardian's statutory commission. Court noted that statutory references to "reasonable and necessary expenses" had not been construed to encompass general administrative fees incurred by guardian, but rather pertained to actual expenditures made by guardian, which were necessary to collect, preserve, and distribute estate property.

Matter of Maria Cedano, 171 Misc2d 689; 655 NYS2d 283 (Sup. Ct., Suffolk Cty., 1997), 251 AD2d 105, related case, 674 NYS2d 34 (1st Dept., 1998)

Where JASA had served as Conservator (pre-Art 81) for a ward under the Soc Serv Law 473-c Community Guardianship Program and the ward was later admitted to a nursing home and removed from the community, Soc Serv Law 473- prohibited JASA from continuing to serve as guardian, even for a brief period until another guardian could be found. Trial court's order compelling JASA to remain as guardian was reversed on appeal.

Matter of Heagney, NYLJ, 4/24/00, p. 37, col. 5 (Sup. Ct., Westchester Cty.)(Friedman, JHO)

Court found that although guardian did not violate fiduciary duties towards IP because of "negligence and sloppiness" in not filing required designations and in not filing annual reports, no

fee was to be awarded.

Matter of Nicks, NYLJ, 1/29/98, p. 25, col. 1 (Sup. Ct., Nassau Cty.)(Rossetti, J.)

Where guardian was removed for failure to carry out duties properly, guardian's fees for past service were denied.

Matter of Skinner (Lyles), 171 Misc2d 551; 655 NYS2d 311 (Sup. Ct., NY Cty., 1997), *aff'd in part, rev'd in part*, 250 AD2d 488; 673 NYS2d 122 (1st Dept., 1998)

Court may not direct petitioner hospital to pay indigent IP's guardian's fee.

I. Co-Guardians

Matter of 2066 N.Y. Misc. LEXIS 2833; , NYLJ July 14, 2006 , p. 23, col. 1 (Sup. Ct. Richmond Cty.)(Giacobbe, J.)

Where there was acrimony between an AIP's son and daughter, both of whom were loving adult children capable of acting as guardian, the court, finding that it would be in the best interest of the AIP to have both of her children involved, appointed the daughter as guardian of the property along with an independent co-guardian of the property and the son as guardian of the person along with an independent co-guardian of the person. The court notes that it is mindful of the history of confrontation and disagreement between the siblings and the potential for further conflict between them in their roles as guardians. The court stated that it therefore appointed independent co-guardians to exert a moderating influence.

Matter of Bertha W., 2003 NY App Div LEXIS 12459 (2nd Dept., 2003)

Appellate Division modifies order to eliminate appointment of non-family member co-guardian of the property stating that there is a preference for family members unless it is impossible to find a qualified family member to serve and that there was no showing that the AIP's nephew required a co-guardian to assist him in carrying out his duties.

Matter of Cuban (Carmen Castro), NYLJ, 11/4/03 (Sup. Ct., Queens Cty.) (Thomas,J)

Co-guardian A is sanctioned for contempt of court, incarcerated for 7 days and directed to pay attorneys fees for Co-guardian B of \$15,000 for impeding Co-guardian B's access to the IP (their mother) to provide for her medical care. Co-guardian A concealed the legal authority to act of Co-guardian B to EMT technicians.

Matter of Mary "J"., 290 AD2d 847; 736 NYS2d 542; (3rd Dept., 2002)

Appellate Division held that where family member that AIP preferred to have as guardian was moving out of state and remaining siblings remained in local area where AIP had resided all her

life, the hearing court properly appointed the two siblings as co-guardians, despite the AIP's wish to the contrary.

Matter of Priviteri (Goldstein), NYLJ, 10/29/95, p. 27, col. 3 (Bronx Sup.)(Friedman, J.)

Where petitioner for guardianship of property was AIP's presumptive heir, there was conflict of interest because guardian stood to seek to enlarge estate for his own benefit, rather than that of ward. After considering size of estate, nature and closeness of familial relationship between proposed guardian and AIP, proposed guardian's financial circumstances, and motivation of proposed guardian, court avoided appearance of impropriety and conflict of interest by appointing AIP's sister as personal needs guardian and nephew plus a co-guardian to be appointed later as her property management guardian.

In re: Robinson, 272 AD2d 176; 709 NYS 170 (1st Dept., 2000)

Court appoints co-guardian who is living out of the country temporarily, stating that modern transportation and communication will enable him to serve adequately.

J. Defacto Guardians

Matter of April-Buxton Sinclair, 2003 NY Slip Op 5492u; 2003 N.Y. Misc.LEXIS 1577 (Surr. Ct.,Westchester Co.)

Surrogate's Court during probate proceeding compels defacto guardian to account for activities with respect to decedent's assets during decedent's lifetime. Contains the quote: "It is well settled that this court may deem a person to be a defacto fiduciary, even though he or she never qualified or was authorized to act in a fiduciary capacity of that person undertook to duties and responsibilities ordinarily assumed by a fiduciary ..." citations omitted.

K. Whether a Power is a Personal or Property Power

Matter of Mary XX, 33 AD3d 1066; 822 NYS2d 659 (3rd Dept. 2006)

Petitioner, guardian of the IP's person but not property, moved for a compulsory accounting by the trustees of the IP's funds. The trust provided that during the IP's lifetime the trustees were to pay the income to the IP and, in their discretion, to pay the principal as needed "to provide adequately and properly for the support, maintenance, welfare and comfort of [the IP]." The order appointing petitioner as guardian of the person authorized her to direct the trustees to pay for the IP's care and maintenance and to examine all the relevant circumstances, including the opinion of treating health professionals, the existing financial circumstances, and the existing physical environment as to what may be the best place for...[IP] to reside and the best arrangements for her continued care and treatment. The trustees, however, refused to provide petitioner with financial documents when she requested same, therefore, petitioner commenced a proceeding for a compulsory accounting in order to fulfill her obligation as guardian. Supreme Court denied the

requested relief, holding that petitioner's powers as guardian of the person were limited to making demands of the trustees for payment of expenses and that the guardian of the person had no powers relative to the financial assets of the IP. The Appellate Division reversed finding that petitioner had made a sufficient showing that the requested accounting is necessary in order to carry out her duties as guardian citing four factors that justify ordering a compulsory accounting and explaining why they were met on these facts: (1) a fiduciary relationship, (2) entrustment of money or property, (3) no other remedy, and (4) a demand and refusal of an accounting. The Appellate Division also noted that authorizing the accounting was not giving the guardian of the person powers over the property because petitioner was not given the power to manage the financial but only information to exercise those particular, limited powers conferred upon her in the guardianship order.

V. PROCEDURAL MATTERS

A. Petitions and petitioners

In the Matter of The Application of Joseph Meisels (Grand Rabbi Moses Teitelbaum); 10_Misc3d 659; 807N.Y.S. 2d 268; (Sup. Ct. Kings Cty.)(Leventhal, J.)

An Article 81 petition was brought for guardianship over the Grand Rabbi of The Satmar sect. He had previously appointed one of his sons and his longtime personal secretary as HCP and POA. The petition alleged that the Rabbi was disoriented, in need of round the clock assistance and was in poor health but there was no allegation that he was not receiving the care he needed. The court allowed the petitioner to submit additional affirmations and considered them as if the pleading had been amended to include them. In fact, the Court visited the Rabbi at home and noted that he has a butler who sleeps in his room, an intercom system linked to his room, a personal secretary, a personal paramedic, a chauffeur and cook and other staff to meet his needs. The judge spoke to the Rabbi who told him that he was satisfied with his care. Since there were no allegations that he was at risk due to his limitations, and since the facts clearly established that he was in fact not at risk and that all his needs were met, the court concluded that there was no showing of a need to commence a guardianship proceeding and dismissed the petition.

Matter of J.G., NYLJ, (Sup. Ct , Bronx Cty). (Hunter , J.) 8 Misc.3d 1029A; 806 NYS2d 445

“A person otherwise concerned with the welfare of the person alleged to be incapacitated” under MHL §81.06 cannot be an attorney representing the AIP in a personal injury suit. As the attorney in the personal injury suit, the petitioner is privy to confidential information that he cannot divulge unless his client waives the attorney client privilege.

(See also under Counsel - **Matter of D.G., 798 NYS2d 343; 2004 (Sup Ct , Kings Cty) (Leventhal , J.)**

The law firm acting as counsel for the petitioner in an Art 81 proceedings was the same firm acting as counsel for the AIP in a simultaneously filed medical malpractice suit. This law firm had

obtained the AIP's medical records in connection with the med mal suit before commencing the Art 81 proceeding. The law firm failed to disclose this conflict in its petition, or to the Court Evaluator or to counsel for the AIP in the Art 81 proceeding. Moreover, during the proceedings, the petitioner wanted to terminate its relationship with the firm in the Art 81 proceeding and also wanted to consent to a cousin's appointment as Guardian and the law firm tried to discourage the petitioner from consenting to the cousin's appointment, presumably because the cousin, as Guardian, could then decide to hire new counsel for the med mal case. The court finds violations of DR5-105(a) and also DR5 101 in that the law firm's independent judgement was compromised by both its dual allegiances and its own financial interests.)

Matter of Mary "J.", 290 AD2d 847 (3rd Dept. 2002)

Specificity in pleading requirement of MHL §81.08 was met where the petition "detailed the nature and extent of the [AIP's] physical and mental disabilities through statements of her doctor and social worker at the nursing home and asserted that despite these conditions and the assistance necessary [the daughter seeking to care for the AIP and whom the AIP wanted to have care for her] had refused to allow a social worker to conduct [a home visit]".

Matter of Beritely (Luberoff), NYLJ, 12/8/95, p. 25, col. 1 (Sup. Ct., Suffolk Cty.) (Luciano, J.)

Conservator sought to convert MHL Art. 78 conservatorship into guardianship. Court found petition deficient for not describing functional level of man, who had bi-polar disorder. Court evaluator's testimony and report, however, proved guardian was needed. Court named co-guardians for property and allowed AIP's elderly mother to resign as co-conservator and become co-guardian of personal needs.

Matter of Onondaga Cty. Department of SS (Parker), 162 Misc2d 733; 619 NYS2d 238 (Sup. Ct., Onondaga Cty., 1994)

Petition denied for failure to comply with pleading provisions of §81.08 requiring petition to include, *inter alia*, a description of AIP's functional level, specific factual allegations as to personal actions and/or financial transactions or other occurrences which demonstrate that person is likely to suffer harm and approximate value and description of financial resources of person. Here, petition did not contain any detailed information as required by that section and did not set forth any meaningful facts pertaining to the AIP's functional level. The only information provided was physician's note that person does not understand his medical condition and that his ability to manage his own affairs is impaired. Also petition is devoid of any specific factual allegations as to the personal actions or financial transactions of person which illustrate that he is likely to suffer harm. Also, the AIP's refusal to divulge his financial resources may have been indication of awareness as opposed to incapacity.

Matter of Staiano, 160 Misc2d 494; 609 NYS2d 1020 (Sup. Ct., Suffolk Cty., 1994)

Although Article 81 and its predecessors do not mention cross petitions, legitimacy of cross-petition as pleading has been implicitly acknowledged. In addition, because cross-petitions are allowable in MHL Art. 77 proceedings, it seems reasonable to conclude that use of cross-petition in guardianship proceeding is also permissible procedure where cross-petition raises issues as to which court clearly has jurisdiction.

Matter of Rochester General Hospital (Levin), 158 Misc2d 522; 601 NYS2d 375 (Sup. Ct., Monroe Cty., 1993)

Representative of hospital other than CEO, such as V.P. of administration, is authorized to commence proceeding as "a person otherwise concerned with the welfare of the person alleged to be incapacitated."

Matter of Petty (Levers), 256 AD2d 281, 682 NYS2d 183 (1st Dept., 1998)

Petition is deficient where it consists of conclusory allegations of incapacity without specific factual allegations.

B. Service and Returns of Petitions and Orders to Show Cause

(i) Proper and timely Service

Matter of Theodore T., 28 AD3d 488; 813 NYS2d 733 (2nd Dept. 2006)

Appellate Division reverses trial court's denial of motion to dismiss OSC which was made returnable on a date that was 12 days late pursuant to former §81.07.

Matter of Harry G. , 12 Misc. 3d 232; 2006 N.Y. Misc. LEXIS 483 (Sup. Ct. Nassau Cty.) (Asarch, J.)

Respondents, AIP's ex-wife, who held the POA and HCP, and the AIP's son was served with Notice of Petition and thereafter requested from petitioner's counsel a copy of the petition, alleging that there was information or allegations therein that affected their property rights and that they were therefore entitled to full and specific notice, an opportunity to be heard and an opportunity to confront their accusers in court. AIP's counsel refused to turn it over, both to protect his rights in the Art 81 proceedings as well as his rights in the long resolved matrimonial proceeding that the wife sought to reopen. (A) A constitutional challenge to MHL 81.07 (g)(2) was not decided because the respondent had failed both to specifically brief the alleged constitutional infirmities and also because she failed to give notice of the challenge to the Attorney General pursuant to Exec Law §71. However, the court did observe that she had in fact been given notice of the proceeding including the court date, was entitled to be present on that date with her own counsel and was able to determine her desired level of involvement in the proceeding. (B) Also the court held that the specific provisions of Article 81 supercede the general directions of CPLR 403(b) since MHL

81.07 as amended is clearly inconsistent with general provisions of CPLR 403.

Matter of Margot Lipton, 303 AD2d 915 (4th Dept 2003)

Failure of proper service upon all parties named in MHL 81.07 resulted in vacating of appointment of guardian.

Matter of Hammons (McCarthy), 168 Misc2d 874; 645 NYS2d 392, (Sup. Ct., Queens Cty., 1996)

Court improperly fashioned alternate method of service other than personal delivery pursuant to §81.07 (d)(2)(i) because AIP's lifestyle of living and sleeping among stray cats in his apartment and walking throughout neighborhood to feed stray cats has made him difficult individual for the process server to locate. Statute requires proof that AIP knew service was being attempted and was affirmatively evading service before an alternate method of service can be authorized.

Matter of Kautsch/Matter of Barrios Paoli, 173 Misc2d 736; 662 NYS2d 388 (Sup. Queens, 1997)

Petitioner sufficiently demonstrated that AIP refused to accept service, thereby authorizing court to grant alternate method of service other than personal delivery pursuant to §81.07 (d)(2)(i) where process server spoke with AIP who was behind locked door, AIP refused to buzz server through when he stated that he had papers to be served and when process server returned on two following days, no one answered bell. AIP's refusal to open door when process server stated that he had papers to be served constitutes refusal.

Matter of Nixon (Corey), NYLJ, 6/4/96, p. 25, col. 1 (Sup. Ct., Suffolk Cty.)(Luciano, J.)

Where AIP had been secreted, and essential obstacle to commencement of Art. 81 proceeding was petitioner's inability to locate and serve AIP court concludes that remedy may be found by combining Article 81 proceeding with *sua sponte* habeas corpus proceeding in which party secreting AIP is directed to produce AIP before Court in order to allow inquiry as to whether she is being unlawfully restrained, detained or confined.

Matter of Staiano, 160 Misc2d 494; 609 NYS2d 1021 (Sup. Ct., Suffolk Cty., 1994)

Once jurisdiction has been secured over AIP by proper service, service of all other papers is governed by CPLR 2103, which authorizes service by mail on a party's attorney, thus, service of cross-petition may be made upon AIP's counsel and not AIP.

(ii) Notice of Petition

a. Validity of Constitutionality and statutory arguments

Matter of Harry G. , 2006 NY Slip Op 26094; 2006 N.Y. Misc. LEXIS 483 (Sup. Ct . Nassau Cty.) (Asarch, J.)

Respondents, AIP's ex-wife, who held the POA and HCP, and the AIP's son was served with Notice of Petition and thereafter requested from petitioner's counsel a copy of the petition, alleging that there was information or allegations therein that affected their property rights and that they were therefore entitled to full and specific notice, an opportunity to be heard and an opportunity to confront their accusers in court. AIP's counsel refused to turn it over, both to protect his rights in the Art 81 proceedings as well as his rights in the long resolved matrimonial proceeding that the wife sought to reopen. (A) A constitutional challenge to MHL 81.07 (g) (2) was not decided because the respondent had failed both to specifically brief the alleged constitutional infirmities and also because she failed to give notice of the challenge to the Attorney General pursuant to Exec Law §71. However, the court did observe that she had in fact been given notice of the proceeding including the court date, was entitled to be present on that date with her own counsel and was able to determine her desired level of involvement in the proceeding. (B) Also the court held that the specific provisions of Article 81 supercede the general directions of CPLR 403(b) since MHL 81.07 as amended is clearly inconsistent with general provisions of CPLR 403.

b. Who is entitled to the Petition?

Matter of Harry G. , 2006 NY Slip Op 26094; 2006 N.Y. Misc. LEXIS 483 (Sup. Ct . Nassau Cty.) (Asarch, J.)

Respondents, AIP's ex-wife, who held the POA and HCP, and the AIP's son was served with Notice of Petition and thereafter requested from petitioner's counsel a copy of the petition, alleging that there was information or allegations therein that affected their property rights and that they were therefore entitled to full and specific notice, an opportunity to be heard and an opportunity to confront their accusers in court. AIP's counsel refused to turn it over, both to protect his rights in the Art 81 proceedings as well as his rights in the long resolved matrimonial proceeding that the wife sought to reopen. While court states that it has a policy of NOT automatically turning over the petition in such circumstances, it did so in this case because it was clear that the ex-wife and son already had all of the information in the petition, having been the petitioners in a prior Article 81 proceeding that had to be discontinued because the AIP was living out of State.

C. Jurisdiction and Venue

In the Matter of Loretta I., In the Matter of Loretta I., 34 AD3d 480, 824 NYS2d 372, 2006 NY Slip Op 8134 (2nd Dept 2006) and In the Matter of Johanna C., 34 AD3d 465; 824 NYS2d 142; 2006 N.Y. App. Div. LEXIS 13340 (2nd Dept 2006); In the Matter of Annette L., 34 AD3d 479; 823 NYS 542; 2006 N.Y. App. Div. LEXIS 13353 (2nd Dept 2006)

In a guardianship proceeding brought on because 3 allegedly incapacitated persons had allegedly

been taken advantage of by a third party and, *inter alia*, coerced into signing away the deed to their home, the third party was neither named nor given notice that the court could ultimately divest her of her title to the property. Title was held by two of the AIPs and the third AIP was the child and natural heir of one of them. The Appellate Division did order that title revert back and the third party appealed on the grounds that the court lacked jurisdiction over her to so divest her of title. With respect to the appeals in the matter involving the 2 AIPs who were title holders, the Appellate Division reversed that portion of the order noting that the transactions in question were not made by persons who were yet adjudicated incompetent and for whom a guardian had already been appointed but, rather, by persons who were unable to understand the nature and consequences of their actions, rendering the transactions *voidable but not void* and concluded that granting the guardians authority to commence a turnover proceeding against the third party rather than deeming the transactions void, and enjoining any further transfer of the subject real property pending the turnover proceeding was a more appropriate course of action. In the appeal involving the child and natural heir of the title holders, the appeal was dismissed on the grounds that the non-title holding child was not aggrieved.

In the Matter of The Application of Joseph Meisels (Grand Rabbi Moses Teitelbaum); 10 Misc3d 659; 807 N.Y.S. 2d 268; 2005 N.Y. Misc. LEXIS 2515 (Sup. Ct. Kings Cty.) (Leventhal, J.)

An Article 81 petition was brought for guardianship over the Grand Rabbi of The Satmar sect. The parties wanted to bring the proceeding in the Bet Din religious tribunal but could not agree on which one so the petitioner ultimately filed in State Supreme Court. The court noted that the matter could not have been held in the Bet Din, which would have been akin to submitting it to arbitration because the case involved the capacity of an individual and not a religious matter; guardianship involves important civil liberties protected by due process, that such process includes a plenary hearing with counsel, application of the rules of evidence, the clear and convincing evidence standard, the placement of the burden of proof on the petitioner and the right to a jury. Thus, the court stated: “An Article 81 proceeding cannot be heard or determined other than by a New York State Court.”

Matter of Oustino, NYLJ, 4/8/03 (Sup. Ct., NY Cty.) (Gangel-Jacobs)

Very interesting case involving a dispute among the highest authorities of the Russian Orthodox Church fighting for control over church property and ideology under the pretext of an Article 81 proceeding for guardianship over the person and property of the AIP, Vitaly Outesnow, the Metropolitan (“Pope”) of the Russian Orthodox Church in the US. At the time of the proceeding, the AIP was in Canada and petitioner was claiming that the AIP had been kidnaped and taken there by church authorities. Court does send Court Evaluator to Canada to evaluate the circumstances. Ultimately, the court refused to hear the case for finding a lack of jurisdiction in the NY Courts because the AIP was a Canadian citizen, living in Canada where he was being adequately cared for at the time of the proceeding, with no intention of returning to NY with no property in NY. Court dismisses application without prejudice to re-file in Canada.

Matter of the Application for an Individual with a Disability For Leave to Change Her Name, NYLJ, p. 20, col 4, 4/01/03 (Civ. Ct., Richmond Cty) (Straniere, J.)

Mildly MR individuals was permitted to change her name in Civil Court without a guardian. Court was initially uncertain whether it could hear case without guardian but, after reviewing purpose of Art. 81 ultimately decides that she is not so functionally limited as to be unable to petition for her name change. Court also points out that it has no jurisdiction over guardianship and would have to refer the case to Supreme Court first and further that there is no Article 81 Part in Richmond County.

Matter of Verna HH, 302 AD2d 714 (3rd Dept., 2003)

AIP lived in Kentucky for 10 years prior to commencement of Art 81 proceeding. Petitioner brought AIP back to NY just before filing petition. AIP moved to dismiss petition on grounds that Court in NY did not have jurisdiction over her because she was a Kentucky resident and did not have any property in NY or any contacts with NY. Lower court grants dismissal and App Div reverses stating that MHL §81.04 requires nothing more than mere presence within the state. (Court also declines to deprive NY courts of jurisdiction the grounds of forum non-conveniens).

Taylor v. Martorella, 745 NYS2d 901, (Sup. Ct., Kings Cty. 2002)

An Article 81 was found not to be equivalent to a guardian ad litem for the purposes of establishing venue pursuant to CPLR 503 (b). Court holds that under CPLR Art. 12, a GAL's only function is to protect the interests of the party in a particular action or proceeding. where as an Art 81 guardian acts in an array of legal proceedings as fiduciaries who can sue and be sued in their respective representative capacities and made parties to a case. Since a Guardian ad Litem is not a real party in interest, his or her residence can not control the choice of venue.

Matter of Pulaski, NYLJ, 12/21/01 (Sup. Ct., Kings Cty.)(Leventhal, J.)

Parties to an Article 81 petition cross-filed Family Offense petitions in Family Court stemming from an alleged assault of the AIP and her mother by the petitioner during a visit that had been ordered by the Supreme Court in the Art. 81 proceeding. Supreme Court ordered that in the interests of justice, the Family Offense petition be transferred to the Supreme Court. The Court reasoned that it is a court of general jurisdiction with coordinate jurisdiction over Family Court matters, and that it was most familiar with the circumstances of the case.

Turner v. Borobio, NYLJ, 12/24/01, p. 17 (SDNY Bankruptcy Court)

The AIP in this Art. 81 proceeding was also involved in a bankruptcy proceeding. He removed the Art. 81 matter to bankruptcy court under 28 USC 1334 (b) claiming that the outcome of the bankruptcy proceeding depended upon the outcome of the Article 81 proceeding. The petitioner in the Art. 81 proceeding moved to have the Article 81 proceeding remanded back to State Supreme Court. The Bankruptcy Court holds that the appointment of a guardian will not affect the AIPs

rights in the bankruptcy proceeding, and therefore, there is no federal jurisdiction over the Article 81 proceeding. The Bankruptcy Court therefore court grants the motion to remove the matter back to State Supreme Court.

Matter of Francis Kleinman, NYLJ, 6/5/00, p.21,col. 3 (Sup.Ct., Nassau Cty.)(Rosetti, J.)

Removal of Art. 81 proceeding at accounting stage was transferred to Surrogate's Court after death of AIP because there was an interrelationship between the Art.81 and the probate proceeding.

Estate of Leon Lianides, NYLJ, Feb. 7, 2001, p. 21 (Surr. Ct., Bronx Cty.)(Surr. Holzman)

Surrogate Court administering estate of IP holds that it lacks the jurisdiction to determine claims by decedent (IP) that prior to the IPs death, the guardian mismanaged the IPs affairs. Surrogate transfers this issues to Supreme Court that appointed the guardian.

Matter of Burns (Salvo), 287 AD2d 862; 731 NYS2d 537 (3d Dept., 2001)

Death of IP during proceeding on petition by guardian to confirm charitable gift by IP did not deprive Supreme Court of jurisdiction and transfer to Surrogates Court was not required.

Matter of Margaret Louise Beasley, 234 AD2d 32; 650 NYS2d 170 (1st Dept., 1996)

Where proposed ward has been institutionalized in facility located in Oswego County for more than 20 years, Surrogate's Court, New York County, properly rejected challenge to its jurisdiction on ground that there was no showing that proposed ward ever had capacity to express an intention to change her domicile from New York County where she was born and her parents have continuously resided. Court also properly refused to transfer venue to Oswego County upon grounds that petitioners reside in New York County, court had already expended great deal of time and effort on matter, Law Guardian, who is serving pro bono, works in New York County and has not been impeded in her tasks by location of facility in which her ward is institutionalized, the court can accept responses to written interrogatories from witnesses who are unable to appear in New York County, and appellant otherwise failed to demonstrate that convenience of material witnesses or ends of justice would be served by transfer.

Matter of Bowers, 164 Misc2d 298; 624 NYS2d 750 (Surr. Ct., NY Cty., 1995)

A foreign guardian of nonresident incapacitated person who is sole distributee of estate of New York domiciliary may proceed in Surrogate's Court to obtain letters of guardianship and acquire standing to apply for letters of administration in estate. Surrogate's Court enjoys limited jurisdiction over Art. 81 proceedings where impaired person has beneficial interest in estate. Although Art. 81 does not specifically confer jurisdiction on Surrogate's Court where beneficiary of estate is neither resident of nor physically present in New York, 81.05 governing venue, provides that where IP is not present in State, residence shall be deemed to be county in which property is located. Thus, petitioner will not be required to proceed in two courts.

Matter of Daniel K. Le and Young, 168 Misc2d 384; 637 NYS2d 614 (Sup. Ct., Queens Cty., 1995)

Court exercises “transient” jurisdiction over AIP who was physically present in State at time guardianship proceeding was commenced, although he did not reside and was not otherwise domiciled in state, where he returned to NY to settle personal injury suit in NY court.

Matter of Mary S., 234 AD2d 300; 651 NYS2d 81 (2nd Dept., 1996)

Court properly exercised jurisdiction over AIP living out of state where she had personal connections and property in this State.

Matter of Vaneria (Norman), 275 AD2d 221; 712 NYS2d 107; 2000 (1st Dept.)

New York courts lacked jurisdiction where 19-year-old AIP lived in out-of-state developmental center and had no property within the state, even though AIP’s parents lived in NY.

Matter of Shea (Buckner), 157 Misc2d 23; 595 NYS2d 862 (Sup. Ct., NY Cty., 1993)

Supreme Court has authority, in its discretion, to grant powers to foreign guardian with respect to ward's New York property, but it is questionable whether New York court would choose to exercise such discretion where out-of-state court that appointed guardian is clearly better situated to decide whether such powers are appropriate.

Matter of Staiano, 160 Misc2d 494; 609 NYS2d 1021 (Sup. Ct., Suffolk Cty., 1994)

Once jurisdiction has been secured over AIP by proper service, service of all other papers is governed by CPLR 2103, which authorizes service by mail on a party's attorney, thus, service of cross-petition may be made upon AIP’s counsel and not AIP.

Matter of Serrano, 179 Misc.2d 806; 686 NYS2d 263 (Sup. Ct., Bronx Cty., 1998)

Foreign jurisdictions’ findings of incompetency not entitled to full faith and credit, particularly when AIP is not a domiciliary of that jurisdiction.

Matter of Tracey L. Card (Siragusa), 214 AD2d 1022, 626 NYS2d 336 (4th Dept., 1995)

Venue lay in county where estranged AIP spouse was residing at time of filing of Art. 81 petition, not in county where marital home was located.

D. Counsel

(i) **Appointment and disqualification**

Matter of Keith H., unpublished, Sup.Ct., Hamilton Cty. (Montgomery County Spec. Term) (Index # 6296–06) (Sept 18, 2006) (Sise, J.)

The Consumer Advisory Board (“CAB”) formed under the Federal Court “Willowbrook Decree” to protect the class members against dehumanizing practices and violations of their individual or legal rights does not automatically have powers of a guardian under Article 81 and, did not automatically have the authority to retain counsel on behalf of a profoundly retarded class member to prosecute a tort claim for an automobile accident until, after a full Art. 81 proceeding where appropriate findings were made, it was first appointed as guardian.

Matter of Williams, 2006 NY Slip Op 51521U; 2006 N.Y. Misc. LEXIS 2109 (Sup. Ct., Kings Cty. 2006)(Belen, J.)

Petitioner’s attorney should have disqualified himself from representing the petitioner due to a conflict of interest. He had previously represented the AIP when he prepared a Will and a Power of Attorney giving petitioner control of her finances. Additionally, although having established an attorney-client, confidential relationship with the AIP and even having met with her and having been notified by her that she believed the petitioner was stealing from her, he undertook to represent petitioner in a proceeding adverse to the AIP to declare her incompetent and nullify her revocation of the power of attorney that he prepared.

Matter of Edward G.N., 17 AD3d 600, 795 NYS2d 244. (2nd Dept. 2005)

Appellate Division reverses Order and Judgment appointing a guardian, on the law, without costs or disbursements, denies the petition and dismisses the proceeding finding that the trial court erred in failing to appoint counsel for the AIP as there was no evidence that the Court Evaluator explained to the appellant his right to counsel, determined whether the appellant wished to have legal representation, or evaluated whether counsel should be appointed in accordance with. Mental Hygiene Law § 81.10 (*see* Mental Hygiene § 81.09[c][2] and [3]; *Matter of Wogelt*, 223 A.D.2d 309, 314, 646 N.Y.S.2d 94).

Matter of D.G.,798 NYS2d 343; 2004 (Sup Ct , Kings Cty) (Leventhal , J.)

The law firm acting as counsel for the petitioner in an Art 81 proceedings was the same firm acting as counsel for the AIP in a simultaneously filed medical malpractice suit. This law firm had obtained the AIP’s medical records in connection with the med mal suit before commencing the Art 81 proceeding. The law firm failed to disclose this conflict in its petition, or to the Court Evaluator or to counsel for the AIP in the Art 81 proceeding. Moreover, during the proceedings, the petitioner wanted to terminate its relationship with the firm in the Art 81 proceeding and also wanted to consent to a cousin’s appointment as Guardian and the law firm tried to discourage the petitioner from consenting to the cousins appointment, presumably because the cousin, as Guardian,

could then decide to hire new counsel for the med mal case. The court finds violations of DR5-105(a) and also DR5 101 in that the law firms independent judgement was compromised by both its dual allegiances and its own financial interests. (See also under Petitions and petitioners—**Matter of J.G., NYLJ, August 17 2005, p. 1, Col. 4 (Sup. Ct., Bronx Cty) (Hunter, J.); 8 Misc 3d 1029A; 806 NYS2d 445.** “A person otherwise concerned with the welfare of the person alleged to be incapacitated” under MHL §81.06 cannot be an attorney representing the AIP in a personal injury suit. As the attorney in the personal injury suit, the petitioner is privy to confidential information that he cannot divulge unless his client waives the attorney client privilege.)

Matter of Application of St. Luke's Hospital Center (Marie H.), 159 Misc2d 932; 607 NYS2d 574 (Sup. Ct., NY Cty., 1993); modified and remanded, 215 AD2d 337; 627 NYS2d 357 (1st Dept., 1995); aff'd, 236 AD2d 106; 640 NYS2d 73, (1st Dept., 1996), aff'd, 89 NY2d 889, 653 NYS2d 257 (1996).

Where Article 81 petition for indigent AIP, seeks power to transfer AIP to nursing home or to make major medical or dental treatment decisions without consent, responsibility of paying for assigned counsel falls upon locality under Article 18-B, rather than State pursuant to Judiciary Law §35.

Matter of Wogelt/Matter of Lichenstein, 223 AD2d 309; 646 NYS2d 94, (1st Dept., 1996); on remand sub nom, In re: Lichtenstein, 171 Misc2d 29, 652, NYS2d 682 (Sup. Ct., Bronx Cty., 1996)

Court's failure to appoint counsel for AIP when it became apparent that AIP contested appointment of the guardian and opposed move to different nursing home, as well as failure to notify AIP on record of purpose and possible consequences of proceeding, her right to be represented by counsel, and fact that court would appoint counsel if she so desired resulted in reversal of appointment of guardian.

In re: DOE, 181 Misc2d 787; 696 NYS2d 384 (Sup. Ct., Nassau Cty., 1999)

Appointment of counsel for AIP in Article 81 proceeding does not extend to unrelated proceedings.

(ii) Counsel fees

a. Responsibility for payment of counsel fees

(i) AIP's funds

Matter of Astor, Misc3d _____; 2006 N.Y. Misc. LEXIS 3733 (Sup. Ct., NY Cty .2006) (Stackhouse, J.)

Over 3 million dollars in legal and expert fees were amassed by 56 lawyers, 65 paralegals, 6

accountants, 5 bankers, 6 doctors, a law school professor and 2 public relations firms during the proceedings in the intensely disputed guardianship of NY philanthropist Brooke Astor. Although there was no opposition filed by any party to any of the fee requests submitted, the court, relying on its inherent authority, reviewed the submissions. In evaluating the fees, the court focused on whether the efforts of the party charging the fee advanced the best interests of the AIP. Under this analysis, the court found that even though the matter was settled, the petitioner was entitled to an award of counsel fees because the efforts of his counsel benefitted Mrs. Astor. Also, while recognizing that Article 81 does not authorize an award of counsel fees to a respondent who opposes a petition, the court nevertheless awarded the respondent, Mrs Astor's son who held her power of attorney, half of his legal fees, highlighting *inter alia* the Court Evaluator's conclusion that the allegations of elder abuse were unsubstantiated.

In re Bloom (Spears); 1 Misc. 3d 910A (Sup. Ct., Suff. Cty.)(Berler, J.) (2004).

Where application was brought in good faith and did ultimately benefit AIP, Court directs that fees for petitioner counsel be paid from the AIP's funds even though the application was ultimately withdrawn. Court also holds that since AIP was not declared incapacitated, she could negotiate her own fee arrangement with her own counsel.

Matter of Jackson, NYLJ, p. 22, col 5 (Sup. Ct., Queens Cty., Feb. 5, 2003)

Denying a request for supplemental fees for substituting one guardian for another in a case where the IP consented to appointment of a guardian and the guardian failed to get himself qualified, the court stated: "The awarding of fees is not a ministerial act wherein the Court merely rubberstamps an order based on statements by an attorney. If that were the case, the order would be submitted to a clerk for entry. It is the responsibility and obligation of the court to scrutinize all requests to ensure that the assets of an incapacitated person are not being dissipated by anyone who thinks they are entitled to funds from the estate by claim of legal services, expenses or for any other reason. Attorneys who do legitimate work are entitled to be paid, however that does not mean that all fees should come from the incapacitated person's assets. **The courts position is that *only fees that directly benefit the incapacitated person will be paid from the incapacitated person's assets....An incapacitated persons assets may not be considered a big piggy bank to be raided by little piggies....***"

Matter of Albert S., 300 AD 2d 311 (2nd Dept., 2003)

App Div sustains trial court's decision to direct the petitioner to pay only \$450 of the \$68,000 combined fees of both counsel and the Court Evaluator and to impose these costs upon the AIP EVEN THOUGH the 81 petition was ultimately dismissed for lack of merit. Court reasons that the petition was herself of meager means and that she did not act out of malice or avarice in bringing the petition but rather out of concern for the AIP. Strong dissent argues that the 81 proceeding did not confer any benefit on the AIP and he should not pay.

Matter of Petty, 256 AD2d 281, 682 NYS2d 183 (1st Dept., 1998)

Where Court Evaluator determined that petition was weak and guardianship completely unnecessary, and court “so ordered” petitioners to discontinue proceeding, Supreme Court improperly ordered AIP to pay court evaluator’s fees, but properly ordered AIP to pay his own attorney’s fees because §81.10 gives court’s discretion to order petitioners to pay court-appointed attorneys, but not the AIP’s privately retained lawyers when a petition is dismissed.

Matter of Grace “PP”, 245 AD2d 824; 666 NYS2d 793 (3rd Dept., 1997), lv. to app. denied, 92 NY2d 807; 678 NYS2d 593 (1998)

§81.10(f) requires that court determine reasonable compensation for attorney appointed to represent AIP, and provides “[t]he person alleged to be incapacitated shall be liable for such compensation unless the court is satisfied that the person is indigent.” Fact that AIP receives Medicaid is not dispositive of indigence.

Matter of Epstein (Epstein), 168 Misc2d 705; 649 NYS2d 1013 (Sup. Ct., Suffolk Cty., 1996)

Article 81 does not provide means of payment of counsel for AIP where AIP is indigent. Moreover, there is no provision for payment of fees for counsel for guardian other than from assets of IP. Application by petitioner to have State pay fee of her attorney is denied, and court-appointed counsel for the AIP denied right to seek payment of fees from guardianship estate absent showing that IP is not indigent and has sufficient funds to pay fees.

Matter of Susan P. a/k/a Susan O. (Schwartz) 243 AD2d 568 (2nd Dept 1997)

AIP was ordered to pay all fees since it was his lack of cooperation in a pending matrimonial proceeding that gave rise to the need for the guardianship proceeding.

(ii) Petitioner

Matter of S.K., 13 Misc3d; ___ NYS3d ___ (Sup. Ct. Bronx Cty) (Hunter , J.)

AIP had functional limitations but also had sufficient and valid advanced directives in place as alternative resources. The nursing home where the AIP resided brought an Article 81 proceeding solely for the purpose of collecting it’s bill because the AIP’s wife, who held the POA, was not paying because she believed the Long Term Care policy should payout. The Court stated: “**The purpose for which this guardianship proceeding was brought, to wit, for the nursing home to be paid for its care of the [AIP] was not the Legislature’s intended purpose when Article 81 of the MHL was enacted in 1993.**” The Court imposed all costs of the proceeding upon the petitioner.

Matter of Williams, 2006 NY Slip Op 51521U; 2006 N.Y. Misc. LEXIS 2109 (Sup. Ct., Kings Cty. 2006)(Belen, J.)

Court denied motion of petitioner nephew's attorney to be paid out of the AIP's funds finding that although the bringing of the petition was probably in the AIP's best interest, (1) the petitioner's application to be selected as guardian had been denied due his self-dealing behavior and theft of her property; (2) the attorney should have disqualified himself from representing the petitioner due to a conflict of interest since he previously represented the AIP when he prepared her Will and the Power of Attorney giving petitioner control of her finances and (3) although having established an attorney-client, confidential relationship with the AIP and even having met with her and having been notified that she believed the petitioner was stealing from her, he undertook to represent petitioner in a proceeding adverse to the AIP to declare her incompetent and nullify her revocation of the power of attorney that he prepared.

Hobson -Williams v. Jackson , 10 Misc3d 58; 809 NYS2d 771; 2005 N.Y. Misc. LEXIS 2584 (App. Term 2nd Dept) 2005 Slip Op 25496

After an unfavorable court award from the assets of the ward, counsel for the petitioner successfully brought suit against her own client for the balance of her fee. Court holds that attorney fee awards from the AIP's estate are within the discretion of the court and the AIP's estate is not the exclusive source for such fees. See also, "Hobson -Williams: Fee disputes with Guardianship case clients", NYLJ Dec 16, 2005, by Daniel Fish warning Elder Law attorneys to clarify this possible outcome from the inception of the attorney-client relationship with a petitioner-client.

Matter of Albert S., 268 AD2d 684; 730 NYS2d 128 (2nd Dept., 2001); 2001 NY App. Div. LEIS 8429

Where AIP had living will, durable Power of Attorney, and where trust fund was being established for his benefit, Appellate Division directed petitioner to pay fees of the court evaluator and counsel for AIP for petitioning for unnecessary guardianship.

Matter of Shapiro, NYLJ, 4/19/01, p. 17 (Sup. Ct., Nassau Cty.)(Rosetti, J.)

Court denied payment of counsel fees to counsel for party whose action created need for the litigation and whose work, although capable and vigorous, did not result in benefit to AIP.

Matter of De Santis, 186 Misc2d 791; 720 NYS2d 757 (Sup. Ct., Nassau Cty., 2000)

Court has power to review reasonableness of petitioner's attorney's fees where petitioner complains they are excessive, even where attorney will be paid by petitioner and not from the AIPs funds.

In re: DOE, 181 Misc2d 787; 696 NYS2d 384 (Sup. Ct., Nassau Cty., 1999)

Court orders fees for AIP's court appointed counsel to be paid by petitioner-also find fees for "vigorous representation" of AIP by court appointed counsel was appropriate, especially where counsel for AIP and court alerted petitioner to deficiencies in his case.

Matter of Naimoli (Rennhack), NYLJ, 9/8/97, p. 25, col. 4 (Sup. Ct., Nassau Cty., 1997)

Where petitioner commenced Art. 81 proceeding as result of power struggle over control of mutual relations estate, petitioner was held personally responsible for compensation of court examiner and AIP's counsel.

Matter of Hammons (Perreau), NYLJ, 7/7/95, p.29,col.3 (Sup. Ct., Kings Cty.)(Goodman, J.)

Where Court has "serious questions" about the "unfounded dramatic allegations in petition," court directs petitioner, Commissioner of Social Services, to pay compensation of MHLS, initially as Court Evaluator and then as attorney.

Matter of Chackers (Shirley W.), 159 Misc2d 912; 606 NYS2d 959 (Sup. Ct., NY Cty., 1993)

Where petition was brought in good faith but all parties ultimately agreed that discontinuance was warranted and no guardian was needed, petitioner's counsel's fee was borne by petitioner not AIP. While petitioner's attorney's fees may be borne by AIP if court "deems it appropriate," court did not impose petitioner's counsel's fees on AIP here. Court finds fact that proceeding was brought in good faith was alone insufficient to shift burden of paying for this proceeding to the AIP where no special circumstance existed to warrant shifting burden of fee to AIP.

(iii) Payment of fees pursuant to County Law 18-B

Matter of Lukia QQ., 2006 NY Slip OP 2419; 2006 N.Y. App Div. LEXIS 33730 (3rd Dept. 2006)

Neither County Law §722-b nor anything in Article 81 requires that counsel to the AIP or the Court Evaluator be paid at assigned counsel rates under County Law §722-b.

Matter of Turner (Loeffler), 189 Misc2d 55; 730 NYS2d 188 (Sup. Ct., NY Cty. 2001)

Citing a "growing crisis" in the judicial system caused by the exceedingly low rates paid to 18-B counsel, an inability to secure counsel and fiduciaries in Art 81. proceedings, and the constitutional liberties at stake in Art 81 proceedings requiring counsel, court assigns 18-B counsel for IP in Art. 81 proceeding to modify the guardian's powers, sets fees at double the statutory rates established in 1986 and calls for Legislature and Governor to follow suit.

Matter of Application of St. Luke's Hospital Center (Marie H.), 159 Misc2d 932; 607 NYS2d 574 (Sup. Ct., NY Cty., 1993), *modified and remanded*, 215 AD2d 337; 627 NYS2d 357 (1st Dept., 1996), *aff'd*, 226 AD2d 106; 640 NYS2d 73, *aff'd*, 89 NY2d 889, 653 NYS2d 257 (1996).

Where Article 81 petition seeks power to transfer AIP to nursing home or to make major medical or dental treatment decisions without AIP's consent, responsibility of paying for assigned counsel falls upon locality under Article 18-B, rather than upon State pursuant to Judiciary Law §35.

(iv) **Public agencies**

In re: Blakey (Buhania), 187 Misc2d 312 (Sup. Ct., Monroe Cty., 2000)

Court authorizes attorneys fees to the AIP's attorney pursuant to the Civil Rights Attorney's Fee Act of 1976 awards against **Attorney General**, even though he claims to have brought claim for reimbursement of "improperly paid" Medicaid in good faith claiming that because this area of the law is still unsettled.

Matter of Hammons (Perreau), NYLJ, 7/7/95, p. 29, col. 3 (Sup. Ct., Kings Cty.)(Goodman, J.)

Where Court has "serious questions" about the "unfounded dramatic allegations in petition," court directs petitioner, **Commissioner of Social Services**, to pay compensation of MHLs, initially as Court Evaluator and then as attorney.

(v) **Non-petitioning Nursing home**

Matter of Topa, 10 Misc3d 355; 806 NYS2d 383; (Sup. Ct., Queens Cty.) (Thomas , J.)(2005)

Nursing home refuses to discharge 94 year old AIP to his adult daughter who held the Health Care Proxy, would not honor the proxy and would not allow AIP to sign himself out AMA, alleging that he was incompetent to do so. Nursing home forced daughter to bring Art. 81 petition to secure her father's discharge. Nursing home based its refusal on fact that APS had started an investigation as to the cause of wound he had received while daughter was trying to get him into his bed at home. Although APS had indicated that they were no longer pursuing the investigation, the nursing home still would not discharge the AIP. The daughter brought the petition without alleging incapacity and the court ultimately found that a guardian was not needed. Petitioner sought legal fees from and sanctions upon nursing home. Nursing home argued that they were not a party and the court has no jurisdiction to order them to pay. Court does order nursing home to pay and finds its authority under MHL §81.16 (f) and also case law holding that a court is empowered to assess legal fees when litigation creates a benefit to another or when an opposing parties malicious act cause another to incur fees. Court states that the nursing home knew that it should have started the proceeding itself if it believed that it was unsafe to discharge the AIP. but probably knew that the court would not grant it because the AIP was not lacking capacity and that they would stuck with the bill. The court concludes that the nursing home could not avoid its responsibilities by forcing the daughter to free her father from their unlawful custody and described the nursing home's behavior as reprehensible. Court assess fees but not sanctions. States that it would assess sanctions if it had not awarded fees.

Matter of Luby, 180 Misc2d 621, 691 NYS2d 289 (Sup. Ct., Suffolk Cty., 1999)

Nursing home denied legal fees in connection with Art. 81 proceeding wherein AIP was represented by separate court-appointed counsel where nursing home was not petitioning party.

Also nursing home was not entitled to award of legal fees in connection with its acceptance and exercise of power of attorney received from resident previously diagnosed by its own physicians with dementia where one objective of power of attorney was to protect nursing home's interest as creditor, since IP received little benefit, if any, as result of appointment of nursing home administrator as his attorney-in-fact. Circumstances surrounding execution of power of attorney, and marketing of IP's home for sale created conflict of interest on part of nursing home. Moreover, nursing home, whose primary objective should have been to secure care and well-being of its patient, placed itself in untenable position when it commenced eviction proceedings against child of its resident. Accordingly, IP will not bear any legal costs associated with execution and exercise of power-of-attorney given to nursing home.

Matter of Sylvia Gaskell, NYLJ, 3/1/94, p. 27, col. 2 (Sup. Ct., Suffolk Cty., 1994) (Luciano, J.)

Where health care facility had unnecessarily required family to petition court for appointment of guardian, court would consider ordering facility to pay fee for Court Evaluator and petitioner's attorney.

(vi) Non-party intervenor

Matter of Kanfer (Lefkowitz), NYLJ, 11/8/96, p. 25, col. 3 (Sup. Ct., Kings Cty.)(Leone, J.)

Nonparty who opposed guardianship is not entitled to counsel fees, especially where his actions did not benefit the AIP and served only to prolong the otherwise straightforward proceedings.

Matter of Schwartz, NYLJ, 3/13/95, p. 25, col. 1 (Sup. Ct., Nassau Cty.)(Rossetti, J.)

Court-appointed fiduciaries, children of 83-year-old IP, applied for reimbursement from funds of their father. Children were divided as to proper management of his affairs. Court granted attorneys' fees from funds but denied reimbursement for personal and litigation expenses primarily incurred as result of battle for control between children. These costs were deemed spent to benefit their own interests, not their father's.

(vii) “The bar in general “

Matter of Maier, NYLJ, 2/6/98, p. 25, col. 3 (Sup. Ct., Bronx Cty.)(Wilkins, J.)

Attorneys were paid only their retainers in interests of fairness and “community service” that the bar owes to community.

b. To whom fees paid

(i) Retained counsel

In the Matter of Enna D., 30 AD3d 518; 816 NYS2d 368;(2006, 2nd Dept)

Following the death of the AIP, the guardianship proceeding abated. Thereafter, Supreme Court lacked the authority to award an attorney's fee to the attorney retained by the petitioner, as §81.10[f], §81.16[f] do not authorize such an award, following the death of the AIP to attorneys other than those appointed by the court.

Matter of John Peterkin, 2 Misc. 3d 1011A, (Sup. Ct., NY Cty. 2004) (Visitation-Lewis, J.)

AIP's daughter held a POA. Her brother petitioned under Article 81 to vacate the POA and be appointed as guardian alleging among other things that the daughter was not caring for the father and was stealing from him. The court finds that the petitioner had not met his burden of proof, that his petition had been brought in bad faith and that he had alleged false and misleading claims. The daughter retained private counsel to represent her for legal fees incurred in defending against the petition. Since MHL §81.10(f) does not apply to retained counsel but only to appointed counsel, she petitioned instead under 22 NYCRR 130-1.1 alleging frivolous litigation and the court directed that her counsel fees be paid by petitioner. She also moved, successfully under MHL §81.08(f) for petitioner to pay the Court Evaluator's fees.

Matter of H.E.M, NYLJ, 8/16/02 (story only) 1091961/01 (Sup. Ct., Kings Cty.)(Leventhal. J.)

Fees for retained counsel for self petitioner in guardianship are reviewable by the court even though there is no express authority in the statute.

Matter of William S., 253 AD2d 557, 677 NYS2d 371 (2nd Dept., 1998); 169 Misc2d 620; 646 NYS2d 760 (Sup. Ct., Queens Cty., 1996)

Upon motion of court examiner-fee for private attorney selected by AIP set at zero where attorney failed to submit affirmation of services detailing work performed and otherwise failed to demonstrate that she performed any services on behalf of AIP. Although MHL §81.10 does not specifically provide for court approval of fees paid to private counsel for AIP, court has inherent authority to supervise same and, in determining reasonable fee, court must consider number of factors. Although attorney here contends that she could not submit affirmation of services because AIP instructed her not to reveal certain information to court, and to file affirmation of services would breach attorney-client privilege, burden of substantiating fee is upon attorney.

Matter of Roy (Lepkowski), 164 Misc2d 146; 623 NYS2d 995 (Sup. Ct., Suffolk Cty., 1995)

Where petitioner's counsel successfully obtained court-appointed guardians for property management and personal needs of AIP, counsel fees will be determined pursuant to MHL§81.16 (f), which provides for reasonable compensation, and not pursuant to retainer agreement between petitioner and attorney.

Matter of Petty, 256 AD2d 281, 682 NYS2d 183 (1st Dept., 1998)

Where court evaluator determined that petition was weak and guardianship completely unnecessary, and court “so ordered” petitioners to discontinue proceeding, Supreme Court improperly ordered AIP to pay court evaluator’s fees, but properly ordered AIP to pay his own attorney’s fees because §81.10 gives court’s discretion to order petitioners to pay court-appointed attorneys, but not the AIP’s privately retained lawyers when a petition is dismissed.

Matter of Maier, NYLJ, 2/6/98, p. 25, col. 3 (Sup. Ct., Bronx Cty.)(Wilkins, J.)

Attorneys were paid only their retainers in interests of fairness and “community service” that the bar owes to community.

Matter of Ricciuti, 256 AD2d 892, 682 NYS2d 264 (3rd Dept., 1998)

Court not bound by fees set in prior retainer agreement between AIP and counsel. Court sets reasonable compensation.

Matter of Rocco, 161 Misc2d 760; 615 NYS2d 260 (Sup. Ct., Suffolk Cty., 1994)

MHL §81.10 (f) does not authorize court to direct petitioner to pay attorney's fees of AIP’s privately retained counsel. Section 81.10 (f) authorizes court to direct petitioner to pay fees for MHLS or any attorney appointed pursuant to section 81.10, but has no application when AIP has privately retained counsel. However, this practical limitation on an AIP’s access to counsel is incongruous in light of statutory scheme, which is so greatly focused on recognizing and protecting rights of AIP, and Legislature should explore whether appropriate amendment to Article 81 is needed. However, case was referred for hearing on sanctions and if frivolous conduct found, attorney fees could be awarded as sanction.

(ii) Counsel for Cross - petitioners

In the Matter of IDA Q. , 2004 N.Y. App. Div. LEXIS 12402, (3rd Dept.2004)

Contains following dicta: “....Supreme Court enjoys broad discretion to award [attorneys] fees to..., a cross petitioner in a Mental Hygiene Law article 81 proceeding, even where, as here, the original petition is not granted and the proceeding is discontinued. “Fees were not granted in this case, however, because respondent made his motion long after the proceeding was discontinued and petitioners' motion for counsel fees was decided without any explanation or excuse for his failure to promptly cross-move. Because of the obvious impact of two sizeable awards of counsel fees on the assets of the AIP and the advantages of the court having been able to considering both fee applications at the same time, it was not improper for the court to deny the fee application here. Supreme Court did not err by refusing to consider respondent's motion on the merits.

(iii) Counsel for Public agencies and MHLS

Matter of Wingate (Kern), 165 Misc2d 108; 627 NYS2d 257 (Sup. Ct., Suffolk Cty., 1995)

County Attorney who appears should be awarded "reasonable compensation" pursuant to §81.16(f) only in extraordinary circumstances.

Matter of Hammons (Perreau), NYLJ, 7/7/95, p. 29, col. 3 (Sup. Ct., Kings Cty.)(Goodman, J.)

Where Court has "serious questions" about the "unfounded dramatic allegations in petition," court directs petitioner, Commissioner of Social Services, to pay compensation of MHLS, initially as Court Evaluator and then as attorney.

(iv) Counsel for guardians/conservators

Matter of Brown, 182 Misc2d 172, 697 NYS2d 838 (Sup. Ct., Queens Cty., 1999)(Kassoff, J.)

Court declines award of attorney's fees from IP's estate for legal fees incurred by conservator to reconstruct IP's financial records, in connection with proceeding to remove conservator for breach of fiduciary.

(v) Counsel for Guardian's surety

In the Matter of Benjamin D. Sherman, 277 AD2d 320;715 NYS2d 746 (2nd Dept., 2000)

Counsel fees awarded to counsel for guardian's surety and counsel for IP's daughter where, after IP's death, daughter petitioned in Supreme Court for Special Guardian and final accounting in relation to guardian's wrong doing in failing to make nursing home payments for IP and also failing to turn

(vi) Counsel for non - party

Matter of Ruth Q., 23 AD3d 479; 2005 N.Y. App. Div. LEXIS 13062

MHL 81.16 (f) does not authorize an award of attorneys fees to counsel for a non -party for services rendered in opposing a petition for the appointment of a guardian.

c. Reasonableness of fee requested

Matter of Audrey J..S., 34 AD3d 820; 825 NYS2d 520 (2nd Dept. 2006)

Appellate Division held an appeal of an attorney fee award in abeyance and remitted it back to

Supreme Court, Queens County to set forth a clear and concise explanation of the factors considered in awarding the fees and the reasons for its determination. The Appellate Division reiterated the factors to be considered in awarding the attorneys fees as: (1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented, (2) the attorney's experience, ability, and reputation, (3) the amount involved and the benefit flowing to the ward as a result of the attorney's services, (4) the fees awarded in similar cases, (5) the contingency or certainty of compensation, (6) the results obtained, and (7) the responsibility involved.

Matter of Astor, ___ Misc3d ___ ; 2006 N.Y. Misc. LEXIS 3733 (Sup. Ct., NY Cty. 2006) (Stackhouse, J.)

Over 3 million dollars in legal and expert fees were amassed by 56 lawyers, 65 paralegals, 6 accountants, 5 bankers, 6 doctors, a law school professor and 2 public relations firms during the proceedings in the intensely disputed guardianship of NY philanthropist Brooke Astor. Although there was no opposition filed by any party to any of the fee requests submitted, the court, relying on its inherent authority, reviewed the submissions. The court, in approving a substantial amount of the requests, noted that Mrs. Astor's financial holdings are extremely complex, that her financial records were poorly maintained thus complicating the task of marshaling and taking control of her assets and income; that the case necessitated investigation into allegations that her son/guardian had converted her assets into his own use; that there were motions by three press organizations for leave to intervene and for access to the files and proceedings; that because the proceeding settled only 6 days before the trial date the parties had to substantially prepare for trial and that there was a need for the law firms to assign a large numbers of staff to the project to move it along quickly. In evaluating the fees, the court allowed only fees for services that served the benefit of the AIP, set the cap for legal fees at \$450/hr., denied all fees related to public relations efforts and the party's attempts to try the case in the media; and denied charges attributable to preparation of the fee applications.

Matter of Lukia QQ., 2006 NY Slip OP 2419; 2006 N.Y. App Div. LEXIS 33730 (3rd Dept. 2006)

Appellate Division reduces fee awarded to Court Evaluator and counsel to AIP because the case was not complex enough to warrant the amount awarded and the CE and counsel to AIP engaged in duplicative work.

Matter of Nebrich, 804 NYS2d 224; N.Y. App. Div. (4th Dept 2005)

Appellate Division remands case for written decision to explain basis for awarding Counsel fees in accordance with following factors: (1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented, (2) the attorney's experience, ability, and reputation, (3) the amount involved and the benefit flowing to the ward as a result of the attorney's services, (4) the fees awarded in similar cases, (5) the contingency or

certainty of compensation, (6) the results obtained, and (7) the responsibility involved.

Matter of Catherine K., 22 AD3d 850; 803 NYS2d 193; (2005 2nd Dept)

Appellate Division uphold award of attorneys fees challenged by counsel as insufficient. Court quotes factors as : (1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented, (2) the attorney's experience, ability, and reputation, (3) the amount involved and the benefit flowing to the ward as a result of the attorney's services, (4) the fees awarded in similar cases, (5) the contingency or certainty of compensation, (6) the results obtained, and (7) the responsibility involved.

In the Matter of Martha O. J., 22 AD3d 756; 804 NYS2d 387 (2nd Dept 2005), *modified after remittitur* 33 A.D. 3d 1002; 822 N.Y.S. 734; (2006)

Appellate Division held an appeal in abeyance and remitted four orders awarding attorneys fees back to Supreme Court Queens County to set forth a clear and concise explanation of the factors considered in awarding the fees and the reasons for its determinations. The Appellate Division sets forth the factors to be considered in awarding the attorneys fees as: (1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented, (2) the attorney's experience, ability, and reputation, (3) the amount involved and the benefit flowing to the ward as a result of the attorney's services, (4) the fees awarded in similar cases, (5) the contingency or certainty of compensation, (6) the results obtained, and (7) the responsibility involved. Upon return from remittitur the Appellate Division modified the fee awards.

Estate of Rose BB, 16 AD3d 801; 791 NYS2d 201 2005 (3rd Dept. 2005), revised judgement affirmed AD3d; 2006 N.Y. App. Div. LEXIS 15308 (3rd Dept. 2006).

IP died and the guardianship proceeding was transferred to the Surrogate's Court and consolidated with a probate proceeding. The parties to the guardianship proceeding enter into a Stip on the records agreeing that the Surrogates Court would determine the fees due in the guardianship proceeding. Guardian submitted final accounting in the Surrogates Court and it was later approved by the Appellate Division. Petitioner in the Art 81 proceeding moved in Surrogates Court for counsel fees pursuant to the Stip. and after hearing the Surrogates Court enters an order directing payment of fees to be paid by the respondent in this appeal who was the other party to the stip.

Respondent argues that the petitioners fee was untimely but court finds that it was delayed by appeals, some of which were required due to respondents behavior. Respondent also argues that the Surrogates Court cannot determine the fees due from the guardianship proceeding but the Appellate Division rejects that argument holding that "when appropriate, counsel fees may be awarded in situations where the misconduct of a fiduciary brings about the expense". Appellate court however finds that it is not in a position to determine the reasonableness of the fees awarded and remands to Surrogates Court for further proceedings as determined by Surrogates Court. On subsequent appeal , the judgement, as revised by Surrogate's Court is affirmed.

Matter of Maylissa, 5 AD3d 4992; 772 NYS2d 554 (2nd Dept., 2004)

Appellate Division holds that it was error for court to have denied attorneys fees for the preparation of and filing of the semi-annual account of the co-guardians who are not attorneys or accountants and remands for findings as to proper fee.

Matter of De Santis, 186 Misc2d 791; 720 NYS2d 757 (Sup. Ct., Nassau Cty., 2000)

Court has power to review reasonableness of petitioner's attorney's fees where petitioner complains they are excessive, even where attorney will be paid by petitioner and not from the AIPs funds.

Matter of Enid B., 7 AD3d704, 777 NYS2d 178 (2nd Dept 2004)

AIP's counsel appeals from order which setting her fee without providing an explanation based upon the relevant factors. Appellate Division, while acknowledging that the trial court has broad discretion, found that the trial court made no reference at all to the relevant factors and it appeared that they were not considered. Therefore, it remitted for a new determination based consideration of the factors.

Matter of Helen C. , 2 A.D.3d 729 (2nd Dept. 2003)

Supreme Court found to have providently exercised its discretion in limiting award of legal fees to counsel for the guardian where "many of the legal services performed...were of the type customarily performed by a guardian".

Matter of Tijuana M., 303 AD2d 681 (2nd Dept. 2003)

App. Div. modifies order awarding attorney fees by increasing the fees, stating that the trial court failed to analyze the relevant criteria and set forth analysis in written decision. App. Div. enumerates relevant criteria and conduct analysis in its opinion.

Matter of Keele, NYLJ, 6/12/01, (Sup. Ct., NY Cty.) (Lehner, J.); Aff'd 305 Ad2d 145 (1st Dept., 2003)

Where counsel for guardian had already been compensated on hourly basis for legal work done, counsel would not be further compensated on basis of percentage of substantial funds recovered, especially for non-legal work, such as searching for assets and correcting accounts that could have been performed by a non lawyer.

Matter of Spingarn, 164 Misc2d 891; 626 NYS2d 650 (Sup. Ct., NY Cty., 1995)

Where many hours billed by law firm were unnecessary, duplicative and not responsibility of AIP, only reduced legal fee paid from AIP's funds will be allowed based on court's experience and analysis of time reasonably involved in preparing, processing and presenting petition to court. In

determining reasonableness of legal fees involved, following factors must be considered: hours reasonably expended; reasonable hourly rate of attorney; nature of services rendered and difficulties involved. Many hours billed were for unnecessary charges such as numerous attorneys in same firm reviewing same documents, and for rudimentary research on Article 81 proceedings as well as for more attorneys than were reasonably necessary appearing in court.

Matter of Kunzelmann, 199 AD2d 1068; 605 NYS2d 606 (4th Dept., 1993)

App. Div. finds trial court's award of fees for AIP's attorney was not "reasonable in relation to the results obtained" and was an abuse of discretion, based on totality of representation, including result obtained, time expended, and attorney's standing in legal community. (*No details provided in opinion*)

Matter of O' Day v. Anthony Maggipinto, 229 AD2d 583; 646 NYS2d (2nd Dept., 1996)

Where order of appointment provided, inter alia: "that the [guardian] is authorized to pay out of the funds of the [AIP] such fees and disbursements of attorneys, guardian ad litem, and the doctor as will hereinafter be fixed by the Court," and attorney billed Guardian directly for fees, substantially over and above those that court had authorized Estate to pay him, court properly directed attorney to return improperly-billed funds to Estate.

d. Proper Court to award fees Surrogate's or Supreme

Estate of Hornik , NYLJ, 11/9/06, p. 30, col. 3 (Surr. Ct. Queens Cty. 2006)(Surr. Nahman)

Surrogate's Court denies without prejudice an application by the guardian of the decedent for compensation and refers the guardian back to Supreme Court where the guardianship was handled.

Estate of Rose BB , 16 AD3d 801; 791 NYS2d 201 2005 (3rd Dept)

IP died and the guardianship proceeding was transferred to the Surrogate's Court and consolidated with a probate proceeding. The parties to the guardianship proceeding enter into a Stip on the records agreeing that the Surrogates Court would determine the fees due in the guardianship proceeding. Guardian submitted final accounting in the Surrogates Court and it was later approved by the Appellate Division. Petitioner in the Art 81 proceeding moved in Surrogates Court for counsel fees pursuant to the Stip. and after hearing the Surrogates Court enters an order directing payment fo fees to be paid by the respondent in this appeal who was the other party to the stip.

Respondent argues that the petitioners fee was untimely but court finds that it was delayed by appeals, some of which were required due to respondents behavior. Second, respondent argues that the Surrogates Court cannot determine the fees due from the guardianship proceeding but the Appellate Division rejects that argument holding that "when appropriate, counsel fees may be

awarded in situations where the misconduct of a fiduciary brings about the expense.”

Estate of Josette Pyram, NYLJ, 1/8/04, p. 31, (Surr. Ct., Queens Cty.)(Surrogate Nahman).

The request for legal fees in an Article 81 proceeding which resulted in the appointment of a Guardian for the decedent was denied by Surrogate’s Court without prejudice to request such fees in the Guardianship Part of Supreme Court.

Matter of Miriam Shapiro, NYLJ, 9/34/03, p. 22 (Surr. Riordan)

Where IP died, her attorney for the Art 81 proceeding should submit bill for services to the Art 81 court, not the Surrogate’s court during probate.

e. Fees set by other courts

(i) Foreign courts not binding

Matter of Serrano, 179 Misc2d 806; 686 NYS2d 263 (Sup. Ct., Bronx Cty., 1998)

Article 81 guardian, with court permission, bought home in Puerto Rico for IP and then sought order permitting him to use IP’s assets to pay legal fees for transaction. Issue was whether amount of legal fees, set in an extraordinarily high amount by foreign court, is binding on New York court. NY court holds that Puerto Rican court could only set fees subject to its approval and awards more reasonable fees to prevent “an outrageous injustice.”

Matter of Whitehead, 169 Misc2d 554; 642 NYS2d 979 (Sup. Ct., Suffolk Cty., 1996)

In proceeding brought by co-committees of Canadian IP, who were appointed by Queen's Bench, Canada, seeking guardian of IP's New York assets, it is inappropriate for Supreme Court to defer to determination by Queen's Bench as to a counsel fee payable by IP in proceeding before Supreme Court. Setting counsel fee by other than Supreme Court's determination pursuant to §81.16 (f) is contrary to public policy of New York State.

(ii) Other New York Courts

Cathy R. v. Aaron Fischberg, 2003 NY Slip OP 50051U1, 2003 NY Misc LEXIS 67

Resolution of attorneys fees issue within the context of an Art 81 proceedings is res judicata and the fee issues cannot later be litigated n another court.

E. Court Evaluators

(i) Role

Matter of the Guardianship of F.R. , 12 Misc3d 247; 2006 N.Y. Misc. LEXIS 527

Court Evaluator bid at auction on real estate belonging to the AIP in whose Art 81 proceeding he served as CE. Court notes that although there was nothing per se improper about the CE bidding at a public auction, but since the CE serves as the “eyes and ears” of the court, its function is quasi-judicial and thus even the appearance of impropriety is to be avoided. Case has good discussion of the role of Court Evaluator.

Matter of D.G. , 798 NYS2d 343; 2004 (Sup Ct, Kings Cty) (Leventhal , J.)

The Court Evaluator is not an adversarial part. Even if the individual appointed is an attorney he/she he does not serve as an attorney. The Court Evaluator works as an arm of the court and the assessment made is of an independent nature. Therefore, the court denied petitioner’s motion to strike the Court Evaluator’s report and for the Court Evaluator to recuse herself for meeting with the petitioner without her counsel present.

55th Management Corp v. Goldman, NYLJ April 15, 2003 (Sup. Ct., NY Cty.)(Lebedeff, J.)

Out of court statements made to a court evaluator in an 81 proceeding are protected by the privileges afforded participants in judicial proceedings, therefore, a libel action against the informant did not lie. The court reasons that the court evaluator plays a vital fact finding role in the article 81 process and his/her function cannot be hampered by the threat that anyone who talks to the C/E will be the subject of a libel suit.

Matter of Lula XX, 88 NY2d 842; 644 NYS2d 683 (1996); 667 NE2d 333; 1996

The Court Evaluator is not a party to an Article 81 proceeding.

Matter of Lee “I” (Murphy), 265 AD2d 750, 697 NYS2d 385 (3rd Dept., 1999)

It is not role of court evaluator to be advocate for AIP but rather to be neutral advisor to court.

(ii) Appointment

Matter of Rochester General Hospital (Levin), 158 Misc2d 522; 601 NYS2d 375 (Sup. Ct., Monroe Cty., 1993)

Where formal statutory notice informed AIP of appointment of court evaluator to explain proceeding and investigate claims made in application, failure to make such appointment does not

render proceeding defective where counsel has been appointed pursuant to §81.10. Although Article 81 contains elaborate provisions for appointment and duties of court evaluator, there is no reason why counsel could not perform most of these same services. As practical matter, appointment of both court evaluator and counsel has potential for exhausting resources of AIP, who may have relatively limited assets.

(iii) Compensation

Matter of Lukia QQ., 2006 NY Slip OP 2419; 2006 N.Y. App Div. LEXIS 33730 (3rd Dept. 2006)

Neither County Law §722-b nor anything in Article 81 requires that counsel to the AIP or the Court Evaluator be paid at assigned counsel rates under County Law §722-b.

Matter of Nebrich, 804 NYS2d 224; 2005 App. Div. (4th Dept 2005)

Appellate Division remands case for written decision to explain basis for awarding Court Evaluator fees in accordance with following factors: (1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented, (2) the attorney's experience, ability, and reputation, (3) the amount involved and the benefit flowing to the ward as a result of the attorney's services, (4) the fees awarded in similar cases, (5) the contingency or certainty of compensation, (6) the results obtained, and (7) the responsibility involved.

Matter of W.E., NYLJ, 4/8/05, p. 119 (Sup. Ct. Bronx Cty.) (Hunter , J.)

Where there was no clear and convincing evidence that AIP was incapacitated, and petitioner, AIP's husband, admitted on the stand that the reason he filed the petition was to have declared null and void a waiver that she signed upon receiving compensation for the 9/11 World Trade Center compensation fund so they could be eligible for more money, court assessed the Court Evaluator's compensation against petitioner, even though he withdrew the petition, finding that but for the Court Evaluator's investigation and report, petitioner would have successfully perpetrated his fraud against the court.

Matter of John Peterkin, 2 Misc. 3d 1011A (Sup. Ct., NY Cty., 2004) (Visitation-Lewis, J.)

AIP's daughter held a POA. Her brother petitioned under Article 81 to vacate the POA and be appointed as guardian alleging among other things that the daughter was not caring for the father and was stealing from him. The court finds that the petitioner had not met his burden of proof, that his petition had been brought in bad faith and that he had alleged false and misleading claims. The daughter retained private counsel to represent her for legal fees incurred in defending against the petition. Since MHL §81.10(f) does not apply to retained counsel but only to appointed counsel,

she petitioned instead under 22 NYCRR 130-1.1 alleging frivolous litigation and the court directed that her counsel fees be paid by petitioner. She also moved, successfully under MHL §81.08(f) for petitioner to pay the Court Evaluator's fees.

Matter of Albert S., 300 AD 2d 311 (2nd Dept., 2003)

App. Div. sustains trial court's decision to direct the petitioner to pay only \$450 of the \$68,000 combined fees of both counsel and the court evaluator and to impose these costs upon the AIP EVEN THOUGH the 81 petition was ultimately dismissed for lack of merit. Court reasons that the petition was herself of meager means and that she did not act out of malice or avarice in bringing the petition but rather out of concern for the AIP. Strong dissent argues that the 81 proceeding did not confer any benefit on the AIP and he should not pay.

Matter of Epstein (Epstein), 168 Misc2d 705; 649 NYS2d 1013 (Sup. Ct., Suffolk Cty., 1996)

Court Evaluator may not seek payment of fees from guardianship estate without first showing that AIP has sufficient funds to pay fees.

Matter of Naimoli (Rennhack), NYLJ, 9/8/97, p. 25 col. 4 (Sup. Ct., Nassau Cty., 1997)

Where petitioner commenced Art. 81 proceeding as result of power struggle over control of relatives estate, petitioner was held personally responsible for compensation of court evaluator and AIP's counsel.

Matter of Slifka, Index No. 00757/96, Sup. Ct., Westchester Cty., Pallella, J., 6/6/96. (NOR)

Court granted AIP's motion to dismiss Article 81 petition but denied motion to impose sanctions on petitioner. Petition was for guardianship over trust to pay for AIP's inpatient care; however he left hospital voluntarily, rendering petition moot. Because it should have been discontinued at that point "obviating the necessity for the motion to dismiss," court did order petitioner to pay the costs of the proceeding plus the court evaluator's fee.

Matter of Sylvia Gaskell, NYLJ, 3/1/94, p. 27, col. 2 (Sup. Ct., Suffolk Cty., 1994) (Luciano)

Where health care facility had unnecessarily required a family to petition for appointment of guardian, court would consider ordering facility to pay fee for court evaluator and petitioner's attorney.

Matter of Geer, 234 AD2d 939; 652 NYS2d 171 (4th Dept., 1996)

Court may not direct AIP to pay portion of court evaluator's fee where petition is denied or dismissed.

Matter of Maier, NYLJ, 2/6/98, p. 25, col. 3 (Sup. Ct., Bronx Cty.)(Wilkins, J.)

Because of their intense involvement as interveners, AIP's family members were ordered to pay court evaluator's fees.

Matter of Susan Pollack (Marvin Pollack), 243 AD2d 568; 663 NYS2d 115 (2nd Dept., 1997)

Where trial court ordered AIP to pay one-half of court evaluator fee and directed petitioner to pay other half of that fee, court improvidently exercised its discretion by directing petitioner to pay half of fee. Under circumstances of this case where petition was brought as result of lack of cooperation by AIP and his conduct in a pending matrimonial action, and petitioner was forced to bring petition because AIP's guardian ad litem refused to do so, AIP should have been required to pay entire fee.

Matter of Schwartz, NYLJ, 3/13/95, p. 32, col. 1 (Sup. Ct., Nassau Cty.)(Rossetti, J.)

Court-appointed fiduciaries, children of 83-year-old AIP, applied for reimbursement from his funds. Children were divided as to proper management of his affairs. Court granted attorneys' fees from funds but denied reimbursement for personal and litigation expenses primarily incurred as result of battle for control between children. These costs were deemed spent to benefit their own interests.

Matter of Robert S.T., 265 AD2d 919; 695 NYS2d 822 (4th Dept., 1999)

AIP (appellant) agreed to pay award of reasonable allowance to court evaluator (respondent). After court evaluator, submitted her affirmation of services, AIP, objected to amount sought. Under those circumstances, lower court erred in determining amount to be awarded court evaluator without conducting hearing. In addition, lower court did not discharge its duty to explain, in writing, reasons for awarding fees in excess of \$2,500 (see N.Y. Comp. Codes R. & Regs. tit. 22 §36.4 [b]). Court therefore reversed judgment, and remitted matter to lower court to determine amount of reasonable allowance to be awarded court evaluator.

Matter of Chackers (Shirley W.), 159 Misc2d 912; 606 NYS2d 959 (Sup. Ct., NY Cty., 1993)

Where petition was brought in good faith but all parties ultimately agreed that discontinuance was warranted and no guardian was needed, court evaluator's fee will be payable by AIP in an amount set in order to be settled.

Matter of Krishnasastri, NYLJ, 8/25/95, p. 25, col. 1 (Sup. Ct., Nassau Cty.) (Rossetti, J.)

Petitioner husband, involved in divorce action, sought to discontinue guardianship proceeding for his wife. At issue was who should pay the fees of the court-appointed evaluator and attorney. It

apparently was unlikely that incapacity of wife could have been proven. Court, noting petitioner's partially self-interested motivation for instituting a guardianship proceeding and noting wife's lack of cooperation, ruled that husband must pay two-thirds and his wife must pay one-third.

Matter of Petty, 256 AD2d 281, 682 NYS2d 183 (1st Dept., 1998)

Where court evaluator determined that petition was weak and guardianship completely unnecessary, and court "so ordered" petitioners to discontinue proceeding, Supreme Court improperly ordered AIP to pay court evaluator's fees, but properly ordered AIP to pay his own attorney's fees because §81.10 gives courts discretion to order petitioners to pay court-appointed attorneys, but not AIP's privately retained lawyers when petition is dismissed.

Matter of Elmer "Q.", 250 AD2d 256, 681 NYS2d 637 (3rd Dept., 1998)

Although 81.10 does not compel courts to assess fees for private counsel, court nevertheless properly exercised its discretion to set counsel fees for privately retained attorney because "utility of court approved fees for services rendered to [an AIP] is equally compelling with regard to a privately retained attorney." Amount of \$32,000 billed by private attorneys was reasonable, even though there were only two court appearances, no evidentiary hearing, and no protracted discovery.

(iv) Report as evidence

Matter of B.P, 9 Misc3d 1115; 808 NYS2d 916; 2005 NY Misc LEXIS 2110 (Sup. Ct Bronx Cty)(Hunter,J.)

Court Evaluator's report could not be considered as evidence because, although the court Evaluator was available to testify, he in fact did not testify and was not in fact cross-examined on the content of the report.

F. Hearings

(i) Hearing required

Matter of William J.J. , 32 AD3d 517; 820 N.Y.S. 2d 318; (2nd Sept 2006)

In the 9th Judicial District, one judge sits in the Guardianship Accounting Part ("GAP") to review and confirm the reports of the Court Examiners in all of the counties of the 9th District. When confirming the Court Examiner's report the instant case, the GAP judge, in two orders, also: (1) added the requirement that the guardian be required to file a bond even though the appointing judge who issued the Order and Judgment had dispensed with a bond; (2) deleted the provision of the Order and Judgment providing that the guardian could draw an annual salary as compensation from the assets of the IP and added that the guardian was required to obtain prior court approval

before taking a Commission, and, (3) curtailed the power granted in the Order and Judgment that allowed the guardian to retain professional services of attorneys and accountants etc. with the IP's funds without prior court approval. The Appellate Division held that the GAP judge had exceeded his authority under MHL §81.32 to alter the guardian's compensation because such compensation can only be altered if the guardian had violated MHL 81.32(c); that the GAP judge exceeded his authority when he modified the guardian's powers to pay the professional fees without prior court approval because that power was reserved to the appointing judge, and even the appointing court could not act *sua sponte*, but only upon application of the guardian, the IP or any other person entitled to commence a proceeding and only then upon notice and hearing; and that the GAP judge has also erred in directing the filing of the bond in the absence of such provisions in the original Order and Judgment.

In the Matter of The Application of Joseph Meisels (Grand Rabbi Moses Teitelbaum); 10 Misc3d 517; 820 N.Y.S. 2d 318; 2005 N.Y. Misc. LEXIS 2515 (Sup. Ct. Kings Cty.)(Leventhal, J.)

An Article 81 petition was brought for guardianship over the Grand Rabbi of The Satmar sect. The parties wanted to bring the proceeding in the Bet Din religious tribunal but could not agree on which one so the petitioner ultimately filed in State Supreme Court. The court noted that the matter could not have been held in the Bet Din, which would have been akin to submitting it to arbitration because the case involved the capacity of an individual and not a religious matter; guardianship involves important civil liberties protected by due process, that such process includes a plenary hearing with counsel, application of the rules of evidence, the clear and convincing evidence standard, the placement of the burden of proof on the petitioner and the right to a jury. Thus, the court stated: "An Article 81 proceeding cannot be heard or determined other than by a New York State Court."

In re New York Foundation (Schoon), 14 A3d 317; 787 NYS2d 288(1st Dept)

Appellate Division holds that it was not improper for trial court, without holding a hearing, to restore powers back to an IP who was hostile and threatening toward the guardian making it impossible for the guardian to fulfill its duties under the order without placing its caseworker at risk of harm.

Matter of Wynne, 11 AD3d 1014; 783 NYS2d 179 (4th Dept 2004)

"Mental Hygiene Law Sec 81.11 (a) requires a hearing to determine whether appointment of a guardian is necessary (see, Matter of Flight,....) ...The determination who that guardians should be is left to the discretion of the court."

Matter of Anthony (Loconti), 783 NYS2d 168 2004 (4th Dept)

"The hearing requirement is not restricted to occasions when a guardian is to be imposed on a possibly unwilling alleged incapacitated person) ... Rather, section 81.11(b) states clearly that "any

party” to an Article 81 proceeding shall have the right to present evidence, call witnesses, cross-examine witnesses and be represented by counsel.”

In re Eglston (Wali Muhammed), 303 AD2d 263 (1st Dept., 2003)

A hearing is required to dismiss or grant an Article 81 petition. It may be requested by any party. The goal of narrow tailoring is enhanced by an evidentiary hearing. App. Div. reversed dismissal of an Art 81 petition and remanded for hearing.

Matter of Marvin W., 306 AD2d 289; 760 NYS2d 337 (2nd Dept.)

App. Div. reverses order of Supreme Court that denied, without hearing, IP’s application to terminate the guardianship. Court holds that MHL §81.36(c) requires that a hearing be held, that the burden of proof is on the person opposing termination of the guardianship, and that the standard of proof is clear and convincing evidence that the guardian’s authority should not be terminated.

Levy v. Davis, 302 A.D.2d 309 (2003)(1st Dept.)

The patient, a person adjudicated to be incapacitated, who suffered from diabetes and dementia, was admitted to the hospital because, according to her court-appointed guardian, she had refused insulin treatments at home. The patient’s guardian commenced a proceeding for modification of the guardianship order to permit permanent placement in a nursing home. However, the patient’s court-appointed attorney informed the court that the patient had refused voluntary placement in a nursing home, and wanted to return to her apartment. *Instead of holding a hearing, the judge referred the question of whether the patient should be involuntarily placed in a nursing home to a special referee.* The appellate court found that, contrary to the judge’s contention, there was nothing in MHL Art. 81 that suggested that the time limitations were applicable only to guardianship appointment proceedings and not to proceedings brought to modify guardianship powers. Moreover, the judge exceeded his authority by referring the issue of the patient’s placement to a special referee.

Matter of Flight, 296 AD2d 845 (4th Dept., 2002).

Appellate Division reverses and remits for hearing where Supreme Court did not conduct a hearing as required by MHL §81.11 to determine who is whether guardian is needed. Also makes clear that hearing must be conduct in relation to choice of guardian not only whether guardian is needed. **See related case: Matter of Flight, 8 A.D.3d 977, 778 N.Y.S.2d 815 (4th Dept. 2004)**(App. Div. affirms lower court decision appointing AIPs brother as his guardians and rejects, without discussion of the facts, the contention by petitioner that the non-family members she proposed should have been appointed instead. Courts reference to the lower Court exercise of its discretion may suggest that a Court may exercise discretion without a hearing may be sufficient to determine whom to appoint .

Matter of Hoffman (Zeller), 288 AD2d 892; 732 NYS2d 394; 2001 N.Y. App. Div. 11287

(4th Dept., 2001)

Appellate Division reverses and remits for hearing where Supreme Court did not conduct a hearing as required by MHL §81.11.

Matter of Ruth “TT”, 267 AD2d 553; 699 NYS2d 195 (3rd Dept., 1999)

Where finding of incapacity was made solely upon report of court evaluator who was not cross-examined and whose report therefore was not introduced into evidence, and upon recommendation of court-assigned attorney, it was not possible to determine whether there was clear and convincing evidence of incapacity. Order and judgment reversed, on law, without costs, and matter remitted to Supreme Court for an evidentiary hearing with respondent represented by counsel of her choice.

a. Presence of AIP at hearing / Bedside hearings

Matter of E.H., NYLJ, 11/20/2006, p. 23, col. 1; Misc3d ; 2006 N.Y. Misc. LEXIS 3194 (Sup.Ct., Bronx Cty 2006)(Hunter, J.)

Court waived AIP’s presence at hearing and conducted hearing in her absence because she refused to come to court for the hearing even though arrangements were made by the hospital to bring her to court. AIP did not want to discuss the proceedings at the hospital and left the room even though her attorney was present.

Matter of C.F.R., 2006 N.Y. Misc. LEXIS 2867; 236 N.Y.L.J. 15 (Sup Ct., Bronx Cty. 2006)

Petitioner daughter sought to have a guardian appointed for respondent, her 90yearold mother, an alleged incapacitated person. A hearing was conducted in the absence of the mother as she came to the courthouse to be present for the hearing but became anxious before her case was called. The parties agreed that it would be best if her home health aide took her back to her apartment. The court waived her appearance.

Matter of Edward G.N., 17 AD3d 600, 795 NYS2d 244. (2nd Dept. 2005)

Appellate Division reverses Order and Judgment appointing a guardian, on the law, without costs or disbursements, denies the petition and dismisses the proceeding finding that the trial court erred in conducting a hearing in the AIP’s absence because there was no evidence establishing that the AIP was unable to come to court, as required under Mental Hygiene Law § 81.11(c). Second, the evidence at the hearing failed to conclusively establish that the appellant was completely unable to participate in the hearing, or that no meaningful participation would result from his presence thereat (*see* Mental Hygiene Law § 81.11[c]). Further, the Supreme Court failed to set forth in its order and judgment of appointment a sufficient factual basis for conducting the hearing without the

appellant's presence (*see* Mental Hygiene Law § 81.11[d]).

Matter of Rose P., 15 AD3d 665; 790 NYS2d 689 (2nd Dept 2005)

Order to sell AIP's home reversed and matter was remanded because Appellate Division, citing MHL 81.11, held that trial judge should have held bedside hearing where AIP was able to meaningfully participate in the proceedings. The court reasoned: "A bedside hearing, apart from giving the Supreme Court the opportunity to make an independent assessment, would give Rose P. an opportunity to be part of the decision making process regarding a proposed significant change in her life .

(ii) Medical Testimony not required

Matter of Ardelia R., 2006 NY Slip Op 2549; 2006 N.Y. App. Div. LEXIS 4077 (2nd Dept 2006)

AIP was properly found to be incapacitated . She was 82-years old, found in her home by APS without running water, food, electricity, or heat, malodorous and frail. She was unable to cook, and was known to wander away from her home. She had forgotten where she banked and did not know her sources of income. Although she owned a home and possessed approximately \$ 115,000 in savings, she was delinquent on her utility bills. Based on these facts, the hearing record established by clear and convincing evidence that AIP lacked the understanding or appreciation of the nature and consequences of her functional limitations. Thus, the Supreme Court's finding that she was an incapacitated person requiring a guardian was proper notwithstanding the lack of medical testimony regarding her medical condition.

Matter of Bess Z., 2006 NY Slip OP 1809; 2006 N.Y. App. Div. LEXIS 2858 (2nd Dept. 2006)

Appellate Division finds that trial court violated the physician - patient privilege by admitting the testimony of the AIP's treating physician and that AIP did not waive the privilege by affirmatively placing her medical condition in issue. However, it finds such violation to be harmless error since medical testimony is not required in an guardianship proceeding and the non-medical testimony established that the IP was unable to function to care for her medical, personal and financial needs.

Matter of Rosa B., 1 AD3d 355; 767 NYS2d 33 (2nd Dept., 2003)

The Appellate Division re-emphasized that the rules of evidence apply in an Article 81 proceedings but that a court, for good cause, may waive the rules in an uncontested proceeding. Specifically, the physician patient privilege applies and the AIP does not waive it by contesting the application for guardianship if he does not specifically put his *medical condition* at issue. In this case, even

though it was a jury trial, the court found that the violation of the privilege was harmless error since medical testimony was not required and there was sufficient independent evidence of functional incapacity based upon non-medical evidence.

Matter of Kustka, 163 Misc2d 694; 622 NYS2d 208 (Sup. Ct., Queens Cty., 1994)

Medical testimony is not required in all Article 81 proceedings. Article 81 does not mandate medical testimony and, even when medical testimony might be necessary, an individual's disease or underlying medical condition is only one factor to be considered since focus of Article 81 is one's functional limitations. Functional limitations can be determined without medical testimony, since non-medical person can determine whether individual is capable of dressing, shopping, cooking, managing assets, and performing other similar activities. Also, Article 81 provides for guardianship tailored to meet individual's needs, and to create limited guardianship.

Matter of Rimler (Richman), 164 Misc2d 403; 224 AD2d 625; 639 NYS2d 390 (2nd Dept., 1996); *lv. to app. denied* 88 NY2d 805; 646 NYS2d 985 (1996)

AIP appellant alleged that trial court's decision to appoint guardian was based largely on psychiatric testimony, and contends that she should have been afforded opportunity to challenge that testimony with the testimony of a court-appointed independent psychiatrist. Appellate court found that trial court based its determination upon statements and testimony of all witnesses, not merely upon psychiatric testimony, and held that nothing in Article 81 mandates medical testimony in guardianship proceeding.

Matter of Donald Loury (Loury), NYLJ, 9/23/93, p. 26, col. 2 (Sup. Ct., Kings Cty.)

AIP was found locked in apartment into which he refused entry, requiring family to drill locks, found dressed in dirty clothes; unshaven, holding a bible surrounded by trash bags, debris, numerous containers of liquid appearing to be urine; strong smell of feces present; and no running water in building. AIP owned several investment properties which were all in disrepair and in default of real estate taxes. Court concludes that AIP's present functional level and functional limitations impair his ability to provide for personal needs and to manage property; that he cannot adequately understand and appreciate nature and consequences of such inability; and that he is likely to suffer harm because of such inability and lack of understanding. Court notes that AIP refused to speak to psychiatrist who nevertheless diagnosed him as bi-polar and paranoid schizophrenic, but noted that no such testimony was need to establish functional impairment.

Matter of Seidner, NYLJ, 10/8/97, p. 25, col. 1 (Sup. Ct., Nassau Cty.)(Rossetti, J.)

Medical evidence upon which petitioner sought to rely was excluded because it was privileged. Privilege is not waived merely by defending an action and denying allegations, so long as defending party does not affirmatively assert his stable mental condition. AIP's privacy concerns were particularly important here because of context of petition (bitter marital dispute).

(iii) Applicability of rules of evidence

Matter of Rosa B., 1 AD3d 355; 767 NYS2d 33 (2nd Dept., 2003)

The Appellate Division re-emphasized that the rules of evidence apply in an Article 81 proceedings but that a court, for good cause, may waive the rules in an uncontested proceeding. Specifically, the physician patient privilege applies and the AIP does not waive it by contesting the application for guardianship if he does not specifically put his *medical condition* at issue. In this case, even though it was a jury trial, the court found that the violation of the privilege was harmless error since medical testimony was not required and there was sufficient independent evidence of functional incapacity based upon non-medical evidence.

Matter of Janczak (Ethel Jacobs), 167 Misc2d 766; 634 NYS2d 1020 (Sup. Ct., Ontario Cty., 1995)

Court did not consider portion of DSS record, which consisted of information derived from visiting nurse service which did not provide home health care services pursuant to contract with DSS, and police investigator, neither of which had duty to report to agency, even though §81.12 (b) provides that court may, upon good cause shown, waive rules of evidence, since relaxation of evidence rules in proceedings under Article 81 only applies in uncontested proceedings. Here, offered exhibit would not be admissible in evidence as business record, and, therefore, an exception to hearsay rule, under CPLR 4518 (a), because knowledge of entrant was not based upon information obtained from a declarant under business duty to report the information.

*[See also all case under **physician-patient privilege** section]

(iv) Clear and convincing evidence

Matter of Weinlein , NYLJ, 8/13/04, p.19 col 1 (Sup Ct Dutchess Cty) (Pagonis, J.)

Court holds plenary hearing to determine need for guardian upon finding of clear and convincing evidence of incapacity but offers parties option of mediating the question of who shall be the proper guardian at the Dutchess County Mediation Center Art. 81 program as an alternative to further litigation if consent to mediation is unanimous.

Matter of Marvin W. , 306 AD2d 289; 760 NYS2d 337 (2nd Dept.)

App. Div. reverses order of Supreme Court that denied, without hearing, IP's application to terminate the guardianship. Court holds that MHL §81.36(c) requires that a hearing be held, that the burden of proof is on the person opposing termination of the guardianship, and that the standard of proof is "clear and convincing evidence" that the guardian's authority should not be terminated.

In the Matter of Joseph A. (Anonymous) a/k/a Joseph B.A. , 304 AD2d 660, 757 NYS2d 481

(2nd Dept., 2003)

Appellate Division reverses order on the law without costs, denied petition and dismisses proceedings upon finding that "petitioner failed to prove by clear and convincing evidence that the appellant was unable to provide for the management of his property and did not appreciate the consequences of such inability." (no facts discussed in opinion)

Matter of Hammons (Ehmke), 164 Misc2d 609; 625 NYS2d 408 (Sup. Ct., Queens Cty., 1995); *aff'd* 237 AD2d 439 (2nd Dept., 1997)

Clear and convincing evidence means "high probability that what is claimed is actually so."

Matter of Ruth "TT" (Mc Ghee), 267 AD2d 553; 699 NYS2d 195 (3rd Dept., 1999)

Where finding of incapacity was made solely upon report of court evaluator who was not cross-examined and whose report therefore was not introduced into evidence, and upon recommendation of court-assigned attorney, it was not possible to determine whether there was clear and convincing evidence of incapacity.

(v) Confidentiality issues

a. Physician-patient privilege

Matter of Q.E.J., NYS2d; 2006 N.Y. Misc. LEXIS 3378 (App Term., 1st Dept 2006) (Leventhal, J.)

Where a treating medical/healthcare facility seeks to admit into evidence a treating physician's testimony and medical records regarding an AIP, such records and testimony, even for the salutary purpose of securing an appropriate placement for the AIP, remain privileged and will not be admitted unless the AIP waives the privilege or affirmatively places his/her medical condition in issue.

Matter of Bess Z., 2006 NY Slip OP 1809; 2006 N.Y. App. Div. LEXIS 2858 (2nd Dept. 2006)

Appellate Division finds that trial court violated the physician-patient privilege by admitting the testimony of the AIP's treating physician and that AIP did not waive the privilege by affirmatively placing her medical condition in issue. However, it finds such violation to be harmless error since medical testimony is not required in an guardianship proceeding. and the non-medical testimony established that the IP was unable to function to care for her medical, personal and financial needs.

Matter of Marie H., 25 AD3d 704; 2006 N.Y. App. Div. LEXIS 676 (2nd., Dept. 2006)

For the purposes of the physician-patient privilege, a psychiatrist who examines an individual as part of a mobile crisis team to determine his/her need for involuntary psychiatric treatment and who did not prescribe or otherwise participate in her treatment and who was unaware of the nature of her treatment is NOT a treating psychiatrist whose testimony can be barred under CPLR 4504(a).

Matter of B.P., 9 Misc3d 115A; 2005 NY (Sup. Ct Bronx Cty) (Hunter,J.)

Information about the AIP's medical condition included as part of the petition was deemed in violation of the physician /patient privilege and court refused to consider it.

Matter of Rosa B., 1 A.D.3d 355; 767 N.Y.S.2d 33 (2nd Dept., 2003)

The Appellate Division re-emphasized that the rules of evidence apply in an Article 81 proceedings but that a court, for good cause, may waive the rules in an uncontested proceeding. Specifically, the physician patient privilege applies and the AIP does not waive it by contesting the application for guardianship if he does not specifically put his *medical condition* at issue. In this case, even though it was a jury trial, the court found that the violation of the privilege was harmless error since medical testimony was not required and there was sufficient independent evidence of functional incapacity based upon non-medical evidence.

Matter of Barry B., 236 AD2d 391; 654 NYS2d 315 (2nd Dept., 1997)

Somewhat vague and evasive decision which may suggest that physician-patients privilege may not exist in Art.81 case, but is not very clear authority at all.

Matter of Higgins (England), NYLJ, 10/6/95, p. 1 col. 1 (Sup. Ct., NY Cty.)(Ramos, J.)

Supporting affidavit from attending doctor of AIP violated physician-patient privilege. Court also held that court evaluator had standing to raise this issue.

Matter of Richter (Goldfarb), 160 Misc2d 1036; 612 NYS2d 788 (Sup. Ct., Suffolk Cty., 1994)

The physician-patient privilege under CPLR 4504 (a) may not be asserted where AIP has submitted own doctor's report in opposition to application, and where AIP has sufficient capacity to retain counsel to oppose petition, since AIP knowingly and effectively put own medical condition in issue, thereby waiving privilege. In addition, regardless of person's actions, intentions and capacity, court may admit medical, psychological and psychiatric records and permit medical, psychological and psychiatric testimony in contravention of CPLR 4504 (a) under authority of Article 81 because 81.09(d) expressly permits disclosure of medical, psychological and psychiatric records to court evaluator and permits such further disclosure of such records as court deems proper.

Matter of Tara X., NYLJ, 9/18/96, p.27, col. 1 (Sup. Ct., Suffolk Cty.)(Prudenti, J.)

Physician-patient privilege prevents court evaluator from examining medical records where AIP

opposes appointment of a guardian.

Matter of Flowers (Bullens), 148 Misc2d 166, 559 NYS2d 775 (Sup. Ct., Kings Cty., 1990)

Unless AIP puts medical issue in question before court, privilege is not waived.

b. Social Worker - Client Privilege

Matter of E.H., Misc3d; NYLJ, 11/20/2006, p. 23, (col.1); 2006 N.Y. Misc. LEXIS 3194 (Sup.Ct., Bronx Cty 2006)(Hunter, J.)

Court acknowledges that CPLR 4508 social worker-patient privilege applies in MHL Article 81 proceeds but permits Assistant Director of Social Work at hospital where AIP was hospitalized to testify in his role as a discharge planning social worker, holding that such a role is different from a social worker in a community setting who has a treating relationship with a patient and assists the person in social and psycho-social issues.

c. Access to DSS records

Matter of Frati; Matter of Grant, NYLJ, 9/18/97, p. 25, col. 1 (Sup. Ct., Nassau Cty.) (Rossetti, J.)

In two guardianship proceedings, petitioner hospital requested judicial subpoenas for production of county Adult Protective Services' records concerning AIP. Citing privacy rights, court held that confidential records should first be disclosed only to court evaluator and court. If after review, court determined that records were necessary to guardianship proceedings, it would reconsider their further disclosure.

Vellosi v. Brady, 267 AD2d 695; 698 NYS2d 361 (3rd Dept., 1999)

Daughter who held power of attorney and subsequent appointment as guardian sought to compel production of her father's social services file pursuant to Social Services Law §473-e[1][b]. Request was denied by DSS which asserted confidentiality. Daughter appealed. Matter was mooted by father's death which extinguished the power of attorney and guardianship that had been the basis for her standing to make request of DSS and thus appeal.

d. Sealing of Courtroom/Court records

Matter of Phillip Marshall (Brooke Astor) 2006 NY Slip Op 51677U, 2006 N.Y. Misc. LEXIS 2325, Aug 29, 2006, Sup. Ct., NY Cty. (Stackhouse, J.)

In a highly publicized case in which Phillip Marshall sought to remove his father, Anthony Marshall, as caregiver of his 104 year old grandmother, philanthropist and socialite Brooke Astor, the Court, at the request of several news organizations, and over the objection of every party to the proceeding, vacated its own interim sealing order, with limited exceptions. Initially, the Court found that the public had a great interest in the proceeding, emphasizing its interest in witnessing that “justice is dispensed in the same manner to the rich as to the poor,” and its interest in learning about “the neglect and mistreatment of the elderly.” Secondly, the Court found that opening the proceedings to the public would not impede the orderly and sound administration of justice (despite the Court Evaluator’s claim that opening the proceeding to the press had impacted, and would continue to impact, his ability to gather information), so long as the Court Evaluator reports remained under seal. Finally, the Court responded to concerns regarding the confidential nature of Article 81 guardianship proceedings, and to concerns regarding Ms. Astor’s personal rights to privacy and dignity, by characterizing her as an “open and candid person” who had earlier published two memoirs in which she detailed episodes of physical abuse by her first husband, by noting that she was not suffering from any “significant emotional or physical distress” as a result of the proceeding, and by affirmatively ordering that her medical, mental health and nursing home records, and all of the Court Examiner’s reports be filed under seal, and that all identifying financial information be redacted prior to its submission to the Court.

Matter of A.J., 781 N.Y.S.2d 623; 2004; NYLJ, Jan 16, 2004, Sup. Ct., Kings, Cty. (Leventhal, J.)

Court closes courtroom, seals record and permits redaction of Court Evaluator report during guardianship hearing for elderly couple, whose son was alleged to be abusive, based upon the Court Evaluator’s assessment that the couple and other witnesses feared the son and would not be able to testify in a forthcoming manner he was in the courtroom. Court cites §81.14(c) permitting judge to excluding individuals including the public for “good cause shown”, the sound administration of justice and the sensitive nature of the matters involved as outweighing the public’s need to know.

Matter of Michael B., Sup. Ct., Westchester Cty., 6/24/99 (Palella, J.)(NOR)

Where AIP had committed highly publicized crime, and media further sought information concerning his Art 81 proceeding, records of proceeding were partially sealed, leaving unsealed only those portions showing how and why proceeding was commenced, and keeping sealed information about his clinical, personal and financial matters.

In re: DOE, 181 Misc2d 787; 696 NYS2d 384 (Sup. Ct., Nassau Cty., 1999)

Court seals record finding that access to record could be embarrassing and damaging for AIP and that there is no public interest in proceedings.

e. Fifth amendment

Matter of A.G. (United Health Services), 6 Misc3d 447; 785 NYS 2d 313 (Sup Ct., Broome)(Peckam, J.)

AIP may not be compelled by petitioner to testify help petitioner meet his burden. Due Process and CPLR 4501 require that an AIP in an Article 81 proceeding have the right to assert the 5th amendment privilege against self incrimination because the potential deprivation of liberty inherent in taking away one's right to make decision about his own person and property.

Matter of Allen, 10 Misc3d 1072, NYS2d ___ (Sup. Ct. Tompkins Cty)(2006) (Peckham, J.)

Brother who was entitled to and did receive notice of the proceeding was not therefore a party. He would not be considered a party unless he filed a cross petition seeking relief that was not requested in the petition. Therefore, he could not be granted an adjournment nor could he submit an answer. While he could not participate as party in the hearing on the central issue of the need for guardianship, he was considered a party to that part of the Order to Show that issued a TRO against him. Moreover, he was permitted to call the AIP as a witness since this part of the proceeding was in the nature of a civil proceeding involving the discovery of property and was not, as prohibited by the United Health Services case (above), a proceeding in which compelling AIP's testimony could serve to infringe upon the AIP's liberty in violation of the 5th amendment.

(vi) Jury trials

In re Application of Department of Social Work of Beth Israel Medical Center (Panartos), 308 AD2d 350 (1st Dept.)

App. Div. reverses trial court where trial court refuses to permit a jury trial even though appellant made timely demand therefore. Instead, trial court held "preliminary hearing" to determine whether there were any triable issues of fact and decided that there were none. MHLS was not given any warning that there would be a hearing that day and had no witnesses and thus could not rebut the hospital's case. Court used this situation to find that there were no triable issues of fact to justify a jury trial. App. Div. DOES NOT GO SO FAR AS TO SAY THAT A JURY MUST BE PERMIT UPON TIMELY REQUEST.

Matter of Claiman, 169 Misc2d 881; 646 NYS2d 940 (Sup. Ct., NY Cty., 1996)

AIP is not entitled to jury trial where no party raised issue of fact regarding need for appointment of guardian. No useful purpose would be served by jury since no factual issue presented as to need for personal needs and property management guardian for AIP. It is function of court, not jury, to determine who will be appointed guardian and powers of guardian.

(vii) Court's consideration of best interest and wishes of AIP

Matter of Shapiro, NYLJ, 4/19/01, p. 17 (Sup. Ct., Nassau Cty.)(Rosetti, J.)

Elderly IP transferred all \$680,000 of her assets to neighbors who recently began helping her, although there were relatives in the picture who had been supportive. Court voids transfer, noting, *inter alia*, that while it is bound to consider wishes and desires of IP, it is only bound to consider "competent wishes consistent with IP's best interest."

(viii) Burden of proof

Matter of Marvin W., 306 AD2d 289; 760 NYS2d 337 (2nd Dept.)

App. Div. reverses order of Supreme Court that denied, without hearing, IP's application to terminate the guardianship. Court holds that MHL §81.36(c) requires that a hearing be held, that the burden of proof is on the person opposing termination of the guardianship, and that the standard of proof is clear and convincing evidence that the guardian's authority should not be terminated.

Matter of Shapiro, NYLJ, 4/19/01, p. 17 (Sup. Ct., Nassau Cty.) (Rosetti, J.)

Elderly IP transferred all \$680,000 of her assets to neighbors who recently began helping her, although there were relatives in the picture who had been supportive. Despite presumption of capacity, evidence of dementia shifted burden to recipients of transferred funds to show that transfer was not due to undue influence or incompetence. Court voids transfer.

(ix) Appointment of Independent Psychiatrist

In the Matter of Donald F. L., 242 A.D.2d 536; 662 NYS2d 75 (2nd Dept., 1997); 1997 NY App. Div. LEXIS 8566

Independent psychiatrist appointed to determine need for guardianship.

Matter of Judith F. Meyers, a/k/a/ Fuhrman, 270 A.D.2d 135; 706 NYS2d 311(1st Dept.); 2000 NY App. Div. LEXIS 3002

Independent psychiatrist appointed to determine need for guardianship.

(x) Findings

Matter of Hoffman (Zeller), 288 AD2d 892; 732 NYS2d 394; 2001 N.Y. App. Div. 11287 (4th Dept., 2001)

Appellate Division reverses and remits for hearing where Supreme Court did not make findings

required by MHL §81.15.

G. Intervenor

Matter of Astor, ___ Misc3d ___; ___ NYS 2nd ___; 2006 N.Y. Misc. LEXIS 2451 (Sup. Ct., NY Cty. 2006)

Where adult son who was sole presumptive distributee of the AIP and the holder of the POA and HCP received notice pursuant to MHL 81.07(g) and was directly affected by the TRO issued by the court, the court found that he was entitled to make a cross-motion over the objection of the petitioner and respondent that he lacked standing because he was not a party. This Court rejected Matter of Allen, 10 Misc3d 1082 as distinguishable because in Allen, the intervenor sought to file an answer after the hearing had already been held.

In re Glass, 29 AD3d 347; 815 NYS2d 36 (1st Dept.)

Appellate Division reversed an order granting the landlord of a rent controlled apartment permission to intervene in an Article 81 proceeding. The landlord sought to intervene to protect against being adversely affected if the AIP's grandson later claimed succession rights to the AIP's apartment. The AIP's grandson had been named in the original Order appointing the guardian which gave the guardian permission to allow the grandson to reside in the AIP's apartment when while she was living in the nursing home. That order was later modified by Supreme Court to clarify that this arrangement would not give the grandson succession rights. The Appellate Division reversed the order permitting intervention because there was no possibility that the Landlord would be adversely affected by the disposition in the Article 81 case both because of the modification of the prior order and also because a claim of succession would fail under other provisions of the Rent Stabilization Law.

H. Sanctions

(i) Frivolous Petitions

Matter of Arnold "O", 226 AD2d 866; 640 NYS2d 355 (3rd Dept., 1996) *lv. to app. denied*, 88 NY2d 810, 649 NYS2d 377 (1996), *related proceeding*, 256 AD2d 764; 681 NYS2d 627 (3rd Dept., 1998)

Upon dismissal of petition, Supreme Court properly imposed award of counsel fees for frivolous conduct, pursuant to 22 NYCRR 130-1.1 where petition to remove guardian was filed approximately six months after entry of prior order which denied petitioners' cross motion to remove guardian. Petitioners' conclusory allegations of guardian's misconduct were unsupported by any evidence. It was clear from record that petitioners disagreed with guardian's choice of health care facility for IP. It was equally clear that prior cross motion to remove guardian and instant petition for the same relief, together with petitioners' threatening and harassing conduct

directed at guardian and staff of health care facility where IP resides, were product of petitioners' frustration and anger.

Matter of Elizebeth R., 228 AD2d 445; 643 NYS2d 224 (2nd Dept., 1996)

Petitioner commenced proceeding to have guardian appointed on behalf of her sister, alleging that AIP was incapable of handling her personal and financial needs due to use of drugs and alcohol. Court properly dismissed petition and imposed sanctions upon petitioner finding that commencing and continuing of this proceeding was frivolous pursuant to 22 NYCRR 130-1.1.-*see related case*, **Matter of Rocco, 161 Misc2d 760; 615 NYS2d 260 (Sup. Ct., Suff. Cty., 1994)**

Matter of Slifka, Index No. 00757/96, Sup. Ct., Westchester Cty., Pallella, J., 6/6/96, NOR

Court granted AIP's motion to dismiss petition but denied motion to impose sanctions on petitioner. Petition was for guardianship over trust to pay for AIP's inpatient care; however he left hospital voluntarily, rendering petition moot. Because it should have been discontinued at that point "obviating the necessity for the motion to dismiss," court did order petitioner to pay costs of proceeding plus court evaluator's fee.

(ii) Discovery

Matter of Mary XX, 33 AD3d 1066; 822 NYS2d 659 (3rd Dept. 2006)

Petitioner, guardian of the IP's person but not property, moved for a compulsory accounting by the trustees of the IP's funds. The trust provided that during the IP's lifetime the trustees were to pay the income to the IP and, in their discretion, to pay the principal as needed "to provide adequately and properly for the support, maintenance, welfare and comfort of [the IP]." The order appointing petitioner as guardian of the person authorized her to direct the trustees to pay for the IP's care and maintenance and to examine all the relevant circumstances, including the opinion of treating health professionals, the existing financial circumstances, and the existing physical environment as to what may be the best place for...[IP] to reside and the best arrangements for her continued care and treatment. The trustees, however, refused to provide petitioner with financial documents when she requested same, therefore, petitioner commenced a proceeding for a compulsory accounting in order to fulfill her obligation as guardian. Supreme Court denied the requested relief, holding that petitioner's powers as guardian of the person were limited to making demands of the trustees for payment of expenses and that the guardian of the person had no powers relative to the financial assets of the IP. The Appellate Division reversed finding that petitioner had made a sufficient showing that the requested accounting is necessary in order to carry out her duties as guardian citing four factors that justify ordering a compulsory accounting and explaining why they were met on these facts: (1) a fiduciary relationship, (2) entrustment of money or property, (3) no other remedy, and (4) a demand and refusal of an accounting. The Appellate Division also noted that authorizing the accounting was not giving the guardian of the person powers over the

property because petitioner was not given the power to manage the financial but only information to exercise those particular, limited powers conferred upon her in the guardianship order.

Estate of Lawrence Bennett; NYLJ, 2/26/03(Surr. Ct., Queens Cty.)

Motion by alleged distributees of an estate for copy of Court Examiner's file - granted.

Matter of Hart, 237 AD2d 145; 654 NYS2d 143 (1st Dept., 1997)

Imposition of \$1,500 sanction was proper exercise of discretion in view of precarious health of appellant's 91-year-old client and counsel's failure to comply with two court orders intended to facilitate findings on exact nature of her disabilities.

Matter of Donald F.L. (Mollen), 242 AD2d 536; 662 NYS2d 75 (1st Dept., 1997)

Courts refusal to remove guardian unless IP appear for psychological evaluation by court-appointed psychiatrist and for deposition was not improper. Further, there was insufficient evidence to support finding that IP had become able to provide for his personal needs or manage his affairs.

I. Discontinuance

Matter of Chackers (Shirley W.), 159 Misc2d 912; 606 NYS2d 959 (Sup. Ct., NY Cty., 1993)

Court concludes that discontinuance is proper although Art. 81 makes no specific provision for same. Legislature surely did not intend to cause needless hearings. Even without hearing, if all factors suggest that no guardian is needed, and all parties agree, Legislature's purpose is met. Discontinuance must be by court order not stipulation.

Matter of Krishnasastri, NYLJ, 8/25/95, p. 25, col. 1 (Nassau Sup.)(Rossetti, J.)

Petitioner husband, involved in divorce action, instituted and then discontinued guardianship proceeding for his wife. At issue was who should pay fees of court-appointed evaluator and attorney. It apparently was unlikely that incapacity of the wife could have been proven. Court, noting petitioner's partially self-interested motivation for instituting guardianship proceeding and noting wife's lack of cooperation, ruled that husband must pay two-thirds and his wife must pay one-third.

Matter of Falick (Mann), NYLJ, 1/19/96, p. 25, col. 6 (Sup. Ct., NY Cty., Miller, J.)

Hospital had petitioned for guardian for an 85-year-old stroke victim. Prior to court's determination, she was discharged to nursing home. On recommendation of court evaluator, proceeding was discontinued because patient continued to functionally improve in therapy and

executed a durable power of attorney to her “devoted, responsible, and caring” niece. Court evaluator also felt that her remaining functional limitations did not impact on her personal needs and property management as she can pay her bills and resides in a facility near her niece.

Matter of Naimoli (Rennhack), NYLJ, 9/8/97, p. 25 col. 4 (Sup. Ct., Nassau Cty., 1997)

Petitioner's sought discontinue over objection of AIP's counsel. AIP's attorney opposed petitioner's request for discontinuance since it was his position that determination should be made on merits as to AIP's alleged incapacity. Court permits discontinuance, stating that no substantial rights of AIP have been affected and AIP has not been prejudiced. Although Article 81 does not specifically deal with voluntary and unilateral discontinuance, CPLR 3217 (b) does and it controlled. Since no evidentiary hearing in matter had been conducted nor was case in any way yet submitted for determination of facts, court found it unnecessary to have parties stipulate to discontinuance, provided, however, that same was accomplished by court order upon terms and conditions deemed proper. Discontinuance was to be conditioned upon petitioner's payment of fees to both court evaluator and to AIP's counsel because court finds that petitioner's claim was malicious and likely unfounded.

J. Death of AIP

In the Matter of Enna D., 30 AD3d 518; 816 NYS2d 368; 2006 N.Y. App. Div. LEXIS 8030 (2006, 2nd Dept); 2006 Slip Op 4839

Following the death of the AIP, the guardianship proceeding abated. Thereafter, Supreme Court lacked the authority to award an attorney's fee to the attorney retained by the petitioner, as §81.10[f], §81.16[f] do not authorize such an award, following the death of the AIP to attorneys other than those appointed by the court.

Estate of Rose BB, 791 NYS2d 201 (2005 3rd Dept)

IP died and the guardianship proceeding was transferred to the Surrogate's Court and consolidated with a probate proceeding. The parties to the guardianship proceeding enter into a Stip on the records agreeing that the Surrogates Court would determine the fees due the guardianship proceeding. Guardian submitted final accounting in the Surrogates Court and it was later approved by the Appellate Division. Petitioner in the Art 81 proceeding moved in Surrogates Court for counsel fees pursuant to the Stip. and after hearing the Surrogates Court enters an order directing payment of fees to be paid by the respondent in this appeal who was the other party to the stip. Respondent argues that the petitioners fee was untimely but court finds that it was delayed by appeals, some of which were required due to respondents behavior. Second, respondent argues that the Surrogates Court cannot determine the fees due from the guardianship proceeding but the Appellate Division rejects that argument holding that “when appropriate, counsel fees may be awarded in situations where the misconduct of a fiduciary brings about the expense”.

Estate of Josephina Howard, NYLJ, 9/22/04, p. 26 (Surr Ct , NY Cty) (Surr Roth)

Where there was an accounting of an Art 81 being conducted in Supreme Court when the probate proceedings was commenced, and there was a discovery motion in Surrogate's Court dealing with the same issues involved in the accounting proceeding, Surrogate Court marked the motion off the calendar and referred the parties to Supreme Court.

In the Matter of the Accounting of by Russell Artuso and Patrick Artuso as co-Guardians; 2004 N.Y. Misc LEXIS 893 (Surr. Ct., Monroe Cty.) (Calversuo, J.)

Acknowledging that ordinarily, guardianship terminates with the death of the IP, Court permits guardianship to continue in this case to enable counsel for the guardian to continue prosecuting a civil action where there was no fiduciary yet named for the estate. The attorney's contingency fees in the civil action was deemed a claim against the estate rather than an administrative expense of the estate.

Matter of Miriam Shapiro, NYLJ, 9/4/03, p.22 (Surr. Riordan)

Where IP died, her attorney for the Art 81 proceeding should submit bill for services to the Art 81 court, not the Surrogate's court during probate.

Estate of Borglum, NYLJ, 3/21/03, p. 19, col. 2 (Surr. Ct., [redacted] Cty.)

Administrator brings motion in Surr Ct. accusing guardian of breaching fiduciary duty and seeking in addition to request that funds be turned over. Guardian seeks to have expenses of action paid from IP/descendent's funds. Surr. Ct. says the issue of payment of expenses must be decided by Sup. Ct. when settling final accounting for guardianship.

Matter of Klasson, 290 AD2d 223; 735 NYS2d 757 (1st Dept., 2002)

During the pendency of the appeal of order that modified an Art. 81 order to the extent of substituting the court evaluator for the guardian originally named, the AIP died. The Appellate Division, First Department held that the AIP's death rendered the appeal moot.

Matter of Francis Kleinman, NYLJ, 6/5/00, p.21,col. 3 (Sup. Ct., Nassau Cty.)(Rosetti, J.)

Removal of Art. 81 proceeding at accounting stage was transferred to Surrogate's Court after death of AIP because there was an interrelationship between the Art.81 and the probate proceeding.

Estate of Irma Paige, NYLJ, 8/23/01, p. 19, (Surr. Ct., Bronx Cty.) (Surr. Holtzman)

Guardian whose ward has died must surrender responsibility for ward's assets to the fiduciary appointed for deceased ward's estate as soon as such fiduciary has been appointed. Guardian may file report with court projecting expenses for final administration of guardianship estate and court

will fix appropriate reserve.

Matter of Burns (Salvo), 287 AD2d 862, 731 NYS2d 537 (3d Dept., 2001); 2001 NY App. Div. LEXIS 9748

Death of IP during proceeding on petition by guardian to confirm charitable gift by IP did not deprive Supreme Court of jurisdiction and transfer to Surrogates Court was not required.

Matter of Kator, 164 Misc2d 265; 624 NYS2d 348 (Sup. Ct., NY Cty., 1995)

Where court appointed co-conservators to manage property of now-deceased IP, and one conservator moved for an order distributing assets to himself to pay estate expenses and manage estate assets in his alleged role as administrator of estate prior to court approval of final account of conservators, notice of motion which was only served upon second conservator was patently insufficient. Article 81 fails to establish procedure for administration of an estate of a person deemed incapacitated pursuant to that statute.

Estate of Lawrence Bennett, NYLJ, 2/2/6/2003(Surr. Ct., Queens Cty.)

Motion by alleged distributees of an estate for copy of Court Examiner's file - granted.

Matter of Estate of Tilly Baron, 180 Misc2d 766; 691 NYS2d 882 (Surr. Ct., NY Cty., 1999)

Court finds that although statute is silent as to when and how a Guardian whose ward has died must surrender responsibility for ward's assets to the fiduciary appointed for deceased ward's estate, Court directs Guardian to turn assets over as soon as such fiduciary has been appointed. However, Court permits guardian to retain a reserve pending disposition of final accounting under these circumstances. Court suggests that additional legislation is needed to facilitate orderly turnover of assets under these circumstances.

Matter of Saphier, 637 NYS2d 630 (NY Cty. Sup., 1995)(Lebedeff, J.)

Shortly after guardianship for petition was filed for AIP, a 90 year-old world famous violinist, her Stradivarius violin disappeared. AIP died shortly after special guardian was appointed to arrange for her care. After her death, the investigation of the missing Stradivarius continued because it was worth 3 million dollars and she had left her estate to many charities. Guardianship was continued under authority of Supreme Court so that special guardian could continue to protect property interests of deceased in recovering violin, as well as to place any other estate issues before proper Surrogate Court.

This Court too finds that statute is silent as to when and how a Guardian whose ward has died must surrender responsibility for ward's assets to the fiduciary appointed for deceased ward's estate. Here, Court directs Guardian to turn assets over but permits guardian to retain a reserve pending

disposition of final accounting. Court suggests that additional legislation is need to facilitate orderly turnover of assets und these circumstances.

Matter of Rose “BB”, 246 AD2d 820, 666 NYS2d 968 (3rd Dept., 1998), *subseq. appeal*, 262 AD2d 805; 692 NYS2d 237, *lv to app. denied*, 93 NY2d 1039; 697 NYS2d 560 (1999)

Death of AIP rendered moot appeal of order appointing guardian.

Matter of Foley (Messina), 150 AD2d 884; 541 NYS2d 141 (3rd Dept., 1989)

Death of AIP rendered moot appeal of order appointing guardian.

Estate of Suvlien, NYLJ, 12/17/99, p. 32 (Surr. Ct., Kings Cty.)(Feinberg, J.)

Estate’s administrator sought order pursuant to SCPA §§2103, 2105 to compel decedent’s former guardian to turn over assets of estate. Although guardian filed final accounting of decedent’s assets with Supreme Court, he retained them pending settlement of matter. Court granted order, acknowledging silence of both SCPA and Article 81 as to when turnover of assets should be made. It followed very recent Manhattan Surrogate Court decision (Tilly Baron) holding that because authority of guardian terminates upon death of ward, ward’s assets must be turned over to “duly appointed personal representative of such ward’s estate once such fiduciary has been appointed.” In this case, as in Tilly Baron, Court directs that Guardian should hold a reserve pending a final order discharging the guardian for funds that might reasonably needed to cover administration expenses or debts in the guardianship proceeding.

Vellosi v. Brady, 267 AD2d 695; 698 NYS2d 361 (3rd Dept., 1999)

Power of attorney and appointment as guardian were extinguished by operation of law upon father's death.

Matter of Tepperman (Bloom), NYLJ, 9/12/95, p. 30, col. 2 (Nassau Sup.)(Rossetti, J.)

After finding of incapacity and settlement but before entry of judgment, AIP died. Dispute about allegedly improper transfers of assets existed between petitioner, AIP’s sister, and respondent friends of AIP. This was settled by stipulation during guardianship proceeding although no order was entered because AIP died. Court held that it could not enter order enforcing stipulation because guardianship proceeding was abated by AIP’s death. However, as matter of statute (§81.16) and equity, court did have authority after AIP’s death to order and fix court evaluator’s and petitioner’s attorneys’ fees for proceeding as claims against estate.

K. Payment of Rent or hospital charges during pendency of Art. 81 proceeding - stay of evictions

3363 Sedgwick Avenue LLC, v. New York Foundation for Senior Citizens Guardian Services Inc., for Gail Feit, (App. Trm, 1st Dept.) , 2006 NY Slip Op 51577U; 2006 N.Y. Misc. LEXIS 2184(2006)

Elderly tenant's request for a brief continuance so as to allow the testimony of the case worker assigned to her under Article 81 of the Mental Hygiene Law should have been granted. The short continuance requested was not for purposes of delay and the case worker's testimony was material to the issues litigated at trial. The courts stated: "Liberality should be exercised in granting postponements or continuances of trials to obtain material evidence and to prevent miscarriages of justice..."

Matter of Seraphin M. (Eggelston); 17 AD3d 584 ; 2005 N.Y. App. Div. LEXIS 4143 (2nd Dept 2005)

DSS had petitioned under Article 81 for a guardians to be appointed for the AIP and during that proceeding, filed to stay an eviction proceeding until 90 days from the qualification of the guardian. The landlord intervened and moved to have DSS pay the rent during the period of the stay and the trial court granted the landlord's application. The Appellate Division reversed reasoning that there must be a legal obligation on the part of the municipality, either statutory or contractual, before public funds may be paid to individuals and that in this instance no statutory or contractual provision was identified requiring the DSS to pay the use and occupancy directed by the Supreme Court.

Matter of Stephen B. (Eggelston); 17 AD3d 584 ; 2005 N.Y. App. Div. LEXIS 4143 (2nd Dept 2005)

DSS had petitioned under Article 81 for a guardians to be appointed for the AIP and during that proceeding, filed to stay an eviction proceeding until 120 days from the qualification of the guardian. The landlord intervened and moved to have DSS pay the rent during the period of the stay and the trial court granted the landlord's application. The Appellate Division reversed reasoning that there must be a legal obligation on the part of the municipality, either statutory or contractual, before public funds may be paid to individuals and that in this instance no statutory or contractual provision was identified requiring the DSS to pay the use and occupancy directed by the Supreme Court.

In re: Bricker, 183 Misc2d 149, 702 NYS2d 535 (Surr. Ct., Bronx Cty., 1999)

Where hospital commences proceeding in order to get IP to go to nursing home or otherwise accept discharge planing, bill shall be apportioned between AIP, or hospital or both depending on equities of situation.

L. Appeals

Matter of Carmen P. , 32 AD3d 951; 820 N.Y.S. 2d 809; 2006 N.Y. App. Div. LEXIS 10852

Subsequent to entry and appeal of an order appointing a temporary guardian, an order was entered appointing a plenary guardian. By its express terms, the order appointing a temporary guardian expired upon issuance of an order appointing a guardian; therefore, the appeal of the order appointing a temporary guardian was rendered academic.

In the Matter of Ollie D. , 30 AD3d 599; 817 NYS2d 142; 2006 N.Y. App. Div. LEXIS 8190 (2nd Dept. 2006); 2006 Slip Op. 5014

Appellate Division found that although the trial court had made the appropriate findings of fact pursuant to Mental Hygiene Law § 81.15 concerning, inter alia, the necessity for the appointment of a guardian, it had failed to make sufficient findings on the record with respect to its determination to appoint a neutral third-party guardian. The Court reasoned that when the record on appeal permits the reviewing court to make the findings which the trial court neglected to make, it may do so and thus held that in the instant case, the record was sufficient for it to make the requisite finding that bitter dissension between the incapacitated person's family members justified the appointment of a neutral third-party guardian.

Matter of Sandra S. 13 AD3d 637 (2nd Dept. 2004)

Appeal dismissed on grounds of mootness because order appointing guardian expired by its own terms before appeal was decided. Strangely, without determining that this case was for some reason an exception to mootness, the Appellate Division nevertheless finds that there was clear and convincing evidence supporting the finding below of incapacity.

Matter of Shirley I. Nimon, 15 AD3d 978; 789 NYS2d 596 2005 (4th Dept.)

Appellate Division substitutes its own judgment for trial court's determination stating that it could do so because the trial court improvidently exercised its discretion even though it had not abused its discretion.

Matter of Ronald N. 14 A.D.3d 567; 789 NYS2d 181 (2nd Dept. 2005)

Appeals was from so much of an order and judgment as stayed execution of a warrant of eviction against AIP for a period of 60 days following the appointment and qualification of as guardian. Appeal held to be moot since AIP had already vacated the premises by the time the appeal was heard and court found that this was not an exception to the mootness doctrine.

Matter of Mildred Jeraldine C., 14 AD3d , 789 NYS2d 180 (2nd Dept 2005). LEXIS (2nd Dept. 2005)

Where the trial court took evidence concerning both the need for a guardian and the proper choice

of guardian, but made findings only as to the need for a guardian and neglected to make a finding as to the proper guardian, the Appellate Division, relying on the record, the made a finding as to the proper choice of guardian.

Matter of GRACE R. , 12 AD3d 764 (3rd Dept 2004)

Disabled son of AIP who lives with AIP seeks to appeal Art 81 order granting petition of guardianship over his mother and authorizing the guardian to placing her in a facility. App Div. dismisses appeal holding that he is not an “aggrieved party” just because (a) he received notice of the application or (b) has a desire to continue living his mother. Court expressly points out that he was not the holder of a HCP, Living Will, or POA for his mother.

Matter of Mathew L., 6 AD3d 712, 775 NYS2d 170 (2nd Dept. 2004)

Appellant of the Art 81 Order and Judgement was the administratrix of the estate of the AIPs brother. The AIP was a litigant in the long-contested estate litigation. Appellant was not named as a party to the Art 81 proceeding but she did appear at the hearing to (1) oppose a TRO that was sought in the Art 81 proceeding that would enjoin enforcement of the judgement in the estate litigation and (2) oppose the appointment of the guardian on the merits as a mere subterfuge to avoid payment in the estate proceeding. Supreme Court found that she had a limited right to challenge the TRO but no right to challenge the appointment of the guardianship.

Court dismisses appeal finding that appellant is not aggrieved by the outcome of the Art 81 proceeding.

Matter of Abraham S., 737 NYS2d 542; 2002 NY App. Div. LEXIS 1654 (2nd Dept.)

Where IP moved for termination of guardianship and IP’s sons, originally the petitioners for the guardianship, did not oppose that motion, and could not appeal order terminating guardianship because they were not aggrieved parties under CPLR 5511.

Matter of Ruby Slater, NYLJ, 2/1//02, p.17, col. 3; appeal dismissed, 305 AD2d 690; 759 NYS2d 883 (2nd Dept.)

Court vacates power of attorney and will where AIP, who was totally dependant upon home health aides, executed these documents in favor of them and court finds that they were executed as a result of undue influence. Subsequently, App Div dismissed appeal brought by the nominated executrix because they said that the executrix is not aggrieved by the order and lacks standing to appeal.

M. Part 36 Rules

Matter of S.M, 13 Misc3d 582; [REDACTED] NYS2d [REDACTED] (Sup. Ct., Bronx Cty. 2006)(Hunter , J.)

Petitioner, the AIP's son sought to be appointed guardian. The petition failed to mention that he was a convicted felon. Although the Court Evaluator, who did address the conviction in her report, told the petitioner and his counsel that weeks before the hearing that Part 36 (22 NYCRR 36.2(c)) prohibited his appointment and that petitioner was not bondable, petitioner's counsel continued to advocate for his appointment. The Court, stated that *it was counsel's obligation to disclose the proposed guardian's felony conviction in the petition and during her examination of him on the stand*. The Court proposes several amendments to Part 36 to insure that those seeking appointment as guardians have not been convicted of a crime or abuse or neglect. Ultimately, the court appoints an independent guardian.

Matter of GLM (Gloria Loise Meyers), NYLJ, 5/6/03, p19, col 2 (Sup. Ct., Kings Cty.)(Leventhal, J.)

Court finds extenuating circumstances under **22 NYCRR 36.29(c)(10)** to appoint the court evaluator in a proceeding as the guardian for a 14 year old girl where there as \$3.5 million involved, where the parents were financially unsophisticated and also divorced acrimoniously, where they both had a good relationship with the court evaluator and where the court evaluator was an experience elder law attorney whose office was near the home of both parents and the child. Of note is that the court did not identify why he could not find someone other than the court evaluator to appoint under the circumstances.

Matter of Kurzman (Bilby), 2003 N.Y. Misc. LEXIS 567 (Sup. Ct., Kings Co.)

Court finds compelling reason under **22 NYCRR 36.2 (c)(8)** to permit a guardian to being appointed counsel. Here, the court, upon motion by the guardian, authorized the guardian, who is also an attorney to act as counsel to the IP to perform a real estate closing that had been ordered by the court. The court reasons that the purpose of the Part 36 rules is to ensure that appointments are made on the basis of merit and without favoritism, nepotism, politics or other factors unrelated to the qualification of the appointment or the requirements of the case. The court finds that the legal work here is necessary, that the guardian is competent to perform a closing, and that the appointment of another attorney to represent the IP at the closing would waste the IP's financial resources because the new attorney would have to review the work already done by the guardian to get up to speed. The court adds that the bill for legal services or guardian compensation under §36.4(b)(4) will be reviewed by the Court and its approval required before payment. The court ultimately concluded that the avoidance of wasting an IP's assets constitutes a compelling reason sufficient to allow the guardian to perform the closing of his ward's real property.

N. Secondary Appointments

(i) Counsel

Matter of Lainez, 2006 NY Slip OP 50822u; 2006 N.Y. Misc. LEXIS 1078 (Sup. Ct. Kings

Cty.)(Johnson, J.)(2006)

Counsel in a medical malpractice case applied to become co-GAL along with the incapacitated persons' husband. She agreed to serve without a fee. The court found that although she facially came under the exception to the strictures of Part 36 as a GAL serving without compensation [§ 36.1(b)(3)] she was seeking her sliding scale medical malpractice fee in the underlying action and that such fee was "compensation" under Part 36.2(d)(3), the standard of approval for compensation for both counsel and GAL being the fair value of the services rendered. [§ 36.4(b)(4)]. The court found no meaningful distinction between serving as an uncompensated GAL while at the same time seeking fees as attorney and held that an attorney seeking to serve as an uncompensated [GAL] and also recover a fee, whether denominated as legal fees or otherwise, must be appointed as provided in Part 36 of the Rules of the Chief Judge, notwithstanding the characterization of the compensation. Since this counsel for the med mal case was not on the Part 36 roster, she could not be appointed as the GAL.

Matter of Esta Ress, 8 AD3d 114, 778 NYS2d 489 (1st Dept., 2004)

22 NYCRR 36.2 (c)(8) prohibits a guardian from being appointed counsel to the IP, unless there is a compelling reason to do so. Here, the court held it permissible to authorize additional fees for successful legal work done by the guardian, reasoning that there was a compelling reason to do so because the guardian was unable to find any other attorney who would take the matter on contingency due to a perceived unlikelihood of success.

Matter of Kurzman (Bilby), 2003 N.Y. Misc. LEXIS 567 (Sup. Ct., Kings Co.)

22 NYCRR 36.2 (c)(8) prohibits a guardian from being appointed **counsel** to the IP, unless there is a compelling reason to do so. Here, the court, upon motion by the guardian, authorized the guardian, who is also an attorney to act as counsel to the IP to perform a real estate closing that had been ordered by the court. The court reasons that the purpose of the Part 36 rules is to ensure that appointments are made on the basis of merit and without favoritism, nepotism, politics or other factors unrelated to the qualification of the appointment or the requirements of the case. The court finds that the legal work here is necessary, that the guardian is competent to perform a closing, and that the appointment of another attorney to represent the IP at the closing would waste the IP's financial resources because the new attorney would have to review the work already done by the guardian to get up to speed. The court adds that the bill for legal services or guardian compensation under §36.4(b)(4) will be reviewed by the Court and its approval required before payment. The court ultimately concluded that the avoidance of wasting an IP's assets constitutes a compelling reason sufficient to allow the guardian to perform the closing of his ward's real property.

O. Filing fees

Matter of Ficalora, 1 Misc3d 602 (Sup. Ct., Queens County) (Taylor, J.)

There is no exception to the CPLR §8020(a) \$45 motion fee for the parties in an Article 81 proceeding, except for the court examiner who is an arm of the court. N.B. Therefore, when MHLS files a motion in an Article 81 proceeding as counsel decision, court evaluators must also pay the fee when filing motions, but, since a court evaluator is not a party, it is not likely that the C/E will be filing any motions.

P. Parties / Non -parties

(i) Court Evaluator

Matter of Astor, ___ Misc3d ___; ___ NYS 2nd ___; 2006 N.Y. Misc. LEXIS 2451 (Sup. Ct., NY Cty. 2006)

Where adult son who was sole presumptive distributee of the AIP and the holder of the POA and HCP received notice pursuant to MHL 81.07(g) and was directly affected by the TRO issued by the court, the court found that he was entitled to make a cross-motion over the objection of the petitioner and respondent that he lacked standing because he was not a party. This Court rejected Matter of Allen, 10 Misc3d 1082 as distinguishable because in Allen, the intervenor sought to file an answer after the hearing had already been held.

Matter of D.G. , 798 NYS2d 343; 2004 (Sup Ct, Kings Cty) (Leventhal , J.)

The Court Evaluator is not an adversarial part. Even if the individual appointed is an attorney he/she he does not serve as an attorney. The Court Evaluator works as an arm of the court and the assessment made is of an independent nature. Therefore, the court denied petitioner's motion to strike the Court Evaluator's report and for the Court Evaluator to recuse herself for meeting with the petitioner without her counsel present.

55th Management Corp v. Goldman, NYLJ April 15, 2003 (Sup. Ct., NY Cty.)(Lebedeff, J.)

Out of court statements made to a court evaluator in an 81 proceeding are protected by the privileges afforded participants in judicial proceedings, therefore, a libel action against the informant did not lie. The court reasons that the court evaluator plays a vital fact finding role in the article 81 process and his/her function cannot be hampered by the threat that anyone who talks to the C/E will be the subject of a libel suit.

Matter of Lula XX, 88 NY2d 842; 644 NYS2d 683 (1996); 667 NE2d 333; 1996

The Court Evaluator is not a party to an Article 81 proceeding.

Matter of Lee "I" (Murphy), 265 AD2d 750, 697 NYS2d 385 (3rd Dept., 1999)

It is not role of court evaluator to be advocate for AIP but rather to be neutral advisor to court.

(ii) Individuals entitled to notice under MHL 81.07(e)

Matter of Allen, 2005 N.Y. Mis LEXIS 3026 (Sup. Ct. Tompkins Cty)(2006) (Peckham, J.)

Brother who was entitled to and did receive notice of the proceeding was not therefore a party. He would not be considered a party unless he filed a cross petition seeking relief that was not requested in the petition. Therefore, he could not be granted an adjournment nor could he submit an answer. While he could not participate party in the hearing on the central issue of the need for guardianship, he was considered a party to that part of the Order to Show that issued a TRO against him.

Collected and compiled by:

Lesley De Lia, Deputy Director

Mary Stevens, Mineola office librarian
(with the assistance of Jonathan Weiner - Law Intern)

Ana Begonja, Susan Tran and Jessica De Lia
(proofreading/cite checking/typing)